

September 28, 2006

1634 I Street, NW Suite 1100
Washington, DC 20006
202.637.9800
fax 202.637.0968
<http://www.cdt.org>

MEMORANDUM TO INTERESTED PERSONS

CDT Analysis of Substitute to H.R. 5825, the Electronic Surveillance Modernization Act

The full House of Representatives is poised to vote on a substitute to H.R. 5825, the Electronic Surveillance Modernization Act, that contains the worst elements of the bills the House Judiciary and Intelligence Committees reported last week.

Far from providing judicial review of the President's program and "modernizing" the Foreign Intelligence Surveillance Act, the Substitute would prevent meaningful judicial review of the President's program and would both ratify and expand to an unprecedented level the government's authority to wiretap Americans without a warrant. It would also allow new, vague and poorly defined categories of warrantless surveillance that could confuse intelligence officials who need the legal clarity that FISA provides in order to efficiently and effectively conduct surveillance.

Like the earlier bill, the substitute still excludes large categories of electronic surveillance from the definition of "electronic surveillance" covered by FISA. It would permit the National Security Agency to turn its vacuum cleaners on American citizens and create a vast database of information, which the government could data mine at will, outside any judicial or congressional oversight, in a fashion reminiscent of the Total Information Awareness program. The substitute also could immunize from liability any communications service provider who gave the government access to private communications from 9/11 until 60 days after the enactment of the bill. This provision could result in the dismissal of pending cases challenging the surveillance program.

The Substitute includes some bad provisions that had been removed from earlier versions of the bill in Judiciary and Intelligence Committee markups. Before analyzing the changes, however, it bears repeating that *none* of the changes the bill makes to FISA is necessary to meet the terrorist threat. In fact, after making multiple amendments to FISA since 9/11, the government has all the authority it needs to intercept terrorist communications in a timely and expeditious way without violating the fundamental rights of Americans.

The following is a description and analysis of the changes reflected in the Substitute:

** The Substitute deletes part of the definition of "minimization procedures" to provide less protection to information collected about US Persons. Under current law, if the government, acting without a warrant under Section 102(a) of FISA, obtains the communications of a US person, those communications cannot be disclosed, disseminated or used, and the government must destroy them within 72 hours unless the Attorney General obtains a court order or determines that the information indicates a threat of death or serious physical harm. This bill would permit unrestricted retention and use of the communications of US citizens obtained without a warrant.

This change is especially important in light of the changes made to Section 102(a), which include new authority for warrantless surveillance of a wide range of domestic and international calls involving US citizens. Current law requires a warrant if there is a substantial likelihood that surveillance inside the US will acquire the contents of communications of US persons. But this bill repeals that limitation and also eliminates the requirement in Section 102(a) that any warrantless wiretapping be limited to means of communications "used exclusively between or among foreign powers."

** The new immunity provision is sweeping. It could provide immunity for communications service providers in cases currently pending and all future cases challenging activity relating to "the provision to an element of the intelligence community of any information (including records or other information pertaining to a customer), facilities, or assistance" from the period between September 11, 2001, thru 60 days after the date of enactment of this bill if the information was provided in connection with a communications intelligence program the Attorney General certifies was intended to protect the US from a terrorist attack. This provision could prompt the dismissal of pending lawsuits seeking damages from service providers for their cooperation with the government's warrantless surveillance programs--including the case against AT&T for the provision of call records.

** The authorizations of warrantless surveillance in the event of a terrorist attack, an armed attack against the territory of the US, and an imminent threat of attack, none of which survived the House Judiciary Committee markup, are back in the Substitute. Section 1811, which is the "wartime exception" (now the "armed attack against the territory of the US" exception), has been changed to allow warrantless surveillance for 3 months after an armed attack against US territory. As was the case in the earlier version of the bill, "armed attack against the territory of the US" isn't defined. Does "territory" mean the 50 states or a US embassy or military base abroad? What does "armed attack" mean?

The authorization to conduct warrantless surveillance after a terrorist attack has been extended from 45 days to 90 days in this version. The "terrorist attack" and "imminent attack" provisions also don't define those terms. Both could be interpreted broadly, creating a dangerous and unpredictable expansion of the President's power to wiretap without a warrant. What's more, these provisions are not necessary. The President already has the authority under existing law to begin surveillance in an emergency (such as the imminent threat of sabotage) before obtaining an order from the FISA court.

** Finally, the Substitute amends the National Security Act of 1947, which requires the President to keep the members of the congressional intelligence committees “fully and currently informed” of U.S. intelligence activities, including any “significant anticipated intelligence activity.” According to legislative history, the term “fully and currently informed,” is intended to mean that the President will provide complete and timely notice of actions and policies. Earlier versions of this bill required the President to submit his certifications to *each member* of the Intelligence Committees. The Substitute deletes the words “each member” and instead just requires the President to submit his certifications for warrantless surveillance to "the congressional intelligence committees" and a FISA judge.

For more information call Jim Dempsey, Policy Director at (202) 365-8026 or Nancy Libin, Staff Counsel at (202) 637-9800 ext. 113.