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A Newly Released Secret Opinion Shows Surveillance Courts Are Even Worse Than You Knew

By: Jeffrey Rosen - September 25, 2013

Last week, with little fanfare, the Foreign Intelligence Surveillance Court (FISA) released a previously secret opinion upholding the National Security Agency's mass surveillance of telephone metadata. The opinion, which deserves more attention than it has received, is a cavalier piece of work. Judge Claire Eagan fails even to consider, let alone to rebut, the strong arguments suggesting that the NSA programs violates both the U.S. Constitution and section 215 of the Patriot Act, the statutory provision the government has invoked to authorize it. The Electronic Privacy Information Center (EPIC) has asked the Supreme Court to conduct an independent review of the legality of the NSA surveillance program, and Justice Antonin Scalia said yesterday that he expects the Court to eventually hear a version of the case. But because the Court may be unlikely, for technical reasons, to rule squarely on the merits, congressional reform of the FISA court is now more urgent than ever.

At a recent panel on the EPIC challenge, James Bamford, the leading chronicler of the NSA, reviewed the sorry history of the telephone metadata surveillance program that the FISA court failed even to discuss or acknowledge. The FISA Court was created in 1978 after Frank Church, head of the Church Committee, worried that technological surveillance capabilities in the hands of the government could "make tyranny total in America." The secret court was a compromise between Democrats, who wanted the NSA to obtain warrants for surveillance in regular federal courts, and Republicans, who wanted few restrictions on surveillance. The compromise worked adequately for 30 years. But in 2001, the Bush administration, having decided that the FISA court wasn't trustworthy enough, created a mass surveillance program of Internet and telephone called Stellar Wind that bypassed the FISA judges and only notified the Chief Judge of the Court.

One of the documents released by Edward Snowden was the NSA Inspector General's report on Stellar Wind. Before the Snowden leak, many believed that James Comey, then deputy attorney general and now the director of the FBI, was a hero because, in 2004, he concluded that one component of Stellar Wind was illegal. This prompted White House Counsel Alberto Gonzalez to rush to the hospital bed of an ailing Attorney General, John Ashcroft, who also refused to authorize the program. But as Bamford

noted, we know from Snowden's disclosures that when Comey and Ashcroft refused to sign off, NSA director Michael Hayden, under White House pressure, decided to continue the Internet and telephone eavesdropping program anyway. Eventually, in 2011, the Obama NSA shut down the Internet metadata surveillance program, concluding that it couldn't be authorized under existing law. But it continued to collect telephone metadata, legalistically justifying it under the "business records" provision of the U.S.A. Patriot Act.

The Obama administration's White paper justifying the mass telephone surveillance was flimsy and weak. But it was less cursory than the FISA Court opinion, which breezily upheld the telephone surveillance program without even considering the strongest constitutional and statutory arguments on the other side. Let's start with the FISA Court's constitutional analysis, which can be summarized in one sentence: "The Supreme Court found [in a 1979 case, Smith v. Maryland] that once a person has transmitted this [telephone metadata] information to a third party (in this case, a telephone company), the person has 'no legitimate expectation of privacy in the information.'"

But, as the Court acknowledges, there is an obvious distinction between Smith and the Bush/Obama mass surveillance program. In Smith, the government was obtaining a few dialed telephone numbers of one person suspected of a crime. Here, the government obtained millions of telephone numbers of millions of people suspected of no crime. The court then dismisses this seemingly powerful distinction by citing one of its own secret opinions, whose name is redacted. "When one individual does not have a Fourth Amendment interest, grouping together a large number of similarly situated individuals cannot result in a Fourth Amendment interest springing into existence ex nihilo."

And that's it. That's the bulk of the analysis distinguishing a limited search conducted with individualized suspicion to an unlimited hoovering of every telephone number, foreign and domestic, in and out of the United States. Even on its face, the distinction appears unpersuasive, since mass searches conducted without any suspicion seem to be textbook examples of the "general warrants" that the Framers of the Fourth Amendment meant to prohibit. But in addition to failing to engage this objection, Judge Eagan also fails to cite cases decided since 1979—including, most significantly, the Jones case involving Global Positioning System Surveillance, in which five justices suggested that ubiquitous, long-term surveillance does require a warrant when the aggregation of massive amounts of information can be used to reconstruct an individual's private activity.(By contrast, Justice Scalia, who has been a strong defender of the Fourth Amendment, said that he considers the Court's test for evaluating non-property based invasions of privacy to be "a generalized right of privacy that comes from penumbras and emanations, blah blah blah, garbage.")

There are thoughtful responses to this argument, offered by Orin Kerr—namely, that it was a concern about the collection and subsequent analysis of mass data that concerned the concurring justices in Jones, while in the NSA program, the data can't be queried (according to a restriction apparently imposed by the FISA court itself) without some degree of individualized suspicion. I find this response unconvincing: The Framers of the Fourth Amendment believed that mass searches authorized by general warrants unconstitutionally threaten our security in our persons, houses, papers, and effects, because they create the possibility, not the certainty, that the government might reconstruct anyone's

movements, thoughts, emotions, and sensations without suspicion. And at the EPIC panel, Jim Harper of the Cato Institute offered another attempt to argue that the Framers of the Fourth Amendment would have considered the telephone mass surveillance program an unconstitutional seizure of property and search of our digital effects. But these are arguments, once again, that Judge Eagan fails to engage.

In addition to offering the thinnest of constitutional justifications, Judge Eagan offers a strained and unconvincing defense of the telephone surveillance program on statutory grounds. Section 215 requires any valid order to include "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." But Judge Eagan, remarkably, omits the last words of the statutory language "to an authorized investigation" and rewrites the legal requirement in the following way: "The government may meet the standard under Section 215 if it can demonstrate reasonable grounds to believe that the information sought to be produced has some bearing on its investigations of the identified international terrorist organizations." As Jim Harper noted at the EPIC panel, the statute requires that the data sought "are relevant to an authorized investigation," not, as Judge Eagan puts it, that they "might [have] some bearing on its [future] investigations." In other words, as Cato puts it in its brief, Section 215 "presumes and requires the existence of an investigation at the time of application," rather than authorizing the prospective hoovering of masses of data that might be relevant to future investigations.

There are other criticisms of Eagan's statutory analysis: Kerr, who is generally sympathetic to the government, faults Eagan for simply repeating, rather than skeptically evaluating, the government's claim that collecting all data is necessary because it might hypothetically be relevant to a future investigation:

Judge Eagan refers to an earlier decision indicating that the relevance standard requires a showing of necessity — that under the earlier decision, mass collection becomes relevant only if it is necessary to find the bad guys. Judge Eagan notes that the government claims that it needs the whole haystack to find the needle, and that the government says that getting everything is necessary. The Court then just concludes that this statement of need "is sufficient to meet the low statutory hurdle set out in Section 215 to obtain a production of records." .... But why is that sufficient? We can debate what the relevance standard should mean, but it seems strange that the government's previously secret claim that the entire database has to be turned over itself makes it legal to turn over the entire database first and then search it later. That reading allows the government to say what the statute means: The government can get whatever the government says it needs, just because the government says it needs it, as it becomes "relevant" whenever the government says it needs it.

So there you have it. The secret FISA court, having received constitutional and statutory arguments only from the government, merely repeats and endorses those arguments, rather than even engaging the best arguments on the other side. If there's a better case for review by the Supreme Court, and Congressional reform of the FISA court, it's hard to imagine.