



What we don't know, and what government does

Published: Saturday, October 01, 2011, 4:55 PM



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By

Former Defense Secretary Donald Rumsfeld, explaining his theory of knowledge, divided reality into three parts: "things we know we know;" things we know that we don't know; and the tricky third group, "unknown unknowns -- the ones we don't know we don't know."

For Rumsfeld, that last group often turned out to be bigger than he'd expected.

But it turns out that the unknown unknowns show up -- or rather, don't show up -- in lots of other areas. For example, they figure in debates over the Patriot Act, and the rights that Americans have -- or rather, don't know they don't have.

Late in September, Sen. Ron Wyden, D-Ore., and Sen. Mark Udall, D-Colo., wrote Attorney General Eric Holder about their concern that "the U.S. government is relying on secret interpretations of surveillance authorities that -- in our judgment -- differ significantly from the public's understanding of what is permitted under U.S. law.

"We believe that policymakers can have legitimate differences of opinion about what types of domestic surveillance can be permitted, but we also believe that the American people should be able to learn what their government thinks the law means Unfortunately, however, the decision to classify the government's interpretation of the law itself makes an informed debate on this issue impossible."

In other words, the United States government may be using the Patriot Act to do things that Americans would not consider acceptable.

But we don't know what we don't know.

The argument is about Section 215, which allows the government to secretly access someone's business records -- or library records, or just about any other kind of records -- if it thinks they contain information that might be helpful, even if the individual involved isn't suspected of anything. The Justice Department maintains that because the language of the Patriot Act is public, there's no issue here. Wyden and Udall, from their position on the intelligence committee, argue that the Justice Department is relying on a secret interpretation of the law by the Foreign Intelligence Surveillance Act court to expand its reach beyond what Americans think it's doing -- but they can't tell us exactly how.

"You have no idea how frustrating it is to have these conversations," Wyden said last week. "You can't get into detail

without breaking the law.

But, he insisted, when Holder and other officials say there is no secret interpretation, and a Section 215 operation works just like any other criminal investigation, "that's just wrong, and they ought to correct it."

Or, as Wyden warned in May, "When the American people find out how their government has secretly interpreted the Patriot Act, they will be stunned and they will be angry."

Except he can't say why.

But people watching this issue closely, such as Julian Sanchez of the Cato Institute -- libertarians are admirably concerned about these issues in both Republican and Democratic administrations -- and Spencer Ackerman of WIRED magazine's Danger Room blog, have suggested what might be up.

The U.S. government can detect, from signals sent by cell phones, where a cell phone carrier is at any moment -- "geolocation" -- although it is legally prevented from revealing the information. But considering those signals as "business records" under Section 215 could provide the power to determine where just about anybody is at just about any time, without the trouble of getting a search warrant.

Wyden, possibly not coincidentally, has proposed a bill that would provide greater privacy protection for geolocation data.

Again, we don't know if that's the issue involved. That's the point.

"Whatever power the government has arrogated to itself by an 'innovative' interpretation of the Patriot Act, it should be up to a free citizenry to consider the case for it, determine whether it is so vital to security to justify the intrusion on privacy, and hold their representatives accountable accordingly," wrote Sanchez. "Instead, Congress has essentially voted blind -- reauthorizing powers that even legislators, let alone the public, do not truly understand."

The proverb tells us that what you don't know can't hurt you.

But what you don't know you don't know can be quite a problem.

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