



No. 21

May 8, 2003

S. 113 S Foreign Intelligence Surveillance Act Amendment

Calendar No. 32

Reported from the Judiciary Committee on March 11, 2003, by a vote of 16-0, with an amendment in the nature of a substitute, and an amendment to the title (no written report).

NOTEWORTHY

- C By unanimous consent, the Senate will proceed to the consideration of S. 113 on May 8, 2003, in the early afternoon, with total debate on the measure and all amendments totaling up to six hours.
- C S. 113, sometimes referred to as the “Moussaoui Fix,” expands the Foreign Intelligence Surveillance Act (FISA) to apply to any foreign visitor to the United States who is believed to be involved in international terrorism, regardless of whether that person is known to be an agent of a foreign government or terror group. The bill is designed to allow the FBI to monitor suspected lone-wolf terrorists such as alleged “20th hijacker,” Zacarias Moussaoui, who is currently awaiting trial in Alexandria, Virginia.
- C Specifically, S. 113 amends FISA’s definition of “foreign power” to include “any person, other than a United States person, or group that is engaged in international terrorism or activities in preparation therefor.” Currently, the definition requires the person or group to have an association with a government or organized group.
- C By amending the definition of “foreign power,” S. 113 would allow a FISA warrant to be issued after a showing of probable cause that a non-United States person is engaged in or preparing for international terrorism, regardless of whether that person also is an agent of a foreign power.

BACKGROUND

Several weeks prior to the September 11th attacks, federal agents attempted to investigate an individual whom they believed to be an international terrorist. That person has since been arrested and accused of being the “20th hijacker.” Federal agents sought to obtain a FISA warrant to search this alleged terrorist’s belongings. One of the principal factors that prevented the issuance of such a warrant was FISA’s requirement that the target be an agent of a foreign power.

Under current law, even if federal agents had been able to demonstrate that this person was preparing for international terrorism, based on the suspicious conduct that brought him to the attention of authorities, the agents would not have been able to obtain a warrant to search him absent a link to a foreign power. As a result, these federal agents spent three critical weeks prior to the September 11th attacks seeking to establish this alleged terrorist’s tenuous connection to groups of Chechen rebels – groups for whom it is now known that this man was not working.

It is not certain that it would have been possible to obtain a FISA warrant to search this person even if S. 113 had been enacted prior to the September 11th attacks. Nor would a search necessarily have led to the discovery of the September 11th conspiracy. It is now known, however, that information in this alleged terrorist’s effects would have linked him to two of the actual September 11th hijackers and to a high-level organizer of the attacks who was captured in 2002 in Pakistan.

Requiring that targets of a FISA warrant be linked to a foreign government or international terrorist organization may have made sense when FISA was enacted in 1978; in that year, the typical FISA target was a Soviet spy or a member of one of the hierarchical, military-style terror groups of that era. Today, however, the United States faces a much different threat, principally that by a movement of Islamist extremists not necessarily related to foreign governments. This movement does not maintain a fixed structure or membership list, and its adherents do not always advertise their affiliation with this cause. Moreover, in response to U.S. efforts to fight terrorism around the world, this movement increasingly has begun operating in a more decentralized manner.

HIGHLIGHTS

- **Last Congress:** In the 107th Congress, Senators Schumer and Kyl introduced S. 2586, a FISA bill similar to S. 113 of this Congress. That bill was referred to the Judiciary Committee, and the Senate Intelligence Committee held a hearing on the bill (no written report). The bill was not reported to the full Senate during the 107th Congress.
- **This Congress:** S. 113 was introduced January 9, 2003 by Senators Kyl, Hatch, DeWine, and Schumer and referred to the Judiciary Committee. The bill was favorably reported by the

Judiciary Committee on March 11, 2003, by a vote of 16-0, after the Committee made technical amendments to the bill and added a sunset clause (see below).

- **Current Law:** FISA currently allows a specially designated court to issue an order authorizing electronic surveillance or a physical search upon probable cause that the target of the warrant is “a foreign power or an agent of a foreign power.” 50 U.S.C. § 1805(a)(3)(A), § 1824(a)(3)(A). The words “foreign power” and “agent of a foreign power” are defined in § 1801 of FISA to include “a group engaged in international terrorism or activities in preparation therefor,” § 1801(a)(4), and any person other than a United States person who “knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power.” § 1801(b)(2)(C).
- **S. 113:** The Kyl-Schumer bill amends the definition of an “agent of a foreign power,” 50 U.S.C. § 1801(b)(1), to include in a new subparagraph (C): a non-United States person who “engages in international terrorism or activities in preparation therefor.”
S. 113 also subjects this new authority to the sunset provision in section 224 of the USA PATRIOT Act of 2001 (Public Law 107-56; 115 Stat. 295), which terminates the authority on December 31, 2005.

ADMINISTRATION POSITION

Per Acting Assistant Attorney General for Legislative Affairs Jamie E. Brown, the Administration supports enactment of S. 113. (See Brown 3/5/03 letter on file with Senate Judiciary Committee.)

POSSIBLE AMENDMENTS

Senator Feingold intends to offer an amendment to require the Justice Department to issue an annual report to the Intelligence Committee and the Judiciary Committee regarding the use of S. 113 authority. Per Acting Assistant Attorney General for Legislative Affairs Jamie E. Brown, the Administration opposes this amendment. (See Brown 4/30/03 letter on file with Senate Judiciary Committee.) However, the primary bill sponsors do not oppose this amendment.

Senator Feinstein intends to offer an amendment by way of a substitute. The amendment, which was not offered in the Judiciary Committee, would permit courts to presume that a “lone wolf” is an agent

of a foreign power. Per Acting Assistant Attorney General for Legislative Affairs Jamie E. Brown, the Administration opposes this substitute. She wrote: “We do not believe that the use of a presumption . . . adds any significant protection to civil liberties, except to the extent that the presumption is read narrowly to mirror current law, in which case the presumption is of little or no value.” (See Brown 4/30/03 letter on file with Senate Judiciary Committee.)

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