



Legislative Bulletin.....September 28, 2006

Contents:

H.R. 5825 — Electronic Surveillance Modernization Act

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: Several

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

**H.R. 5825 — Electronic Surveillance Modernization Act — *as amended*
(Wilson, R-NM)**

Order of Business: The bill is scheduled for consideration on Thursday, September 28, 2006, subject to a closed rule (H.RES. [1052](#)). **Note** that the rule provides that the House will take up the introduced version of H.R. 5825 (available on the Rules Committee website), strike the language and replace it with the amendment in the nature of a substitute – which is the [manager's amendment](#) available on the Rules Committee website. The following legislative summary is based on the manager's amendment, not the introduced text of the bill on LIS.

Summary: H.R. 5825 would amend existing law and procedures the government must follow to utilize electronic surveillance programs used to investigate international terrorism. The bill would amend the Foreign Intelligence Surveillance Act (FISA) to update the definition of electronic surveillance, removing the current distinction between wire and radio communications (from the original 1974 law). The bill would expand the ability of the federal government to conduct electronic surveillance without a court order in certain cases where the target of the

surveillance is an agent of a foreign power. The bill would also allow the government to conduct surveillance on a person believed to be outside of the U.S. Finally, H.R. 5825 makes numerous revisions that may reduce material and documentation required to obtain a FISA application, including reducing the detailed descriptions of the nature of foreign intelligence information that is sought and what method of collection might be used. The major provisions of the bill are as follows:

- modifies the definition of “agent of a foreign power” to also include a person who “is reasonably expected to possess, control, transmit, or receive foreign intelligence information while such person is in the United States,” provided that the official making the determination determines the information to be significant;
- modifies the definition of “electronic surveillance” to include electronic, mechanical, or other surveillance devices used to gather information by direct surveillance of a particular person in the U.S. that would otherwise have a reasonable expectation of privacy and that a warrant would be required for law enforcement purposes to gather information;
- authorizes the President, acting through the Attorney General (AG), to authorize electronic surveillance without a court order to obtain foreign intelligence information for up to one year if the *Attorney General certifies in writing under oath* if the surveillance is directed at:
 - 1) obtaining communications of a foreign power (or its agent), or
 - 2) obtaining technical intelligence from the premises under the control of a foreign power (such as a foreign embassy), other than spoken communications;

Note: The provisions above and other surveillance powers granted to the government under FISA are often subject to “minimization procedures,” which stipulates limitations on the type of material that may be obtained, and how obtained material may be disseminated (50 U.S.C. § 1801h).
- authorizes the AG to acquire foreign intelligence information on a person reasonably believed to be outside the U.S. if the AG certifies in writing under oath that:
 - 1) the acquisition does not constitute electronic surveillance;
 - 2) the acquisition obtaining the intelligence information with the assistance of a wire or electronic communication service provider that has access to the information (e.g. – records of phone calls from a local telephone company);
 - 3) a significant purpose of the acquisition is to obtain foreign intelligence information; and
 - 4) the proposed minimization procedures used to obtain the information conform to the procedures under 50 U.S.C. § 1801h.
- specifies that a certification to obtain foreign intelligence information does not have to identify the specific facilities, places, premises, or property where the intelligence gathering is taking place;
- authorizes the AG to direct a person, when gathering electronic surveillance, to:
 - 1) immediately provide the government with all information and assistance necessary to obtain foreign intelligence information in a way that will protect the secrecy of the electronic surveillance and provides minimum interference with the service being provided to the target of the surveillance (e.g. – does not interrupt the target’s mobile phone service); and

- 2) maintain any records (using certain guidelines specified by the AG) concerning the electronic surveillance or its acquisition.
- directs the government to compensate a person (at a prevailing rate) for providing the above mentioned information on foreign intelligence, and provides for penalties for failure to comply with the AG's request for assistance and information gathering;
 - allows a person receiving a directive to provide foreign intelligence information the ability to challenge the legality of the directive by filing a petition, and stipulates the specific procedures for consideration;
 - modifies the requirements for submitting an application for an order approving electronic surveillance by substantially reducing the material required for the application. Specifically, it changes the requirement to submit a "detailed description" of the nature of information sought in foreign intelligence gathering to submitting a "summary description" to a FISA court;
 - authorizes the AG to collect electronic surveillance without a court order to acquire foreign intelligence information for a period not to exceed 60 days following an armed attack against U.S. territory;
 - authorizes the AG to conduct electronic surveillance to acquire without an order when terrorist organizations and their affiliates responsible for the attack have been identified and notified to the Congress and the FISA court, when there is a reasonable belief that the target is communicating with a terrorist organization, for a period not to exceed 45 days following a terrorist attack against the U.S.;
 - allows the President to authorize electronic surveillance when an imminent threat exists, likely to cause death, serious injury, or substantial economic damage to the U.S., when the entities responsible for the threat have been identified and notified to the Congress and the FISA court, and when there is a reasonable belief that the target is communicating with those entities, for a period not to exceed 90 days. It requires the President to submit notification to Congress as soon as practicable, but not later than five days after the authorization; and
 - requires the AG, on a semiannual basis, to "fully inform" the relevant House and Senate Intelligence Committees on all electronic surveillance conducted without a court order.

Additional Background: The Foreign Intelligence Surveillance Act (FISA), P.L. 95-511, was introduced by Senator Kennedy in 1978, and signed into law later that year by President Carter. FISA provisions allow the federal government to utilize electronic surveillance and a host of other investigative tools to obtain foreign intelligence information against potential terrorists.

The reauthorization of the USA PATRIOT Act in 2005 also included several FISA provisions. Please see the [RSC Legislative Bulletin on the PATRIOT Act](#) reauthorization for more information. For additional information on FISA, please see [this CRS Issue Brief](#) or this [related CRS Issue Brief](#).

Possible Conservative Concerns: Some conservatives have expressed concerns that the powers granted to federal authorities under FISA were unnecessarily broad and could infringe upon citizens' constitutional rights under the First, Fourth, Fifth and Sixth Amendments. The area of concern most frequently mentioned seems to be that of surveillance without obtaining a court order or warrant. Attempts have been made in this bill and in the USA PATRIOT Act (regarding

FISA provisions) to ameliorate some of these concerns. Some conservatives are split as to the proper balance between ensuring national security and protecting the privacy rights of individuals.

Amendments: There will be a closed rule for H.R. 5825, and therefore no amendments will be allowed.

Committee Action: H.R. 5825 was introduced on July 18, 2006, and referred to the Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security and the House Intelligence Committee. The Committee held hearings, a markup session, and reported the bill, amended, by a vote of 20-6 on September 20, 2006 (House Report 109-680 [Part 1](#) and [Part 2](#)).

Administration Policy: Although no Statement of Administration Policy (SAP) was available at press time, the Administration has been publicly supportive of electronic surveillance reform and the substantive measures contained in this legislation, allowing greater flexibility for federal officials to conduct electronic surveillance on enemies of the U.S.

Cost to Taxpayers: The CBO cost estimate for H.R. 5825 stated, "CBO has no basis for predicting how the volume or type of surveillance would be changed if H.R. 5825 were enacted. Furthermore, information regarding surveillance techniques and their associated costs are classified. For these reasons, CBO cannot estimate the impact on the federal budget of implementing H.R. 5825."

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Judiciary Committee, in House Report [109-680 Part I](#), cites constitutional authority in Article 1, Section 8 (the power of Congress to provide for the common defense and general welfare of the U.S.).

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