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Congress Must Stop Playing Politics with FISA and National Security

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This week, Congress passed a 15-day extension of the Protect America Act, just two days before the law was set to expire, so that House Democrats could leave Washington for a party retreat. The Protect America Act updated the Foreign Intelligence Surveillance Act (FISA) to exempt surveillance of communications between persons located outside of the United States when the communications happen to pass through domestic networks, a type of communications to which Congress never intended FISA to apply. A 15-day extension is not good enough, because it puts intelligence-gatherers in an impossible situation: They must either try to guess what sort of legislation Congress will pass and act accordingly or assume that FISA will apply and begin the arduous task—at the cost of hundreds of hours of work per FISA application and potentially weeks or months of delay—of bringing this surveillance within the FISA regime. Congress must make the authorities in the Protect America Act permanent and, to further aid intelligence-gathering cooperation, enhance its provisions to provide retroactive and permanent liability protection to American businesses that cooperate with reasonable intelligence requests.

Playing Politics with Security. The U.S. government has publicly acknowledged thwarting over 19 terrorist conspiracies aimed at the United States since September 11, 2001. Covert intelligence and surveillance have likely stymied even more threats. These results have been achieved using, in part, surveillance and investigatory powers under the Patriot Act and tools like the Terrorist Surveillance Program

(TSP). The Protect America Act was intended to strengthen and clarify civil liberty protections under the TSP and to ensure that the program remained an effective instrument for terrorist surveillance.

When Congress passed the Protect America Act last spring, it set the bill to expire in six months. That “compromise” was driven by politics. On the one hand, it allowed Members of Congress to dodge criticism of allowing statutory authorities for critical counterterrorism tools to lapse, and on the other, it allowed them to put off having to make difficult policy decisions that could offend critics of the Administration and the TSP. The bill just passed by Congress does more of the same, stretching out the debate while trying to give lawmakers cover from criticism that their inaction is undermining counterterrorism efforts.

Extending the statutory authorities in the Protect America Act would not be controversial but for politics. This particular debate, in fact, is only a recent one. The Protect America Act was intended to correct an erroneous FISA Court decision seeking to extend that court’s power to control foreign surveillance that was never intended to be covered under FISA and never had been. The decision was based, according to those who have seen it, on the irrelevant

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details of recent changes in technology that do not implicate the core concerns behind FISA. Congress never intended FISA to apply to wholly international communications that do not involve persons in the United States, but instead recognized that surveillance of wholly international communications is an inherent power of the President and part of his solemn responsibility to protect America's security. Permanent extension of this authority simply returns FISA to the status quo before the erroneous court decision, thereby allowing vital and uncontroversial intelligence work to continue unabated.

No Free Lunch. Passing temporary extensions of the Protect America Act, however, makes Americans less safe than providing permanent authority. Serious counterterrorism investigations can take years. They can consume vast amounts of manpower and resources. Creating uncertainty over what authorities will be available in the future greatly complicates the task of the intelligence services and the telecommunications industries that must cooperate with them to make their efforts efficient and effective. The longer Congress drags out and leaves unsettled this vital issue, the more it hamstrings effective long-term planning and complicates decisions about future operations. Thus, American security does pay a price every time Congress kicks the can down the road.

The risks to national security of bringing communications between persons located outside of the United States that happen to pass through domestic networks inside the FISA process are great. Just preparing to present an application to the FISA Court, which grants orders for classified surveillance programs, takes hundreds of hours of lawyer and intelligence analyst time. Though critics are quick to point out that the FISA Court rejects few applications, this is due to the immense time and effort Justice Department officials dedicate to preparing FISA applications, which are over 100 pages on average, and the back-and-fourth process entailed in FISA Court review. Potentially delaying crucial foreign intelligence-gathering operations by weeks or months, as temporary extensions threaten to do, simply endangers national security. This is particularly distressing when there is no legitimate purpose other than political gamesmanship for doing so.

Inconsistency and uncertainty with respect to legal authorities put national security at risk. As documented in the 9/11 Commission Report and the Department of Justice's Bellows Report, the legal authorities behind FISA and foreign surveillance in general are extremely complicated, frequently leading to confusion and mistakes. Intelligence officials work hard to stay within the bounds of the law, and when the law is unclear or uncertain, they become even more conservative, denying some surveillance requests that would be legal and requiring more time to approve others that fall well within the law. In some cases, confusion may cause agents in the field to avoid requesting important surveillance altogether. When Congress leaves the law unclear, it directly harms national security.

Stop the Insanity. It is time for Congress to stop playing politics with national security and pass sensible legislation that meets the needs of those who protect the country from attack while upholding Americans' civil liberties. The Protect America Act accomplished these crucial goals.

First, its major provision concerns persons not on U.S. soil. Constitutional protections were never intended to extend to cover wholly foreign intelligence gathering for national security purposes. Further, this surveillance relies on the same minimization procedures that have always applied to reduce the intrusion on the privacy interests of Americans who (whether wittingly or unwittingly) communicate with suspected terrorists or other enemy soldiers.

The act also wisely extended prospective immunity to communications providers that have worked with U.S. intelligence services to facilitate intelligence gathering for national security. With 40 or more civil lawsuits already filed against these providers for their cooperation, Congress should take the logical, fair step and provide retroactive immunity as well.

The bill ultimately should go further and expressly authorize the President to use his constitutional authority to conduct the intelligence gathering at home and abroad necessary to protect America from future terrorist attacks. That, however, is most likely a debate for another day. For now, Congress should make the provisions of the

Protect America Act permanent and let the government get back to the business of stopping terrorists before they attack.

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