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EDITORIAL

Limiting Power's 'Natural Tendency'

After a long and frightening period of acquiescence, Congressional Democrats are standing up to President Bush's assault on civil liberties — demanding an end to spying on Americans without court supervision.

Last week, the full House and the Senate Judiciary Committee endorsed major improvements to a deeply flawed measure that the White House pushed through Congress just before the summer recess. The leadership will have to stand firm to enact more needed fixes to that law — and prevent the White House from using the occasion to encroach even further on civil liberties.

The bill had a narrow aim, to close a loophole in the 1978 law on electronic spying that was created by new technology. But Mr. Bush added provisions that gave legal cover to his decision to spy on Americans' international calls and e-mail messages without a warrant after 9/11 — and actually expanded his powers. The only thing good to come of last summer's rout is that the law was set to expire in February, and a group of Congressional Democrats are fighting to get it right this time.

The House passed a measure last week that contains the necessary updates to the 1978 Foreign Intelligence Surveillance Act. It allows the collection of e-mail messages and phone calls between people outside the United States that happen to go through American data hubs. It grants some additional latitude for starting eavesdropping on communications originating or ending in the United States, and then getting court approval afterward.

But it restores critical oversight powers to the special foreign intelligence court — to monitor such programs, compel the intelligence agencies to comply with the rules and impose sanctions if they do not. These legitimate restraints on the government's power are reflected in a Senate bill that was approved by the Judiciary Committee last week.

Mr. Bush opposes that bill, as well as the House bill, because it restores the court's oversight powers. The president is also insisting that Congress give immunity to telecommunications companies that turned over data to the government without a warrant — which they did for five years after Sept. 11, 2001.

Both measures could use strengthening, but they are a good start. Much depends on Senate Majority Leader Harry Reid, who should allow the Judiciary Committee bill to come to the Senate floor and permit vital amendments to be proposed by Senator Russ Feingold. Mr. Reid should allow a parallel, badly flawed bill passed by the Intelligence Committee to die a well-deserved death.

Here are some red lines for this debate:

SUNSET The law must have an expiration date. Congress should not grant the government unending powers to spy on Americans. The Bush administration, predictably, wants just that. We support the House bill's two-year

expiration date.

COURTS AND WARRANTS Any new law must include real supervision by the special FISA court. The administration wants to gut the court's powers, taking away the requirement for advance warrants for most eavesdropping on international communications originating or ending in the United States. The administration would allow the court to rule afterward on whether required procedures were followed, but strip the court of its remaining powers to enforce such a judgment. It is vital to retain provisions in the Senate Judiciary Committee's bill that would make it clear that the government cannot just collect information in bulk — by, say, tapping all calls to and from Pakistan — but has to cite targets, including specific phone numbers and e-mail addresses.

Even if the government is legitimately targeting someone overseas in an eavesdropping operation, the 2007 law would permit it to collect vast databases that would include Americans at the other ends of those communications. Mr. Feingold is working on vital amendments that would restrict the ways the government could store and use such information.

The Senate bill would require a warrant to eavesdrop on an American who is in another country. The White House opposes this provision. It must be retained.

AMNESTY The telecommunications companies must not get amnesty. Lawsuits against them must be allowed to proceed, in the interest of the rule of law and also to force disclosure of the nature and extent of the lawless eavesdropping that began after Sept. 11, 2001.

Senator Arlen Specter, the ranking Republican on the Judiciary Committee, is expected to propose an alternative that would allow plaintiffs to sue the government rather than the companies. That would leave the taxpayers holding the bag for monetary damages and allow the government to use claims of sovereign immunity and state secrets to kill the suits. If the government wants to protect the companies, it can set caps on damages. Mr. Bush wants this amnesty to ensure that his own administration's culpability is never revealed in court.

As this debate proceeds, Mr. Bush and his allies will tell Americans that these reforms — and the Democrats — will make it impossible to eavesdrop on Osama bin Laden. That's not true. American intelligence has most of the tools it needs to do that already, and the Democratic bills give them the few extra ones they may be missing. Mr. Bush will present Americans with a false choice between effective intelligence and protecting their freedoms. It is possible, quite easily, to have both.

Senator Sam Ervin, the author of groundbreaking legislation in this area, warned eloquently in June 1974 of the dangers that arise when the "natural tendency of government to acquire and keep and share information about citizens is enhanced by computer technology" without legal and judicial restraint.

"Each time we give up a bit of information about ourselves to the government, we give up some of our freedom," he said. "For the more the government or any institution knows about us, the more power it has over us. When the government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words."

We hope that lawmakers, both the remaining passive Democrats and those Republicans who cherish the Constitution but have been afraid to buck this president, bear those words in mind as they debate the electronic

espionage law.

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