

Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 86, the nomination of Priscilla R. Owen of Texas to be United States Circuit Judge for the Fifth Circuit.

Bill Frist, Orrin Hatch, John Cornyn, Michael B. Enzi, Jim Talent, Judd Gregg, Jeff Sessions, Wayne Allard, Mike Crapo, Thad Cochran, Mitch McConnell, Susan Collins, Don Nickles, George Allen, Kay Bailey Hutchison, Gordon H. Smith, John Warner.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Priscilla Richman Owen to be United States Circuit Judge for the Fifth Circuit shall be brought to a close?

The yeas and nays are required under the rule.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. McCONNELL. I announce that the Senator from Alaska (Ms. MURKOWSKI) is necessarily absent.

Mr. REID. I announce that the Senator from Massachusetts (Mr. KENNEDY) and the Senator from Connecticut (Mr. LIEBERMAN) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 52, nay 45, as follows:

[Rollcall Vote No. 144 Ex.]

YEAS—52

Alexander	Dole	Miller
Allard	Domenici	Nelson (NE)
Allen	Ensign	Nickles
Bennett	Enzi	Roberts
Bond	Fitzgerald	Santorum
Brownback	Frist	Sessions
Bunning	Graham (SC)	Shelby
Burns	Grassley	Smith
Campbell	Gregg	Snowe
Chafee	Hagel	Specter
Chambliss	Hatch	Stevens
Cochran	Hutchison	Sununu
Coleman	Inhofe	Talent
Collins	Kyl	Thomas
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—45

Akaka	Conrad	Harkin
Baucus	Corzine	Hollings
Bayh	Daschle	Inouye
Biden	Dayton	Jeffords
Bingaman	Dodd	Johnson
Boxer	Dorgan	Kerry
Breaux	Durbin	Kohl
Byrd	Edwards	Landrieu
Cantwell	Feingold	Lautenberg
Carper	Feinstein	Leahy
Clinton	Graham (FL)	Levin

Lincoln	Pryor	Sarbanes
Mikulski	Reed	Schumer
Murray	Reid	Stabenow
Nelson (FL)	Rockefeller	Wyden

NOT VOTING—3

Kennedy	Lieberman	Murkowski
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The PRESIDING OFFICER. On this vote the yeas are 52, the nays are 45. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

The Senator from Utah.

Mr. HATCH. Mr. President, I ask unanimous consent the Senate now stand in recess until 3:20 p.m.

Mr. CARPER. Reserving the right to object, if the Senator will defer for just a moment? I ask unanimous consent to make a brief statement, maybe 1 minute.

Mr. HATCH. Of course.

VOTE EXPLANATION

The PRESIDING OFFICER. The Senator from Delaware.

Mr. CARPER. Mr. President, early this morning the train I was traveling on from Wilmington to Washington experienced mechanical difficulties causing us to arrive at Union Station more than one-half hour late. As a result, I missed maybe my second or third vote in the U.S. Senate. I missed the vote on the Resolution of Ratification of the NATO expansion treaty. Had I been here I would have voted yes.

I ask unanimous consent the RECORD reflect my reasons for missing the vote and how I would have voted had I been here.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECESS

Mr. HATCH. Mr. President, I renew my request to have the Senate stand in recess until 3:20 p.m.

There being no objection, the Senate, at 2:34 p.m., recessed until 3:20 p.m. and reassembled when called to order by the Presiding Officer (Mr. CRAPO).

The PRESIDING OFFICER. In my capacity as a Senator from the great State of Idaho, I suggest the absence of a quorum. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

FOREIGN INTELLIGENCE SURVEILLANCE ACT—Continued

AMENDMENT NO. 536

(Purpose: To establish additional annual reporting requirements on activities under the Foreign Intelligence Surveillance Act of 1978)

Mr. FEINGOLD. Mr. President, I call up amendment No. 536.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Wisconsin [Mr. FEINGOLD] proposes an amendment numbered 536.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To establish additional annual reporting requirements on activities under the Foreign Intelligence Surveillance Act of 1978)

At the end, add the following:

SEC. 2. ADDITIONAL ANNUAL REPORTING REQUIREMENTS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

(a) ADDITIONAL REPORTING REQUIREMENTS.—The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended—

- (1) by redesignating—
 - (A) title VI as title VII; and
 - (B) section 601 as section 701; and
- (2) by inserting after title V the following new title VI:

“TITLE VI—REPORTING REQUIREMENT “ANNUAL REPORT OF THE ATTORNEY GENERAL.

“SEC. 601. (a) In addition to the reports required by sections 107, 108, 306, 406, and 502 in April each year, the Attorney General shall submit to the appropriate committees of Congress each year a report setting forth with respect to the one-year period ending on the date of such report—

“(1) the aggregate number of non-United States persons targeted for orders issued under this Act, including a break-down of those targeted for—

“(A) electronic surveillance under section 105;

“(B) physical searches under section 304;

“(C) pen registers under section 402; and

“(D) access to records under section 501;

“(2) the number of individuals covered by an order issued under this Act who were determined pursuant to activities authorized by this Act to have acted wholly alone in the activities covered by such order;

“(3) the number of times that the Attorney General has authorized that information obtained under this Act may be used in a criminal proceeding or any information derived therefrom may be used in a criminal proceeding; and

“(4) in a manner consistent with the protection of the national security of the United States—

“(A) the portions of the documents and applications filed with the courts established under section 103 that include significant construction or interpretation of the provisions of this Act, not including the facts of any particular matter, which may be redacted;

“(B) the portions of the opinions and orders of the courts established under section 103 that include significant construction or interpretation of the provisions of this Act, not including the facts of any particular matter, which may be redacted.

“(b) The first report under this section shall be submitted not later than six months after the date of the enactment of this Act. Subsequent reports under this section shall be submitted annually thereafter.

“(c) In this section, the term ‘appropriate committees of Congress’ means—

“(1) the Select Committee on Intelligence and the Committee on the Judiciary of the Senate; and

“(2) the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives.”

(b) CLERICAL AMENDMENT.—The table of contents for that Act is amended by striking the items relating to title VI and inserting the following new items:

“TITLE VI—REPORTING REQUIREMENT
“Sec. 601. Annual report of the Attorney
General.

“TITLE VII—EFFECTIVE DATE
“Sec. 701. Effective date.”.

Mr. FEINGOLD. Mr. President, this amendment would simply require the Department of Justice to report to the Intelligence Committee and the Judiciary Committee about the use of this new lone-wolf exception to FISA. With this information, Congress will be better able to assess the need for reauthorization as the sunset provision in the bill approaches. I am pleased that the amendment has been agreed to by the sponsors of the bill.

I ask unanimous consent that this amendment be agreed to under the previous order.

The PRESIDING OFFICER. Under the previous order, the amendment is agreed to.

The amendment (No. 536) was agreed to.

Mr. FEINGOLD. Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, this morning I noted in detail the provisions of this amendment, why I supported the amendment and why I thought it was a good thing, and therefore any reference to further discussion on it can be made to the comments I made on it this morning.

Mr. FEINGOLD. Mr. President, I thank the Senator from Arizona for his cooperation in working together to provide this measure of accountability to this important piece of legislation.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 537

(Purpose: To propose a substitute)

Mrs. FEINSTEIN. Mr. President, I call up amendment No. 537.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself and Mr. ROCKEFELLER, Mr. LEAHY, Mr. EDWARDS, Mr. FEINGOLD, Mr. DODD, Mr. WYDEN, and Mrs. BOXER, proposes an amendment numbered 537.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. PRESUMPTION THAT CERTAIN NON-UNITED STATES PERSONS ENGAGING IN INTERNATIONAL TERRORISM ARE AGENTS OF FOREIGN POWERS FOR PURPOSES OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

(a) PRESUMPTION.—(1) The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after section 101 the following new section:

“PRESUMPTION OF TREATMENT OF CERTAIN NON-UNITED STATES PERSONS ENGAGED IN INTERNATIONAL TERRORISM AS AGENTS OF FOREIGN POWERS

“SEC. 101A. Upon application by the Federal official applying for an order under this Act, the court may presume that a non-United States person who is knowingly engaged in sabotage or international terrorism, or activities that are in preparation therefor, is an agent of a foreign power under section 101(b)(2)(C).”.

(2) The table of contents for that Act is amended by inserting after the item relating to section 101 the following new item:

“Sec. 101A. Presumption of treatment of certain non-United States persons engaged in international terrorism as agents of foreign powers.”.

(b) SUNSET.—The amendments made by subsection (a) shall be subject to the sunset provision in section 224 of the USA PATRIOT Act of 2001 (Public Law 107-56; 115 Stat. 295), including the exception provided in subsection (b) of such section 224.

Mrs. FEINSTEIN. Mr. President, I rise to offer a substitute amendment to S. 113, the Kyl-Schumer FISA bill. I ask you to bear with me because the explanation goes on for a while.

I am also pleased that Senator ROCKEFELLER, the ranking member on the Intelligence Committee, and Senator LEAHY, the ranking member of the Judiciary Committee, are cosponsors of this amendment. I am pleased to also acknowledge that Senators DODD, EDWARDS, FEINGOLD, BOXER, and WYDEN are also cosponsors of the amendment.

Let me try to briefly describe the difference between current law, S. 113, and my amendment.

S. 113 is the Kyl-Schumer FISA amendment. First, the Kyl-Schumer amendment only applies to non-U.S. persons. I want to make clear that it does not cover green card holders under that amendment.

Under current law, the FISA court may only grant a FISA application against a non-U.S. person if the Government can show probable cause that the target is working on behalf of a foreign power or a terrorist group. The Government also has to certify that it is seeking foreign intelligence information that can't be obtained by any other means.

As I understand the Kyl-Schumer bill, it drops a primary requirement for FISA warrants; that is, the individual or the target be agents of a foreign power. Under Kyl-Schumer, this prerequisite is gone. That is what the so-called lone wolf deals with.

This would then give the FISA court no discretion to deny applications for FISA orders against a true so-called lone wolf. These are alleged inter-

national terrorists operating completely on their own. This is confusing. In other words, current law gives the FISA court no discretion to grant FISA orders in closed cases. But S. 113—Kyl-Schumer—gives judges no discretion to deny FISA the FISA court application in closed cases. Both of these circumstances raise certain problems.

My amendment is essentially a compromise. It grants the court a presumption. So the FISA court may presume that a target is an agent of a foreign power, or the court may choose not to invoke that presumption. The bottom line is the court is given some discretion.

In other words, the court may choose to grant a FISA order despite a lack of evidence that a target is working on behalf of a foreign power. Similarly, the court may choose to deny an order against a true lone wolf. It is up to the court. Federal judges in title III criminal cases have similar discretion. Although the standard there is about whether the Government can show probable cause that a person has committed a crime or will commit a crime, that is a very different standard than under FISA. Federal judges have not abused that discretion and, in fact, in rare cases have been able to act as a check on the Government to prevent overreaching and abuse.

Why do the sponsors of S. 113 show less trust for FISA judges in the FISA content? In fact, such trust is even more warranted in the FISA content. Not only is the FISA process secret and hard to keep accountable, but the FISA court has only denied one FISA application in its 25-year history.

Such a lack of trust is even less necessary given the fact that even if the Government is unable to get a FISA order against a target, it remains completely free to use all the tools of the criminal process under title III to get search and wiretap orders against the target.

The bottom line is, our amendment preserves FISA's agent-of-a-foreign-power requirement without jeopardizing our security. Our amendment allows the Government to get FISA orders against suspected international terrorists even in close cases where the Government cannot show the target is working on behalf of a foreign power or terrorist group. However, unlike S. 113, the amendment also ensures the FISA court is more than a rubberstamp and has discretion to deny a FISA application if the Government overreaches by attempting to use FISA authority.

I now would like to discuss the issue in somewhat greater detail.

Mr. President, at times of crisis, it is possible the Government can overreach in both legislative and executive decisionmaking with respect to our criminal and intelligence laws. That can have unfortunate consequences for both our security and individual rights.

The Foreign Intelligence Surveillance Act, or FISA, was passed in 1978. It was the first statute ever passed in