



DIGITAL FOURTH

The Massachusetts campaign to protect digital data
from unconstitutional government surveillance

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Joint Committee on the Judiciary
Senator Katherine Clark and Representative Eugene O'Flaherty, Chairs

OPPOSING S. 654 / H. 3261 AN ACT UPDATING THE WIRE INTERCEPTION LAW

Dear Senator Clark, Representative O'Flaherty, and members of the Committee,

Digital Fourth is a Massachusetts-based nonprofit. Our board consists of academics and specialists in surveillance policy, online privacy and constitutional jurisprudence. We have brought together six civil liberties groups¹ and over 4,000 petition signatories residing in Massachusetts to ask you to oppose this bill.

1. The Constitution (federal and state) and the Legislature's previous findings mandate particular care when dealing with the interception power. The Legislature found that electronically intercepting the communications of Massachusetts residents is not a "normal investigative procedure." "[S]trict judicial supervision" is required, because "the [...] unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth."² The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". Beyond this, Massachusetts itself has older and stronger Constitutional constraints: "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if [they] be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in [such] cases." S. 654/H. 3261's no-holds-barred approach should be evaluated in the light of these constraints. Most notably, the bill proposes eliminating entirely the Preamble from which the legislative findings above were taken. We have every reason to suppose that it is still true that "the use of modern electronic surveillance devices pose[s] grave dangers to privacy."

¹ The ACLU of Massachusetts; the Bill of Rights Defense Committee; Demand Progress; the Electronic Frontier Foundation; and Fight for the Future.

² The legislative findings are taken from Mass. General Laws chapter 272, section 99, Preamble.

2. No evidence has been presented to support loosening the law. This bill would greatly loosen long-standing constraints on law enforcement's interception power, without the bill's proponents having presented any evidence of actual cases where **any** criminal is now walking free because of those constraints. The one case they have cited publicly, that of Paolo Tavares, involved an accused murderer whose trial collapsed because wiretap evidence was excluded; however, he was convicted on retrial and is now serving a lengthy sentence. Proponents have cited the idea that "criminals have the upper hand" here in Massachusetts, but crime per head is at historic lows.³ The Attorney-General's office has been arguing for many years for loosening the law, and their justification for it changes according to the news of the day: one year it is because of Wall Street fraud, the next because of school bullyings and shootings, the next because of terrorism. However, they have presented no evidence and no explanation of how these looser rules on electronic interceptions would have helped to prevent any of these crimes. Given the strong Constitutional constraints in this area, it is not appropriate to loosen the law based on such weak evidence.

3. The bill overreaches by very greatly expanding the list of offenses for which warrants are permitted, to relatively minor and sometimes vague crimes.

The bill as drafted removes the requirement to connect the investigation to organized crime, and greatly expands the list of 'designated offenses' for which electronic wiretapping warrants would be permitted. It does this on the basis that limiting the law to "organized crime" is too narrow. However, as the Electronic Frontier Foundation also observes, "organized crime" has been interpreted broadly by the courts to apply to any sort of coordinated criminal activity. If law enforcement wishes to investigate non-Mafia coordinated criminal activity under the existing statute, **it can already do it**. The current list of "designated offenses" for which electronic wiretapping is permitted is:

"In connection with organized crime, arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, illegal gaming, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses."

The new, vastly expanded list of designated offenses is:

"Murder, kidnapping, robbery, or extortion; arson, assault and battery with or without a dangerous weapon, bribery, corruption or attempted corruption of a public official, burglary, misuse of credit cards or fraudulent use of credit cards to obtain money, goods or services, malicious destruction of

³ Crime has been steady at less than 3 reported crimes per 100 residents per year since around 2002, and that that level is the lowest since 1968. Sources: Federal Uniform Crime Reports; US Census population figures for Massachusetts; analysis at <http://warrantless.org/2013/01/think-of-the-children/>.

property, embezzlement, enterprise crime, escape, throwing or placing explosives at or near persons or property, illegal possession or storage of explosives, possession of infernal machines, forgery, gaming violations, identity fraud, indecent assault and battery, insurance fraud, intimidation of witnesses or jurors or persons furnishing information in connection with criminal proceedings, larceny, lending of money or things of value in violation of the general laws, mayhem, money laundering, perjury, subornation of perjury, prostitution, rape, receiving stolen property, communicating terroristic threats, possessing or using chemical, biological or nuclear weapons, possession or use of hoax substances, crimes involving violations of: gambling and lottery laws, gift laws, liquor laws, tobacco laws, firearms laws, securities laws, lobbying laws, ethics laws, or conflict of interest laws; any offense involving the possession or distribution of a narcotic drug, marijuana, or other dangerous drug; coercion of child under eighteen into criminal conspiracy, inducing person under eighteen to have sexual intercourse, possession or dissemination of matter harmful to minors, posing or exhibiting child in state of nudity or sexual conduct, dissemination of visual material of child in state of nudity or sexual conduct, purchase or possession of visual material of child depicted in sexual conduct; any offense punishable by imprisonment for more than one year involving the possession or distribution of firearms; any accessory to any offense described in this act or any conspiracy or attempt or solicitation to commit any offense described in this act; the location of any fugitive from justice from an offense described in this subsection.

The new list includes non-violent and minor crimes, and includes several vague laws that could easily lead to abuses of prosecutorial discretion.

Also, for the first time, this bill includes language that seems to allow law enforcement to place mass wiretaps at phone company switching stations. Such a wiretap would intercept thousands of people's call data with a single warrant, a practice which would violate the Fourth Amendment's particularity requirements.

In summary, this "update" is extraordinarily broad in scope. It goes almost as far as it is possible for a state to go in loosening wiretapping laws without falling foul of federal law. Given the long-standing constitutional protections surrounding the surveillance power here in Massachusetts, and the lack of evidence presented to the public so far as to why loosening the law is needed, the electronic interception power should remain **strictly circumscribed and extremely limited in both form and substance**. We urge you to vote against this bill, and would welcome the opportunity to work with the Committee and share our research and materials as you consider this important proposal.

Sincerely,



Alex Marthews, President