the Atlantic

This Week's Senate Scandal: Scorn for the 4th Amendment

Crucial attempts to rein in government spying failed Thursday, guaranteeing that the privacy of more innocent Americans will be violated.

By: Conor Friedersdorf - December 28th, 2012

I haven't passed the bar, but I know a little bit about the 4th Amendment. Have you read it lately? "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," it states in plain English, "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That's all of it.

The landline in your house? The government needs a warrant to tap it. The letters in your mailbox? The government needs a warrant to read 'em. It's like the Framers said: probable cause is required.

Yet a text or an email, even one sent from your bed, is treated differently -- it's afforded much less protection from government snoops, even though we're increasingly going all digital in our communication.

Why?

Senator Rand Paul raised that question Thursday on the Senate floor. "We became lazy and haphazard in our vigilance," he told his colleagues during a debate about government surveillance. "We allowed Congress and the courts to diminish our Fourth Amendment protection, particularly when our papers were held by third parties. I think most Americans would be shocked to know that the Fourth Amendment does not protect your records if they're banking, Internet or Visa records. A warrant is required to read your snail mail and to tap your phone, but no warrant is required to look at your email, text or your Internet searches. They can be read without a warrant. Why is a phone call more deserving of privacy protection than an email?"

The subject came up because the legislators were debating whether or not to extend a law that gives the federal government surveillance powers that some say are necessary to fight terrorism, especially by intercepting foreign communication that originates outside the United States. "This sparsely-attended holiday session is likely to be the only full floor debate on sweeping surveillance legislation that has been in force for four years

already (during which we know it has already been used unconstitutionally), and is all but certain to be renewed for another five," Julian Sanchez, Cato's expert on the subject, wrote before the debate began. "That's especially disturbing given that, when the House debated the law back in September, its strongest supporters revealed themselves to be profoundly confused about what the law does, and just how much warrantless spying on the communications of American citizens it permits."

So why specifically is the law objectionable? Just ignore the acronyms and you'll understand just fine:

> The FAA authorizes large scale surveillance of Americans' communications. Supporters of the act suggested again and again that this can't be true, because the law requires NSA surveillance programs to have a foreign 'target.' But this is based on a misunderstanding of what 'target' means in FISA. As former Deputy Attorney General David Kris explains at length in his book on the law, the 'target' of a surveillance program under FAA is typically just the foreign group--such as Al Qaeda or Wikileaks--that the government is seeking information about. The FISA court approves general procedures for surveillance, but it's NSA agents who decide which particular phone lines and e-mail accounts will be wiretapped, and there is no explicit requirement that these particular phones and e-mail addresses be foreign--only the program's overall target.
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> And of course, there is something historically very strange about imagining that surveillance can only violate the rights of named targets: The Founders abhorred 'general warrants,' which they passed the Fourth Amendment to abolish, precisely because these warrants authorized searches of people and homes who were not specifically named targets, exactly as the FAA does.

Making the case for continuing to empower the Obama Administration and its spying, the Heritage Foundation's Jessica Zuckerman mentions neither the past abuses associated with the legislation nor the ways the private communication of innocent Americans are made vulnerable by it.

Sanchez, a policy analyst at The Cato Institute, reported on several efforts to amend the legislation to better protect innocent Americans from government spying on their communications, including what he characterized as several "very mild, common sense tweaks," which I'll detail shortly, and a proposal by Senator Paul that he described as "genuinely radical."

Sen. Paul's proposal, as described on his Web site, "extends Fourth Amendment guarantees to electronic communications and requires specific warrants" if police want to search or seize them. What does it say about how far afield we are from the spirit of the 4th Amendment that the mere attempt to reaffirm it for the electronic age would require radical change?

Senator Paul's amendment failed 79 to 12*.

What about the lesser tweaks I mentioned?

Senator Leahy tried to amend the law so that it would be extended for three years rather than five, but he was voted down -- put another way, we don't know who'll be president

when this law comes up again for renewal. But what really gets me is the failure of Senator Merkley's amendment.

In order to understand it, you'll need a bit of information I'm hesitant to share, because if you're like most people, it'll sound too egregious to be true, and you might think that I am making it up.

I assure you I'm not.

The thing is that there's a legal interpretation that shapes how surveillance is conducted under current law. And it's a secret interpretation -- a memo written up by government lawyers explaining how the law works, but that Americans subject to the law aren't allowed to see. Senator Ron Wyden, who has seen it, says it's problematic -- that the 'lawyer take' isn't what a lot of people might expect, given the text of the law. But he isn't allowed to say anything more specific.

Openly debating the interpretation is verboten!

If you'll go into the weeds with me very briefly, here's the Electronic Frontier Foundation explaining further:

> In 2010 and 2011, Obama administration officials promised to work to declassify secret FISA court opinions that contained "important rulings of law." These opinions would shed light on whether and how Americans' communications have been illegally spied on. Since then, the administration has refused to declassify a single opinion, even though the administration admitted in July that the FISA court ruled that collection done under the FAA had violated the Fourth Amendment rights of an unknown number of Americans on at least one occasion.
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> Starting with the precept that "secret law is inconsistent with democratic governance," Sen. Jeff Merkley's amendment would force the government to release any FISA court opinions that contain significant interpretations of the FISA Amendments Act so the American public can know how it may or may not be used against them.

And even Senator Merkley's amendment failed!

A majority of the Senate bears responsibility for this scandalous abandonment of the Fourth Amendment. And TechDirt rightly singles out Democratic Senator Dianne Feinstein of California:

> Senators Ron Wyden and Jeff Merkley did their best to raise significant issues, but Senator Dianne Feinstein kept shutting them down with bogus or misleading arguments, almost always punctuated with scary claims about how we had "only four days!" to renew the FISA Amendment Acts or "important" tools for law enforcement would "expire." It turns out that's not actually true. While the law would expire, the provisions sweeping orders already issued would remain in place for a year -- allowing plenty of time for a real debate.
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> Furthermore, Feinstein continued to mislead (bordering on outright lies) about the FISA Amendments Act. While some of the proposed amendments focused on

> finally forcing the secret interpretation of the FISA Amendments Act to be disclosed, Feinstein held up the text of the bill and insisted there "is no secret law" and that "the text is public." That assumes that "the law" and "the text of the legislation" are one and the same. They are not. As Julian Sanchez notes, imagine that Supreme Court rulings were all classified, how would you interpret the Constitution? You could make guesses, based on what the law said, but without the court's rulings, you would not know what that meant in practice. That's exactly the situation we have with the FISA Amendments Act... and it's made even worse by the fact that those who have seen the still-secret interpretation -- such as Senator Wyden -- have made it clear that its quite different than what most people think the law says.

Just days ago I wrote about Congress' scandalous abandonment of the 5th amendment. And now the Senate has reminded attentive Americans that it has too little regard for the 4th Amendment too. Draw your own conclusions about what President Obama is signalling by going along.

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*Its supporters included Senators Baucus (D-MT), Begich (D-AK), Cantwell (D-WA), Heller (R-NV), Lee (R-UT), Merkley (D-OR), Stabenow (D-MI), Tester (D-MT), Udall (D-NM), Webb (D-VA), and Wyden (D-OR).