US Congress moves toward passage of domestic spy bill

Joe Kay
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The US House of Representatives and two different Senate committees have approved competing versions of a bill that would modify a law governing spying on domestic and international communications.

All versions of the bill would expand government spying powers by modifying the 1978 Foreign Intelligence Surveillance Act, which requires a warrant for electronic surveillance of US citizens. The bills differ on whether or not to grant retroactive immunity to telecommunications companies that participated in the Bush administration's National Security Agency (NSA) warrantless wiretapping program.

Congressional Democrats are split on whether or not to include the immunity provision, while the administration has pledged to veto any bill that does not include it.

The new bill is intended to replace one passed by a Democratic-controlled Congress in August, which granted the Bush administration all the spying powers it requested. The bill allowed for warrantless domestic wiretapping as long as one of the persons involved in the communication was "reasonably believed to be located outside the Untied States." That bill is set to expire in February.

In October, Senate Intelligence Committee Chairman John Rockefeller IV, a Democrat, forged a compromise with the Bush administration that included an immunity clause and expanded domestic spying powers. The bill, which would essentially extend the legislation passed in August, was overwhelmingly approved by the intelligence committee by a 13-2 vote.

The vote demonstrated that there is broad support within the Democratic Party beyond Rockefeller for the expanded powers and immunity clause. This year, Rockefeller received $42,000 in political donations from Verizon and AT&T, the two main companies targeted by lawsuits for their role in the NSA domestic spying program.

Following Senate procedures, the bill also had to be approved by the Senate Judiciary Committee before coming to a vote in the full Senate. Approval of the same bill that went through the intelligence committee was expected after Senator Dianne Feinstein of California, who also sits on the intelligence committee, indicated her support for the immunity clause. On Thursday, a vote was taken on the committee supporting the inclusion of retroactive immunity, and passed 11-8 with Feinstein and Senator Sheldon Whitehouse of Rhode Island joining Republicans to support the provision.

Shortly after that vote, however, Judiciary Committee Chairman Patrick Leahy called a vote on the bill without the immunity clause. It passed with a party-line 10-9 vote. The Democratic leadership engineered the maneuver after some members threatened to absent themselves from a final vote, denying sufficient numbers to approve the bill.

Also on Thursday, the full House of Representatives passed a parallel bill weakening the provisions of FISA but containing slightly more restrictive requirements than the version passed in August and the one currently supported by the Senate committees. It also does not include immunity for telecommunications companies. The House bill would require "umbrella warrants" for wiretapping involving people in the United States—allowing the government to obtain broad authority for domestic spying. The bill passed 227-189, largely along party lines.

The Bush administration declared the House measure to be unacceptable. A White House statement released Thursday said that it would "dangerously weaken our ability to protect the nation from foreign threats."

There are still several steps before a final bill is passed by Congress. Senate Majority Leader Harry Reid now has the option of choosing either the Intelligence Committee or the Judiciary Committee version to put before the full Senate. If the version without immunity is presented,

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supporters of immunity will still have the option of putting forward an amendment, which would almost certainly garner majority support in the Senate.

Once the Senate passes a bill, it would have to be reconciled with the House version, and both the House and Senate would have to re-approve the compromise. It would then have to be signed by Bush. The Senate is not expected to vote on a version of the bill until some time in December.

During that period, there is ample room for a rotten compromise of some sort. Given the substantial support within the Democratic Party leadership for an immunity clause, it is likely that a bill including the measure will be included in any final bill that is passed, whether this is done before or after a veto from Bush.

According to a report in the Associated Press, "House Judiciary Committee Chairman John Conyers [Democrat—Michigan] left the door open to an immunity deal but said the White House must first give Congress access to classified documents specifying what the companies did that requires legal immunity."

Meanwhile, Republican Senator Arlen Specter is pushing for an amendment that would immunize the companies, while calling for current lawsuits to list the government as the defendant instead of the companies. The Bush administration, however, has attempted to cite "national security" to have thrown out any cases involving the domestic spying program.

The question of immunity is significant, both on the specific program of warrantless wiretapping and as a precedent for future collaboration of big business in the illegal activities of the government. There are presently about 40 lawsuits against the telecommunications companies. In one case, a former AT&T employee has testified that the company set up a special room that routed all communications and Internet traffic directly to the NSA.

Democratic and Republican supporters of immunity have cited the potential financial damages to the companies to justify their position. Feinstein declared that companies should not be "held hostage to costly litigation in what is essentially a complaint about administration activities."

The financial interests of a powerful section of big business are no doubt an important factor. However, the immunity would also be aimed at closing off one of the few remaining avenues for challenging the administration's illegal actions. The immunity clause approved by the Senate Intelligence Community would not only throw out the civil suits seeking financial damage, but also the suits seeking public disclosure and a court injunction on future spying.

Whatever the divisions over immunity, both political parties accept the premises of the debate—that increased powers are necessary as part of the "war on terror." Democratic House Speaker Nancy Pelosi said on Thursday, in justifying the House version, "I understand full well the threats to our national security. I understand full well the need for us to have legislation that strikes the proper balance between liberty and security."

The action on the new spying bill takes place as the Bush administration's new attorney general, Michael Mukasey, takes over at the Justice Department. Mukasey was approved by the Democratic-controlled Senate earlier this month, despite his refusal to declare waterboarding torture and his support for other antidemocratic policies.

One of Mukasey's first tasks will be to handle the controversy over domestic spying, and his first classified briefing was on FISA. The White House also moved to grant Justice Department investigators clearance to conduct an inquiry into the spying program, reversing a decision it made earlier this year to deny security clearance.

The decision, which was hailed by Democrats, is intended to contain the controversy by organizing an investigation that will be a whitewash. The *New York Times*, citing Justice Department officials, reported earlier this week that it is "unlikely" that the investigation "would address directly the question of the legality of the N.S.A. program itself: whether eavesdropping on American soil without court warrants violated the Foreign Intelligence Surveillance Act."

The intention of both the new legislation and the Justice Department investigation is to place the administration's domestic spying program on a firmer foundation.

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