

Honolulu, Hawaii

March 24, 2006

RE: S.B. No. 965
S.D. 2
H.D. 1

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Third State Legislature
Regular Session of 2006
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred S.B. No. 965, S.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO ELECTRONIC SURVEILLANCE,"

begs leave to report as follows:

The purpose of this measure is to revamp Hawaii's wiretap law by repealing part IV, Electronic Eavesdropping, of chapter 803, Hawaii Revised Statutes (HRS) and replacing it with a new part entitled Wiretapping and Electronic Surveillance.

This bill also amends chapter 641, HRS, relating to appeals, to include denial of permission to intercept a wire, oral, or electronic communication among judicial decisions from which the State may appeal in a criminal case.

The Honolulu Division of the Federal Bureau of Investigation, the Attorney General, Department of the Prosecuting Attorney of the City and County of Honolulu, County of Hawaii Police Department, Office of the Prosecuting Attorney of the County of Kauai, State of Hawaii Organization of Police Officers, Kuliouou/Kalani Iki Neighborhood Board #2, and a concerned individual submitted testimony in support of this bill. The Office of the Public Defender, American Civil Liberties Union of Hawaii, and a concerned individual opposed this measure.



Your Committee has amended this measure by deleting sections 1 and 3 which, respectively, add a new part to chapter 803, HRS, and repeal existing part IV, and instead inserting a new section 2 that retains the existing part IV, with amendments. Specifically, this new section 2:

- (1) Amends section 803-41, HRS, by:
 - (A) Adding definitions of "communication common carrier", "designated judge", "electronic communication service", and "remote computing service,"; and
 - (B) Amending the definition of "electronic communication" to exclude the portion of a cordless telephone communication transmitted between the handset and base unit, and to include certain electronic funds transfer information stored by a financial institution;
- (2) Incorporates into section 803-42(a), HRS, the conduct prohibited in section 803-B(a)(5) of S.B. No. 965 S.D. 2, relating to unauthorized disclosure with intent to obstruct a criminal investigation;
- (3) Adds "by a person not acting under color of law" to the proviso language of section 803-42(b)(3), HRS, to address concerns about the authority of a court to authorize law enforcement "bugging." See State v. Lo, 66 Haw. 653 (1983);
- (4) Amends section 803-42(b), HRS, to permit disclosure of illegally intercepted communication "in the course of publication of truthful information of public concern." See Bartnicki v. Vopper, 523 U.S. 514 (2001) (striking as unconstitutional, a provision in the Pennsylvania wiretap statute that would penalize a reporter who broadcast a legally obtained copy of an intercepted communication);
- (5) Amends section 803-46, HRS, by:
 - (A) Adding to section 803-46(a), HRS, a requirement that a written memorandum from the Department of the Attorney General accompany each application for



an intercept order, with a recommendation that the application be approved or denied; and

- (B) Deleting from section 803-46(b), HRS, the requirement that the applicant appear at an in camera hearing on the application and that the judge appoint independent counsel to oppose the application;

Consistent with these amendments to section 803-46(a) and (b), HRS, section 1 of this bill establishes within the Department of the Attorney General a surveillance review unit whose responsibilities include the preparation of the memorandum to the court;

- (6) Adds to section 803-46(g)(2), HRS, a provision protecting applications and orders from disclosure absent a showing of good cause, as provided in section 803-J(g)(2) of S.B. No. 965 S.D. 2;
- (7) Amends section 803-47, HRS, to require reports concerning pen registers and trap and trace devices, as provided in section 803-AA of S.B. No. 965 S.D. 2;
- (8) Adds provisions to section 803-47.9, HRS, concerning reasonable cost reimbursement, as provided in section 803-S(b) and (c) of S.B. No. 965 S.D. 2;
- (9) Adds a new section to chapter 803, HRS, to authorize the Attorney General to initiate a civil action to enjoin a felony violation of the wiretap law, as provided in section 803-M of S.B. No. 965 S.D. 2; and
- (10) Makes technical, nonsubstantive changes for purposes of clarity and style.

As noted above, your Committee added a new section 1 to this measure to establish a Surveillance Review Unit within the Department of the AG.

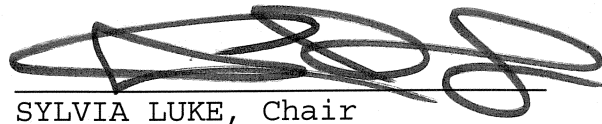


As to section 2 of S.B. No. 965 S.D. 2, section 641-13, HRS, would not apply to an application for an intercept order that is not part of a criminal "case." The state's authority to seek expedited appeal from denial of an intercept application and from a pretrial order granting a motion for suppression of evidence are currently provided for in section 803-46(i)(2), HRS, and section 641-13(7), HRS, respectively. Accordingly, your Committee deleted section 2 of S.B. No. 965 S.D. 2.

Finally, with regard to conformity with federal law, your Committee notes that in countless instances throughout S.B. No. 965 S.D. 2, changes inconsistent with federal law are proposed, even though our current law tracks federal language verbatim.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 965, S.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 965, S.D. 2, H.D. 1, and be referred to the Committee on Finance.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,



SYLVIA LUKE, Chair



