

Democrats Capitulate on FISA

Democrats are trying to rationalize capitulating on surveillance and telecom immunity in the new FISA bill by calling it a compromise. It isn't.

JULIAN SANCHEZ | June 25, 2008 | web only

Editors' Note: This piece has been [corrected](#).

A "compromise" usually involves parties in conflict each giving something up to seek a middle ground. So it was strange to see the term [bandied about](#) on Friday, when the House of Representatives -- after holding strong for months against White House demands -- [passed a surveillance reform bill](#) that will grant legal amnesty to telecoms that participated in the National Security Agency's program of warrantless wiretapping, and give George Bush carte blanche to continue listening to our international calls with only the most anemic court oversight. A vote in the Senate could come as early as today.

One might think, as Sen. Russ Feingold (D-WI) [does](#), that the proper word for this is "capitulation." After all, Republicans got precisely what they had wanted all along, and Democrats seem not to have wheedled even a mess of pottage in trade for the rule of law and the Fourth Amendment. But give the House leadership points for at least accidental honesty: "[Compromise](#)" can also mean "to make a shameful or disreputable concession," which fits the deal brokered by Majority Leader Steny Hoyer (D-MD) to a tee.

That hasn't stopped supporters of the compromise from trying to cast the white flag as a victory banner, pointing to a number of purported improvements in the latest House bill over the Senate version Democratic leaders [blocked](#) in February and March. Almost none of their arguments stand up to scrutiny.

By far the most attention in the debate over changes to the Foreign Intelligence Surveillance Act has been lavished on the question of retroactive legal amnesty for telecoms that let the NSA listen in on their networks and access private customer data without the court orders required by the law. These companies are now embroiled in [massive class action suits](#), which President Bush has argued will deter patriotic cooperation in the future if they are allowed to go forward. Civil libertarians, however, worry that changing the rules after the fact will signal the firms that they can ignore the law with impunity whenever the president gives a thumbs-up.

They needn't worry, according to Rep. Silvestre Reyes (D-TX). "In this bill, Congress does not grant immunity," Reyes declared on the House floor Friday. "Congress isn't deciding the question of immunity; the district court will." Reyes was immediately seconded by Minority Whip Roy Blunt (R-MO), who asserted that the telecoms' "protections will be determined by the court, not this legislation." They are both wrong.

Blunt was more candid a day earlier, when he described the court review process provided for in the House bill as a "formality," and confidently predicted that the suits against the telecoms would be dismissed. And he's right to be confident: While the Senate bill provided immunity so long as the telecoms had received a written directive from the attorney general, the House bill commands a federal judge to ... provide immunity so long as the telecoms had received a written directive from the attorney general.

The standard in the two laws is the same -- the court's role is merely to confirm that the administration asked for the telecoms' cooperation in writing (which there is no reason to doubt anyway). The central questions -- whether the NSA wiretapping program was legal, and whether the telecoms could have reasonably believed the government's requests to be lawful -- are kept outside the court's purview.

Compromise supporters are also terribly proud of language asserting that FISA is the "exclusive means" by which electronic surveillance may be conducted. According to Rep. James Langevin (D-RI), this guarantees that "no president will have the power to do an end-run around the requirements of FISA," as President Bush did when he authorized warrantless wiretaps in the wake of the 9/11 attacks. The only problem is that the same "exclusive means" language was already present in FISA at the time; the president simply disregarded it. Perhaps reiterating the provision will persuade the executive that Congress *really, really* means it?

The award for the most bald-faced lie on the House floor Friday, however, goes to Speaker Nancy Pelosi (D-CA), who insisted that the bill "does not allow warrantless surveillance of Americans." She is wrong. It does.

The broader spying powers given to the executive branch by the compromise bill require intelligence agencies to "target" foreigners. But if those foreign "targets" happen to call or e-mail Americans, those communications are fair game. And since the Foreign Intelligence Surveillance Court is only permitted to review the broad targeting procedures government eavesdroppers use to determine that a target is abroad, and not the substantive basis for authorizing surveillance of any target, *anyone* is a potential target.

The bill, in other words, allows the government to conduct "vacuum cleaner" surveillance -- sweeping up international traffic willy-nilly -- then filter it for anything that looks interesting. Indeed, many believe that licensing such surveillance is precisely the point of this legislation. If so, "warrantless surveillance of Americans" could well become routine, whether or not they are the formal "targets" of eavesdropping.

It's for this reason that we shouldn't get too excited about the new protections for Americans traveling abroad embedded in the new bill. Similar safeguards were added to the Senate's FISA reform legislation, thanks to the efforts of Ron Wyden (D-OR), and they do provide some additional rights for citizens outside the borders of the U.S. But here, too, the new protection is limited to an injunction against "targeting" Americans, which will do little good if your conversation is swept up in the "vacuum cleaner".

Surveying all the important "concessions" House Democrats claim to have won, conservative writer Ramesh Ponnuru of *National Review* [concluded](#): "It sure looks like they got rolled." But it may not be simple naiveté: The watchdog group MAPLight [notes](#) that House Democrats who changed their votes to support the new FISA bill received almost twice as much money from the telecom industry over the past three years as those who remained opposed. Either way, though, it sure looks like they're hoping *you* will get rolled.

Correction: This article originally stated inaccurately that House Democrats who changed their votes to support the new FISA bill received almost twice as much money over the past three years as those who remained opposed. In fact House Democrats who changed their votes to support the new FISA bill received almost twice as much money from the telecom industry over the past three years as those who remained opposed