



Federal surveillance continues despite constitutional concerns

By: MELISSA DANIELS – January 6th, 2012

HARRISBURG — The federal government will probably continue to keep secret even the most basic data involving “warrantless wiretapping” despite calls for transparency.

The U.S. Senate in December voted to reauthorize the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, and both members of Pennsylvania’s delegation — Democrat Sen. Bob Casey and Republican Sen. Pat Toomey — voted for it.

The act allows the National Security Agency, under the guise of foreign intelligence, to intercept communications to or from an American citizen without a traditional court order as long as one party is outside the United States.

Multiple amendments that would’ve made public more information about the scope and gravity of surveillance fell short of collecting the 60 necessary votes to pass. Requests included providing estimates of the number of Americans whose communications have been tapped, disclosures of interpretations of the law made in a classified court and a shorter sunset period to boost discussion.

Over the years, civil liberties advocates, constitutional defenders and digital rights champions have lambasted the FAA, arguing the program violates the Fourth Amendment.

The proposed amendments, proponents said, would uphold the rights of citizens’ in the modern surveillance age, adding transparency and accountability without interfering with security operations.

“The rules about how you would protect that information and how privacy actually works out on a practical level have always been kept secret,” said Michelle Richardson, legislative counsel with the American Civil Liberties Union.

It’s acceptable for the government to keep its national security intelligence classified, Richardson said, but the fear is FAA is used as a “mass collection tool,” sweeping up bundles of unrelated communications because the terms used for collection are overly broad. Even the government’s logic for maintaining those unrelated communications is a secret.

Given the number of senators who supported the amendments, Richardson said, there's still hope to expand oversight before the next re-authorization in 2017.

"The Senate debate was incredibly important and the votes on the amendments showed that there is substantial concern by the Senate about how these programs affect Americans and that 40 percent of the Senate want more," Richardson said.

Pennsylvania's Casey voted in favor of two amendments, including one from Sen. Ron Wyden, D-Oregon, that would require NSA to disclose how many Americans have been affected by its surveillance, and one that would grant an earlier sunset provision.

John Rizzo, press secretary for Casey, said the senator believes it essential intelligence and counterterrorism efforts do not infringe on the civil liberties of Americans. Overall, he said, Casey felt the bill was necessary from a security standpoint.

"We must not sacrifice our fundamental values and ideals in the face of this critical threat," Rizzo said in an email. "Additionally, Senator Casey felt it was important to vote for the overall bill which would ensure that the intelligence community had the necessary authorities to protect American lives and security."

Toomey voted for the Wyden amendment but against the others.

Julian Sanchez, a research fellow at the libertarian Cato Institute, said the overall problem is the secrecy of how surveillance decisions are made. This could lead to over-collection, as reported by The New York Times.

"The vacuum cleaner here is so powerful that it can, in a way, be almost indiscriminate," Sanchez said.

Beyond that, the lurking fear is what happens with all that information, digitized and easily stored. Sanchez said there's concern about "backdoor searches," or federal agents, in search of other offenses, potentially sweeping back through data unrelated to their initial investigations.

What does it mean for Fourth Amendment rights?

"What we do know is that we really shifted from the traditional, individualized warrant process to something that looks a look lot more like what the American colonists were so opposed to," Sanchez said.

Chances are, Sanchez said, Americans won't initially know much about the strength of the surveillance muscles. While some abuses of surveillance power have come out through media reports, the concept of transparent, constitutional surveillance programs is not among the talking points for most politicians.

It might take something bigger, something egregious and visible, to get the public's attention.

“If we could point to people and say, ‘Here are 100 people whose private communications got read even though they’re not remotely involved in any kind of wrongdoing,’ that is the kind of thing that I think might provoke a popular backlash,” Sanchez said.