



NEW YORK
CITY BAR

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The Honorable Bill Frist
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
528 Hart Senate Office Building
Washington, DC 20510

RE: Electronic Surveillance—Substitute Versions of H.R. 5825

Dear Majority Leader Frist and Minority Leader Reid:

I write on behalf of the Association of the Bar of the City of New York (“the Association”) to urge you to oppose the two substitute versions of H.R. 5825, one reported out by the House Intelligence Committee and a second reported out by the House Judiciary Committee. We understand one or both of these versions may receive a vote on the House floor this week. As you may recall, the Association wrote you a letter on September 14, 2006 urging you to oppose H.R. 5825, as well as S. 2453 and S. 2455. As we stated in that letter, each of these bills would dramatically upset the balance of powers envisioned by the Constitution and the Foreign Intelligence Surveillance Act (FISA), by allowing the Executive Branch to engage in surveillance activities without meaningful legislative or judicial oversight. Our opposition to these bills remains unchanged. We write today to address the additional ways in which the two substitute versions of H.R. 5825 would further threaten civil liberties and the rule of law.

1. The Intelligence Committee Substitute Version

Section 8 of H.R. 5825 would allow the President to conduct electronic surveillance “after a terrorist attack” without judicial authorization for as long as the President sees fit to do so. (The initial period for the surveillance would be 45 days, but the period is unilaterally renewable by the President without limitation). The term “after a terrorist attack” is undefined and this extraordinary authority to conduct warrantless surveillance would not require any judicial approval, and would only require that certain reports be made to the House and Senate Intelligence Committees and to the FISA Court. As we stated in our previous letter, we strongly oppose this provision. A terrorist attack should not be a basis for totally abandoning the rule of law and depriving American citizens of their civil liberties, particularly when the power granted may continue, not for some short period of emergency (as the FISA statute already authorizes), but indefinitely into the future.

The Intelligence Committee substitute version of H.R. 5825 retains this ill-conceived provision and incorporates a new section, Section 9, which grants the President similar warrantless surveillance powers whenever “there exists an imminent threat of attack likely to cause death, serious injury, or substantial economic damage to the United States.” In this new provision, the initial period of warrantless surveillance would last for 90 days, and again the President would have the sole discretion to renew the warrantless surveillance indefinitely. The substitute version also purports to limit the surveillance of U.S. persons by requiring the President to “certify” that certain criteria are met, but leaves such findings to the President’s unreviewed discretion.

Section 9 does not define what level of injury is “serious” or what level of economic damage is “substantial.” It is also not clear what is meant by the term “imminent.” Given the assertions made to date by the President and other Administration officials, it is conceivable that they already consider such an attack sufficiently “imminent” to trigger these extraordinary powers. Moreover, FISA currently permits the Attorney General to conduct surveillance for 72 hours before obtaining a court order. Should it be shown that this period is likely to provide insufficient flexibility in an emergency, it could be extended by a period that is reasonable in light of demonstrated need. Indeed, S. 3001, introduced by Senator Feinstein, would extend the 72-hour period

to 168 hours, which would seem to be more than sufficient. But Congress has conducted no investigation to determine what the real needs are or why the existing 72-hour period may be insufficient, and Congress surely has no justification for providing a 90-day period, let alone authority for indefinite surveillance, without a court order.

We also note that FISA provides a fifteen-day period for warrantless searches after a declaration of war, to allow time to seek congressional amendment to meet any special wartime needs. Again, if Congress determines, after a reasonable inquiry into the facts, that this period is insufficient, it could provide for a reasonable expansion of this period. But there is currently no justification for conferring these unlimited powers on the President.

2. The Judiciary Committee Substitute Version

The Judiciary Committee strikes Section 8 and 9 discussed above, but includes provisions that would give the President even greater authority to conduct warrantless surveillance.

First, the definition of “electronic surveillance” as set forth in Section 3(b) would be limited solely to communications entirely within the United States. As discussed below, the only international communications between the U.S. and a foreign location covered by this version seem to be those where the information is acquired from a communications provider. Thus, a major category of communications involving U.S. persons simply would no longer be covered by FISA and would be unregulated.

Second, Section 4(a) of this substitute version would authorize the President through the Attorney General to acquire foreign intelligence without a court order for a “period of up to one year” if the electronic surveillance is directed at the acquisition of the contents of communications of foreign powers or their agents – including persons suspected of terrorist activities – merely on the basis of certifications by the Attorney General. These certifications must only be filed under seal with the FISA court. That court is given no powers to review the certifications or to require the discontinuance of the surveillance.

This provision thus would allow warrantless surveillance of communications with U.S. persons occurring entirely within the United States. There is no limitation on the number of “periods up to one year” for which warrantless surveillance is authorized. The surveillance authorized thus far exceeds the scope even of the warrantless NSA surveillance program heretofore described by the Administration.

As noted, another provision in Section 4(a) gives similar powers to conduct surveillance that the Attorney General certifies is “not electronic surveillance” and involves information acquired from communications providers. This would appear to be the sole provision involving international communications to and from the United States. This program, directed at information acquired from communications providers, threatens the invasion of the privacy of the communications companies’ subscribers. Other provisions of this substitute version would leave subscribers no opportunity to object. While the communications companies themselves may file petitions asking the FISA court to review the directive, they will have little incentive to do so and the provision imposes a gag order preventing them from disclosing the surveillance to affected subscribers. And the subscribers are barred from suing the communications companies, which are immunized from liability for providing the information to the government.

The provisions of this substitute effectively provide the President and the Attorney General with sweeping, unreviewable power to conduct surveillance of American citizens, which we believe violates the First and Fourth Amendments.

* * *

We submit that Congress lacks any basis for making the drastic and, in our view, unconstitutional amendments to FISA, provided in these two versions of H.R. 5825. They effectively emasculate the protections FISA was designed to provide. Accordingly, we urge you to reject both the Intelligence Committee and Judiciary Committee versions of H.R. 5825.

Sincerely,



Barry Kamins

CC: Senator Arlen Specter
Senator Patrick Leahy
Senator Charles Schumer
Senator Hillary Clinton
Senator Robert Menendez
Senator Frank Lautenberg
Senator Joseph Lieberman
Senator Christopher Dodd
Senator Dianne Feinstein
Senator Carl Levin
Senator Pat Roberts