

House Judiciary's New (*Anti-Reform*) Draft CFAA: Internet Criminalization Run Amok

The House Judiciary Committee's draft CFAA (Computer Fraud & Abuse Act) bill is the epitome of overcriminalization, overfederalization and government over-reaching at its worst. In the face of a loud and sustained call for CFAA *reform* that reaches across the right-left divide, some on the Judiciary Committee staff seem to believe now is the time to do exactly the opposite, and expand this vague law even further, hike up its criminal penalties and increase the government's ability to seize the property of unsuspecting, law-abiding individuals. Specifically, the new (anti-reform) draft CFAA would:

- Dramatically hike up maximum prison sentences for CFAA violations, even where economic damage is negligible. This drastic step would be taken without any evidence or explanation of how current sentences are deficient (and they are not), and despite the fact that no federal judge has ever found the current statutory maximum penalties too low, much less imposed the maximum penalties that are *already* available under law.
- Broaden the "exceeds authorized access" prong that so many are urging Congress to *restrict* and not *expand*. This would actually criminalize contract violations—in direct contrast to judicial decisions in the Fourth Circuit and elsewhere narrowing the term. Consider these examples: You join an online dating site with the intent of contacting and, hopefully, getting to know the personal details of someone. Lying about your age in your dating profile would now be a federal crime. How about the person who files a complaint on their county's website because their neighbor's dog is barking through the night? If that person seeks to do so anonymously, listing himself as "John Smith" in violation of the terms of service, then he could be subject to federal charges. These examples would be humorous if they weren't so troubling. Sadly, this bill would turn a large majority of Internet users into potential federal felons.
- Create a conspiracy offense punishable by the same draconian penalties that apply to actual CFAA violations. This means that just *talking* about committing computer crimes—including merely violating certain websites' terms of service—without actually doing so, could result in federal criminal charges.
- Make all CFAA violations a predicate for RICO, the "Racketeer Influenced and Corrupt Organizations Act," a statute designed to prosecute the mafia and gangsters. Adding the CFAA to the already-long list of RICO predicates could transform even harmless violations into a separate federal felony punishable by up to 20 years in prison. Remember that disgruntled neighbor mentioned above? What if he organizes all his neighbors to also file anonymous complaints on the county's website? Watch out! Under this new CFAA, the entire neighborhood could be facing federal RICO and conspiracy charges just by talking about it.
- Expand the government's criminal forfeiture authority and create new civil forfeiture authority. Most disturbingly, to seize any "real" property, the government need only show probable cause that the property was intended to be used to "facilitate" a CFAA violation. The government could confiscate not just the computer involved in the violation, but also the dwelling that housed the computer—putting at risk homes of law-abiding citizens with no knowledge of the computer activity in question—without proving criminal activity or even filing criminal charges against the homeowner.
- Weaken the critical and constitutionally required federal jurisdictional hook from the password trafficking offense at §1030(a)(6), effectively expanding its reach to *any* computer that can access the internet and giving the federal government even greater control over purely local and intrastate conduct.
- Create a new offense for damage to "critical infrastructure" that is punishable by up to 30 years in prison. This draft not only defines the term "critical infrastructure" in an astonishingly broad fashion, but also permits felony convictions for persons who never had any actual intent to disrupt "critical infrastructure" or to cause the resulting damage.
- Overall, this bill gives prosecutors free rein to go after employees, social networking users, academics, researchers and other computer users for everyday online activity—exposing all of us to the risk of criminal prosecution.

House Judiciary Committee Members pledged publicly to look at reform proposals and, in the words of Committee Chair Rep. Goodlatte, do "what needs to [be] done to make sure that the law isn't abused[.]" And yet, despite that pledge, and amid public outcry, the reform discussion has been perverted into what is a dangerous anti-reform bill.