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'War on Terror' II

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We know the rules by now, the strange conventions and stilted Kabuki scripts that govern our cartoon facsimile of a national security debate. The Obama administration makes vague, reassuring noises about constraining executive power and protecting civil liberties, but then merrily adopts whatever appalling policy George W. Bush put in place. Conservatives hit the panic button on the right-wing noise machine anyway, keeping the delicate ecosystem in balance by creating the false impression that something has changed. We've watched the formula play out with Guantánamo Bay, torture prosecutions and the invocation of "state secrets." We appear to be on the verge of doing the same with national security surveillance.

Last week, the Senate Judiciary Committee **seemed to abandon hope** of bringing any real change to the Patriot Act. A lopsided and depressingly bipartisan majority approved legislation that would reauthorize a series of expanded surveillance powers set to expire at the end of the year. Several senators had proposed that reauthorization be wedded to safeguards designed to protect the privacy of innocent Americans from indiscriminate data dragnets--but behind-the-scenes maneuvering by the Obama administration ensured that even the most modest of these were stripped from the final bill now being sent to the full Senate.

In September the Senate got off to a promising start. Only three provisions are actually slated for "sunset" this year: "lone wolf" authority to wiretap terror suspects unconnected with any foreign terror group; "roving" wiretaps that can follow a suspect across an indefinite number of phone lines and Internet accounts; and "Section 215" orders that can be used to compel third parties to turn over any "tangible thing" investigators believe may be relevant to a terrorism investigation. Yet several Democrats had signaled a desire to use the renewal process to undertake a much **broader** review of the post-9/11 surveillance architecture, including National Security Letters (NSLs)--a controversial tool that permits the mass acquisition of financial and telecommunications records without court order--and last year's sweeping amendments to the Foreign Intelligence Surveillance Act (FISA), which permit the executive branch to authorize broad interception of Americans' international communications with minimal court oversight. Democratic Senator Russ Feingold proposed an ambitious and comprehensive reform bill called the JUSTICE Act--which still would have reauthorized roving wiretaps and 215 orders--while Democratic Senator Patrick Leahy offered a more modest bill that nevertheless sought to narrow the nearly unlimited scope of NSLs and Section 215.

The renewal of the expiring provisions was always a fait accompli, though **Fox News** and some **conservative columnists** falsely claimed that Democrats were scheming to eliminate them entirely. Feingold had recommended permitting the as-yet-unused "lone wolf" provision to lapse,

but at hearings on renewal last month Democratic Senator Sheldon Whitehouse didn't believe there was "any doubt" about the reapproval of all three. Rather, Whitehouse explained, the question was whether any "further refinements" might be needed to check potential abuses.

In public, the administration **declared** its openness to such "modifications." As well one might expect, considering that President Obama himself had **co- sponsored legislation** in 2005 containing many of the very same safeguards now in Feingold's bill. Even when, during the campaign, Obama had disappointed many of his supporters by voting for the very FISA Amendments Act he pledged to filibuster, he **reassured** them that as president he would revisit that "imperfect" bill. Civil libertarians understood that the more limited Leahy bill would provide the template for reform but had reason to hope some of the key provisions of Feingold's JUSTICE Act might be incorporated during markup.

It was not to be. When the Senate Judiciary Committee convened at the beginning of the month to start work on legislation, it became clear that the Obama administration had been waging a campaign behind the scenes to oppose any significant modifications to NSL or 215 authority--in particular, any requirement that investigators have "specific and articulable facts" tying records sought to terror suspects or their associates. In a last-minute switcheroo, Democratic Senator Dianne Feinstein swooped in with a substitute bill that gutted the core reforms of Leahy's modest bill. And it got worse. A week later, a series of further amendments offered by Republican Jeff Sessions **watered down the final bill** reported out of committee still further. Remarkably, the arch-conservative Sessions appears to have been taking dictation from the Obama administration, presumably to spare committee Democrats the indignity of further overt capitulation: the *New York Times* **reported** that his changes were "a verbatim transfer of the text of amendments the Obama administration had privately sent to Congress on Wednesday." An attempt by Feingold to amend the FISA Amendments Act--perhaps the most egregious of the post-9/11 expansions of executive branch surveillance authority--was promptly torpedoed by Leahy on procedural grounds.

The supposed rationale for rejecting these changes--many of which the very same Judiciary Committee had unanimously favored just four years earlier--was that any new limitations on broad search powers might interfere with an "ongoing investigation." During hearings, one Justice Department official had alluded to an "important, sensitive collection program" involving 215 orders, and Attorney General Eric Holder **publicly implied**--though he did not state outright--that the new powers had played a crucial role in the capture of alleged bomb plotter Najibullah Zazi.

But there is ample reason for doubt. **According to a report** on National Public Radio, intelligence officers became aware of Zazi thanks to a tip from Pakistani intelligence indicating that he had trained with Al Qaeda. Such a tip should have provided grounds for a full-blown FISA wiretap warrant, and would have far surpassed the mere "reasonable basis" to suspect a terror link that even the most aggressive reform proposals required for NSLs or 215 orders. Democratic Senator Dick Durbin complained that "the real reason for resisting this obvious, common-sense modification of Section 215 is unfortunately cloaked in secrecy," and worried that posterity would look unkindly on his colleagues once that cloak was lifted. Feingold, too, disputed that his reforms would hamper investigations, and hinted that classified briefings had revealed uses of

Section 215 that he considered abuses of the power.

While it's impossible to know precisely which tools were pivotal in the Zazi investigation, or what difference the proposed reforms would have made, the intelligence community has recently shown it has few qualms about making strained claims of necessity to support expansion of its powers.

That power to spy on "lone wolf" terror suspects under the looser standards of FISA was originally justified by the claim that FBI agents were unable to search "twentieth hijacker" Zacarias Moussaoui's laptop before 9/11 for want of such power. Yet in 2003 a **bipartisan Senate report** concluded that this was untrue: in reality, FBI supervisors had "failed miserably" by misunderstanding the fully sufficient powers they already enjoyed under FISA. The law as written in September 2001 would have permitted them to obtain a warrant; and in fact, investigators later used precisely the same evidence they'd already gathered to obtain an ordinary criminal warrant on Moussaoui.

Or consider the 2005 **investigation of Magdy Mahmoud Mostafa el-Nashar**, a former acquaintance of the London transit bombers (later cleared of wrongdoing). An FBI agent had gone to obtain records from North Carolina State University, where el-Nashar had done a stint as a graduate student. With the records in hand, however, the agent got a call from FBI headquarters instructing him to return them and instead obtain the same documents using a National Security Letter. As anyone even remotely acquainted with NSLs would have known, however, they cannot be used for educational records--and indeed, agents had to improvise a form to make their request. The perplexed university properly denied the request, and another subpoena was obtained.

Though any such misuse of an NSL is supposed to be reported to an oversight board promptly, no such report was filed for more than a year. Yet within a week of the incident, it had somehow come to the attention of FBI Director Robert Mueller, who cited the "delay" as evidence that the Bureau's current NSL powers were inadequate.

The FISA Amendments Act is the successor to an even broader bill called the Protect America Act, which similarly gave the attorney general and director of national intelligence extraordinary power to authorize sweeping interception of Americans' international communications. It was hastily passed in 2007 amid claims that the secret FISA Court had issued a ruling that prevented investigators from intercepting wholly foreign communications that traveled across US wires. Former Director of National Intelligence Michael McConnell even claimed that FISA's restrictions had rendered it impossible to immediately eavesdrop on Iraqi insurgents who had captured several American soldiers. **The *New York Post*** quoted tearful parents of the captured men expressing their horror at the situation and a senior Congressional staffer who alleged that "the intelligence community was forced to abandon our soldiers because of the law."

Yet as a Justice Department official **later admitted**, the FISA law clearly placed no such broad restriction on foreign wire communications passing through the United States; rather, there had been a far more narrow problem involving e-mails for which the recipient's location could not be determined. And as James Bamford explained in his essential 2008 book, *The Shadow Factory*,

the delay in getting wiretaps running on the suspected kidnappers was the result of a series of missteps at the Justice Department, not the limits of FISA--no surprise, since even when FISA does require a warrant, surveillance may begin immediately in emergencies if a warrant is sought later. (The suspected kidnappers, by the way, turned out not to have been the actual kidnappers.) Yet on the basis of such claims, a panicked Congress signed off on almost limitless authority to vacuum up international communications--authority that **we already know** has resulted in systematic "overcollection" of purely domestic conversations, and even resulted in the interception of former **President Bill Clinton's e-mails.**

In theory, the purpose of building "sunset" provisions into these new powers was to allow--indeed, to force--Congress to consider what changes might be needed in the event of such misuse. Given the incredible secrecy of intelligence investigations, this would be a dubious check even under ideal circumstances. But what's truly astonishing is that even known abuses don't seem to have given legislators second thoughts about resisting administration demands.

Among the reforms in Feingold's JUSTICE Act was a measure requiring targets of "roving" wiretaps to be identified, as is required under criminal wiretap statutes, rather than merely described. Unlike criminal taps, FISA eavesdropping tends to be extraordinarily broad, with any innocent communications picked up "minimized" later. Yet "minimization," the legal procedures meant to protect the privacy of innocent Americans when their communications are swept up in a FISA wiretap, does not mean deletion. In a 2003 case, *US v. Sattar*, prosecutors submitted 5,175 recordings made under FISA that had not been "minimized." Yet, faced with disclosure obligations at trial, it turned out that they were able to produce a far greater volume of recordings: more than 85,000 audio files.

Given that breadth, the risks inherent in "John Doe" warrants, which neither name a specific phone line or Internet account in advance nor identify a target, are obvious. Indeed, a **2005 Inspector General report** on the FBI's translation backlogs revealed that among the eighty-seven years' worth of foreign language material recorded FISA in 2004 alone--a tiny fraction of what the NSA collects--there were an undisclosed number of "collections of materials from the wrong sources due to technical problems." Feingold's proposed change was not even publicly debated.

Still harder to justify is the unwillingness to rein in NSLs, now issued by the tens of thousands annually--the majority of which are for the records of US persons. The Senate did see fit to make some modest changes to the NSL gag orders that prohibit recipients from talking about them--orders **federal courts had already found unconstitutional** in their present form. But there seemed little concern that the massive expansion in the scope of NSL authority under the Patriot Act and subsequent legislation had given rise to the **endemic misuse** of the letters discovered in two Inspector General reports. As IG Glenn Fine **testified in September**, two years after that first report, the FBI has still not produced the new internal guidelines his office recommended.

Fortunately, not all legislators are quite so willing to accept the "trust us" standard of the Bush years. Several House Democrats are **requesting** more public information about the use of 215 orders in particular, and there is still plenty of time to fix the flaccid bill produced by the Senate Judiciary Committee. It will take courage to push back against glib assurances that we can be

made safe from terror only if Americans' private records can be vacuumed into vast databases with few limits. But if Democrats want to project real toughness in the national security arena, this would be a good place to start.

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