



September 20, 2006

The Honorable Peter Hoekstra, Chairman  
The Honorable Jane Harman, Ranking Member  
House Permanent Select Committee on Intelligence  
United States House of Representatives  
Washington, DC 20530

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**Re. Opposition to the Amendment in the Nature of a Substitute to  
H.R. 5825, Further Reducing the Protection for US  
Persons under the Foreign Intelligence Surveillance Act  
and Reducing Congressional Oversight**

Dear Congressman Hoekstra and Congresswoman Harman:

On behalf of the American Civil Liberties Union, and its hundreds of thousands of activists, members and fifty-three affiliates nationwide, we write to share our views about the Amendment in the Nature of a Substitute to H.R. 5825, a bill intended to “update” the Foreign Intelligence Surveillance Act (FISA). We wrote you on July 27, 2006 to express our strong opposition to H.R. 5825 because it authorizes an unchecked expansion of electronic surveillance power for the National Security Agency (NSA) to the detriment of the rights of the American people. The Amendment in the Nature of a Substitute to H.R. 5825 would only expand that authorization, and weaken the congressional oversight provisions that were present in the original bill. We therefore restate our original objections to H.R. 5825 and offer our views on the expanded warrantless surveillance the substitute would provide. We ask that this letter be submitted for the record in the consideration of this bill.

A new section 9 in H.R. 5825 would authorize the NSA to engage in warrantless surveillance and physical searches for a 90-day period (60 days for U.S. persons) whenever the President certifies that “there exists an imminent threat of attack likely to cause death, serious injury, or substantial economic damage to the United States.” This is a completely unnecessary provision because FISA already allows warrantless wiretapping in emergency situations, subject to later judicial review.

That the substitute would authorize a 90-day period of warrantless surveillance in the event of an “imminent attack” calls into question just how loosely successive Presidents might define the word “imminent,” particularly because the substitute authorizes repeated 90-day periods of warrantless surveillance under the same “imminent” attack provision.

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Indeed, the President has often stated that we are under a constant threat from terrorism, which would make it unnecessary to ever submit an application for a FISA order to search Americans' homes or seize their private conversations. There is no mechanism for either Congress or the Foreign Intelligence Surveillance Court to stop the continuous warrantless surveillance. While the substitute requires the President to provide notification to a few Members of Congress and the Court, it does not require the approval of either body, let alone the individualized warrants required by the Constitution. The nature of the surveillance authorized under this provision will be classified, so any Member who were notified could not share the basis for concerns with the American people. All Americans would live under the threat of being subjects of warrantless surveillance and searches at the whim of the executive branch, with no effective oversight against abuses.

The substitute likewise fails to define the terms "serious injury" and "substantial economic damage." These broad terms, which would serve as a predicate for warrantless searches of anyone in the US, are so vague that the American people will not know whether a broken leg or a hacked computer might trigger 90-days of unregulated surveillance.

Finally, the substitute reduces congressional oversight by limiting even further the number of Members who would know that the President has authorized warrantless surveillance and searches of Americans. The original bill's requirement that the President notify "each member" of the House and Senate Intelligence Committees when he authorizes warrantless surveillance has been removed in the substitute. And a new provision in section 10 of the substitute amends the National Security Act of 1947 to give the Chairpersons of the Intelligence Committees the discretion to decide if other members of their Committees would be informed.

This amendment to the National Security Act of 1947 will have a devastating impact on congressional oversight of the intelligence community because it applies not just to FISA, but also to all intelligence activities and covert operations. Under this provision, Intelligence Committee Chairpersons could withhold from Intelligence Committee members:

- 1) Reports by the executive to keep the committees fully and currently informed on the intelligence activities of the United States;
- 2) Reports on any illegal intelligence activity; and
- 3) Reports on covert operations and Presidential findings authorizing such operations.

Limiting the number of members who would have access to this information violates both the letter and the spirit of the National Security Act, as amended by FISA, as well as the Intelligence Oversight Act. It also undermines the rule of law.

This bill gives the President a blank check to continue spying on American residents without the judicial authorization required by the Fourth

Amendment. The Administration has already demonstrated its callous disregard for the civil liberties of ordinary Americans by authorizing the NSA surveillance program in the first place in violation of plain law, and this bill authorizes even more warrantless surveillance than the President has admitted to, while destroying the congressional oversight requirements that he also unilaterally bypassed. The right of Americans to be secure in their persons, houses, papers, and effects should not be violated except with judicial warrants supported by probable cause and particularized suspicion. This bill is utterly inconsistent with the command of the Fourth Amendment, and it guts FISA and the Intelligence Oversight Act.

We respectfully ask the members of the Committee to reject H.R. 5825, as amended by the substitute for that bill, as a major setback for the civil liberties of all Americans.

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Fredrickson', written in a cursive style.

Caroline Fredrickson,  
Director, Washington Legislative Office

A handwritten signature in black ink, appearing to read 'Lisa Graves', written in a cursive style.

Lisa Graves,  
Senior Counsel for Legislative Strategy