

Center for National Security Studies

Protecting civil liberties and human rights

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Memorandum to Interested Persons

Re: The RESTORE ACT is an Important but First Step toward Stopping Unconstitutional Surveillance.

From: Kate Martin and Lisa Graves

Summary: The RESTORE Act (HR 3773) is a substantial improvement to current law.

The Protect America Act (PAA), passed in August by majorities in both Houses, allows the government access to the international communications of Americans by going directly to the telecommunications companies. The RESTORE Act would reinstate the requirement of a court order before such access is granted.

The RESTORE ACT is sunsetted in December 2009 and contains strong reporting requirements that will ensure that Congress obtains access to the information it needs before determining what permanent amendments should be made to the FISA.

At the same time, the Act would authorize the FISA court to approve surveillance of Americans' international communications without a warrant in some circumstances where we believe that the Fourth Amendment requires a warrant. However, unlike the PAA and the President's warrantless surveillance program prior to the PAA, the Restore Act provides some protection against such unconstitutional surveillance because it requires some independent court review before such surveillance can take place and additional rules ensuring a warrant when a significant purpose of the surveillance is to obtain the communications of Americans.

Given the majority votes for the (PAA) this past August, we welcome the RESTORE Act as an important first step towards restoring constitutional protections and congressional and public oversight.

Background:

The Center for National Security Studies is the only organization whose sole mission is to work to protect civil liberties and human rights in the context of national security issues. It has worked to prevent unconstitutional government surveillance for more than thirty years and litigated, testified and advocated for constitutional protections in the Foreign Intelligence Surveillance Act since then.

Analysis:

In August, the PAA eliminated the requirement that the government obtain a warrant to seize Americans' international communications in the United States. The Fourth Amendment's warrant requirement codified in the Foreign Intelligence Surveillance Act (FISA) had been the law of the land for the past thirty years. The FISA warrant requirement was enacted following revelations that the National Security Agency (NSA) had undertaken secret programs, such as "Operation Shamrock," to seize nearly every international telegram to or from any person in the US. Since then FISA has been updated

many times, including several changes in the Patriot Act. And, until the PAA, the law had always maintained a clear bar on acquiring the contents of Americans' electronic communications (whether by phone or e-mail) from the telecommunications infrastructure in the US unless the FISA court issued an individualized warrant or a warrant was sought after the fact in an emergency. This bar to protect Americans' privacy applied whether the communications were purely domestic or involved Americans on one end and foreign nationals overseas on the other.

The PAA effectively eliminated that requirement and replaced it with an unconstitutional process by which the Attorney General and the Director of National Intelligence are authorized to issue blanket demands to US telephone and internet companies for access to communications. The PAA allows secret surveillance if it is "directed" at or "concerning" a person reasonably believed to be outside the US, even if that person is communicating with a person inside the US. And the PAA permits such surveillance in an extremely broad range of circumstances, whenever gathering "foreign intelligence information" – defined very broadly - is the objective.

The RESTORE Act cures some of these flaws.

It is an important first step toward restoring the civil liberties protections lost in August. The bill would be a significant improvement over the current law passed at the President's urging, and it is much more protective of civil liberties than any of the bills considered in August.

The RESTORE Act contains important privacy protections the administration has unreasonably opposed. In particular, the RESTORE Act reinserts some judicial involvement in the process before the government can access Americans' international communications. It would also require the FISA court to review several procedures regarding the treatment of Americans' communications that are intercepted under the court orders authorized by the bill. In addition, the RESTORE Act would permit such authority to be used in fewer circumstances than does the PAA and would thereby better focus the scope of this surveillance on the most important national security threats. The RESTORE Act also reinforces that surveillance must be conducted within the requirements of the FISA or criminal law and not at the President's say-so.

At the same time, the court orders authorized by the statute - if used to seize Americans' international communications – would not meet the Fourth Amendment's requirement for particularized warrants based on probable cause specifically describing which communications may be seized. This bill, if passed, would still authorize the warrantless surveillance of a significant number of international communications that were protected by the warrant requirement until this last summer.

Such authorization is somewhat mitigated by three additional provisions in the bill: the fact that these changes are not permanent; the requirement of substantial reporting to the court and the Congress concerning past surveillance, especially the audit of the warrantless surveillance program, and surveillance carried out under the RESTORE Act; and the rejection of the administration's demand to give retroactive immunity to any person or company that assisted its illegal warrantless surveillance program(s) over the past six years. As to the latter, the RESTORE Act instead extends the statute of limitations for violations of the FISA.

The congressional and public reporting requirements in the RESTORE Act would lay the groundwork for the next administration and the next Congress to gain a full

understanding of the administration's illegal surveillance, its underlying interpretations of applicable laws, and the impact of any changes to FISA this year. The RESTORE Act would help ensure that more information, not just the administration's rhetoric and selective disclosures, are made available to Congress, and will give Congress and the American people, the opportunity to assess the RESTORE Act procedures and surveillance on the basis of a complete record in 2009.

The Center for National Security Studies calls on Congress to work:

- ✓ to seek a full accounting of the administration's past illegal surveillance of Americans;
- ✓ to insist on full reporting about what kind of surveillance is now being conducted;
- ✓ to restore fully the requirement that a judicial warrant be obtained when the government seizes Americans' international communications; and
- ✓ to restore the requirement that the telecommunications companies, not the government or the NSA, be the gatekeeper for access to communications to ensure that the government has access only to those communications it is entitled to as a matter of law.

In sum, while the RESTORE Act does not fully restore the rights of Americans' done away with the stroke of pen in August, it does provide many more protections than any proposal the administration has helped draft on these issues. It is crucial that Congress defeat any attempt to make those proposals the permanent law or to immunize past misconduct.

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October 16, 2007