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Our dishonest debate over NSA spying

By Julian Sanchez, research fellow, Cato Institute – September 24, 2012

The House of Representatives recently signed off on another five years of sweeping warrantless surveillance by the National Security Agency, voting by a wide margin to extend the controversial FISA Amendments Act of 2008. But the debate on the House floor showed that the law's staunchest supporters either don't understand what the law really says and does—or don't care.

Traditionally, the Foreign Intelligence Surveillance Act required an individualized warrant, issued by the secretive Foreign Intelligence Surveillance Court, whenever the government sought to intercept communications either sent or received by an American from a wire in the United States. The FAA, which effectively created a legalized version of President Bush's infamous warrantless wiretapping program, changed the rules. Now, the attorney general and director of national intelligence can authorize broad surveillance programs encompassing general "categories of foreign intelligence targets," with the court's role limited to approving general procedures for surveillance rather than individual wiretaps.

Supporters of the FAA insisted repeatedly during Wednesday's debate that this broad power was limited to surveillance targeting "foreigners in foreign lands," and therefore should raise no concerns about the civil liberties of Americans. "This bill has nothing to do with Americans on American soil," Rep. Trey Gowdy (R-S.C.) thundered, "This bill doesn't implicate the Bill of Rights, any more than it implicates any other part of our Constitution, unless you think that foreign nationals who are on foreign land fall within the protections of the United States Constitution."

But Gowdy has to know that this is false: As the government recently acknowledged, the secret FISA court has already ruled, on at least one occasion, that FAA surveillance had violated the Fourth Amendment's prohibition on "unreasonable searches and seizures." It did not rule this way, of course, because foreigners on foreign soil have Fourth Amendment rights, but because the FAA authorizes large-scale monitoring of Americans' communications.

One reason it does this is obvious: Foreign surveillance targets—who need not be terrorists, or even suspected terrorists—may communicate with Americans. The FAA removed the need for a specific warrant when these communications are intercepted on U.S. wires—essentially permitting our international

communications to be recorded in bulk.

The other reason is less obvious: Under FISA, as former Assistant Attorney General David Kris explains in his definitive treatise on the law, the “target” of surveillance is defined as the “entity about whom or from whom information is sought,” which is not necessarily the person against whom surveillance is “physically directed.” Moreover, a FISA “target” can be a group or organization—like Al Qaeda or, for that matter, Wikileaks—rather than an individual human being. Under these technical definitions, Kris writes, the requirement that surveillance have a “foreign target” wouldn’t necessarily prevent the NSA from vacuuming up the contents of American citizens’ e-mail accounts in search of information about a foreign group.

This misleading focus on “foreign targets” is especially strange given that one of the primary purposes of the Fourth Amendment was to abolish the “general warrants” so detested by American colonists. These gave authorities the power to invade any private home, not just the specific places mentioned in the warrant, in search of evidence. For the Framers of our Constitution, the fact that no specific citizen was named as the “target” of a general warrant was exactly what made it so abhorrent.

Another supposed protection for Americans was cited by Rep. Lamar Smith (R-TX), who claimed that the FAA prohibits the interception of purely domestic communications. (Which, incidentally, wouldn’t make much sense if the foreign target requirement really did rule out surveillance of Americans.) Unfortunately, Smith conveniently omitted a crucial part of that prohibition: NSA is only forbidden from collecting communications "known at the time of acquisition" to be entirely domestic. But one of the main reasons the intelligence community clamored for the broad authority granted by the FAA was that it’s often hard to know in advance where the parties to an e-mail exchange are located. While this restriction may prevent NSA from recording entirely domestic phone calls, then, it often won’t apply to domestic e-mail, because the government won’t “know” it’s domestic until after it’s intercepted. This danger is hardly hypothetical: The New York Times reported in 2009 that the FAA had almost immediately led to the large scale, systematic “overcollection” of entirely domestic e-mails.

Finally, Intelligence Committee Chairman Mike Rogers (R-Mich.) acknowledged that the FAA might allow spying on Americans in an “odd case,” but asserted that this “has not happened frequently at all.” Yet it seems clear that he can’t have any sound basis for that claim. Sen. Ron Wyden (D-Ore.) has repeatedly asked the NSA for a rough ballpark estimate of how many Americans—100? 1,000? 100,000?—have had their communications caught up in the agency's FAA dragnets. If Rep. Rogers were correct, you'd expect the answer to be "almost none"—but instead, the agency has repeatedly insisted that it can’t provide even an approximate tally.

Americans should demand a more honest debate than we’ve seen in the House

justifying any expansion of the NSA's spying powers,. If the FAA is as vital to national security as its boosters insist, they should be able to defend it without misleading us about what the law does.

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