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## FISA: A Law With Many Loopholes

By: Jacob Gershman – June 7, 2013

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To find the legal authority underpinning the top-secret Prism surveillance program, we once again turn to the Foreign Intelligence Surveillance Act.

Law Blog on Thursday wrote about the statute allowing the government to compel the production of “business records” relevant to a foreign intelligence probe.

Another statute, Section 702 of FISA, provides procedures for spying on the online communication of foreigners or groups located outside our borders.

In a statement Thursday, Director of National Intelligence James R. Clapper said Section 702 “cannot be used to intentionally target any U.S. citizen, any other U.S. person, or anyone located within the United States.”

But the statute passed by Congress in 2008 leaves quite a bit of wiggle room, according to legal experts. Here are some potential loopholes:

‘Reasonably believed’: The Attorney General and the intelligence director must certify to a special surveillance judge that targets are “reasonably believed to be located outside the United States.” How certain is that? According to the Washington Post, that means a 51% confidence, similar to the preponderance of evidence standard.

“Given the scale of collection here, even if [the error rate] were only a few percent, we’d still be talking about a huge number of American communications,” Julian Sanchez, a research fellow at the Cato Institute, told Law Blog.

Also, the government doesn’t have to be 51% sure that the target isn’t an American citizen nor a legal resident. The government just has to assert that it’s not intentionally targeting a citizen or legal resident.

Who’s the target? There’s another ambiguity around the notion of a target. It’s unclear whether NSA interprets the law to allow the government to tap into accounts belonging to Americans as long as the surveillance is broadly directed at a foreign group, like Al Qaeda, according to Mr. Sanchez.

Optional verifying: The targeting procedures are subject to judicial review by the Foreign Intelligence Surveillance Court, but “the court is not required to look behind the assertions made in the certifications” submitted by the attorney and the national intelligence director, according to an analysis of the law prepared by the Congressional Research Service, a nonpartisan and independent group that advises Congress on legal matters.

Exigent circumstances: In the absence of a court order, the attorney general and intelligence director may also authorize targeting if they determine that “exigent circumstances exist which would cause the loss or delay of important national security intelligence, according to the Congressional Research Service. The government has seven days to submit the “certification” paperwork to the court, but it can move forward with the spying during that week.

“They’re assuring us that there are secret procedures in place to protect privacy, but there’s never been a public evaluation of them,” Michelle Richardson, legislative counsel for the American Civil Liberties Union’s Washington Legislative Office, told Law Blog. “We’re disinclined to take their word for it knowing that they are doing things like collecting everybody’s telephone records.”

Mr. Clapper in his statement said that information collected under Prism “is among the most important and valuable foreign intelligence information we collect, and is used to protect our nation from a wide variety of threats.”

Mr. Clapper also said in his statement that “activities authorized” by the law “involve extensive procedures . . . to ensure that only non-U.S. persons outside the U.S. are targeted . . .”

A spokesperson for Mr. Clapper’s office did not immediately respond to a request seeking comment.