Keeping Lone Wolves from the Door

Why Congress should not renew the PATRIOT Act's "lone wolf" provision

Julian Sanchez | October 5, 2009

The USA PATRIOT Act, a vast expansion of the American intelligence community's search and surveillance powers, was passed in haste in the wake of the 9/11 terror attacks. Now a new administration may finally have given Congress the leisure to repent. Last month, lawmakers on both sides of Capitol Hill held hearings to consider three important surveillance provisions slated to "sunset" at the end of the year. The Obama administration has requested that all three be renewed, but also announced its willingness to consider "modifications to provide additional protection for the privacy of law abiding Americans." Some prominent Democrats see the coming legislative tussle over whether and how to renew those provisions as an opportunity to finally halt the runaway expansion of executive snooping authority, from National Security Letters to secret "sneak-and-peek" searches.

Competing reform proposals have been offered up by Sen. Patrick Leahy (D-Vt.) and Sen. Russ Feingold (D-Wis). While Feingold's bill is by far the more sweeping; like Leahy's it provides for the renewal of roving wiretap authority and expansive powers to acquire business records and other "tangible things," albeit with extensive modifications to strengthen oversight. But unlike Leahy's bill, Feingold's wisely allows the PATRIOT Act's so-called "lone wolf" authority to expire entirely.

The extraordinary tools available to investigators under the Foreign Intelligence Surveillance Act (FISA), passed over 30 years ago in response to revelations of endemic executive abuse of spying powers, were originally designed to cover only "agents of foreign powers." The PATRIOT Act's "lone wolf" provision severed that necessary link for the first time, authorizing FISA spying within the United States on any "non-U.S. person" who "engages in international terrorism or activities in preparation therefor," and allowing the statute's definition of an "agent of a foreign power" to apply to suspects who, well, aren't. Justice Department officials say they've never used that power, but they'd like to keep it the arsenal just in case.

As with so many of the post-9/11 intelligence reforms, the lone wolf provision has its genesis in the misguided assumption that every intelligence failure is evidence that investigators need more power. In the aftermath of the attacks, it was initially alleged that FBI investigators who had wanted to obtain a warrant to search the belongings of so-called "20th hijacker" Zacarias Moussaoui were unable to do so because FISA lacked a "lone wolf" provision. But a blistering 2003 report from the Senate Judiciary Committee tells a

very different story. It notes that on 9/11, investigators were able to obtain a conventional warrant using the exact same evidence that had previously been considered insufficient. Worse, the Committee found that supervisors at FBI Headquarters had failed to link related reports from different field offices, or to pass those reports on to the lawyers tasked with determining when a FISA warrant should be sought. Officials in charge, the Senate discovered, fundamentally misunderstood such crucial legal standards as "probable cause" and falsely believed that they could not seek a FISA order unless a target could specifically be tied to a particular, already-recognized terror group.

"In performing this fairly straightforward task," the report concludes, "FBI headquarters personnel failed miserably." They didn't need new "lone wolf" powers; they needed to understand the powers they already had. Nevertheless, new powers were what they were granted, in an ill-considered reform that undermines the vital distinction American law has traditionally observed between domestic national security concerns and foreign intelligence.

Courts have generally been extraordinarily deferential to the executive in the realm of foreign intelligence, and have suggested that the Fourth Amendment's protections against warrantless searches apply only weakly, if at all, in this context. But when it comes to domestic national security investigations, a unanimous Supreme Court has ruled that the usual restrictions remain largely intact. The court clearly saw the involvement of a "foreign power" as providing the distinction between the world of the criminal law's Fourth Amendment protections and the hazy arena where the executive enjoys far greater latitude. The "lone wolf" provision recklessly blurs that line, defying the common sense meaning of an "agent of a foreign power," and giving investigations that belong in the first world a dubious statutory foothold in the second.

To be sure, FISA's definition of "international terrorism" still requires some foreign "nexus" before a suspected lone wolf can be targeted, but the statute provides only the vague guidance that its aims or methods "transcend" national boundaries. Justice Department officials have suggested that the definition would cover a suspect who "self-radicalizes by means of information and training provided by a variety of international terrorist groups via the Internet," making a Web browser the distinction between a domestic threat and an international one. Activities "in preparation" for terrorism, according to the legislative history, may include the provision of "personnel, training, funding, or other means" for an attack.

While it's difficult to be an unwitting "member" of a terror group, nothing in the law requires that the contribution a lone wolf makes to terror activities be a knowing one. And while definitions of an "agent of a foreign power" applicable to citizens explicitly prohibit investigations conducted wholly on the basis of protected First Amendment activities, PATRIOT appears to permit "lone wolves" to be targeted merely on the basis of advocacy. Finally, while the criminal law requires "preparation" for terrorism to include a "substantial step" in the direction of carrying out an attack, the Justice Department has suggested that FISA's definition does not. Thus, not only may lone wolf suspects be monitored despite the absence of ties to a terror group, they may not even need to be engaged in criminal conduct.

Though the standard of proof needed to target a person under FISA is clearly lower than under criminal law, the surveillance powers it affords are substantially broader. Title III, the statute covering criminal wiretaps, requires evidence of a "nexus" between suspected criminal activity and each location or communications facility monitored. Even then, agents are only supposed to record conversations that are pertinent to the investigation. Once someone is designated an "agent of a foreign power," by contrast, FISA permits broad monitoring coupled with "minimization"-the purging of irrelevant communication, such as the conversations of innocent housemates-"hours, days, or weeks after collection." Though targets of Title III surveillance are typically informed of the eavesdropping eventually, after the investigation has finished, FISA targets usually are not, enhancing the secrecy of intelligence practices, but removing a powerful check against abuses.

All of these significant differences make sense in the context of spying aimed at a member of an international terrorist conspiracy. But the lone wolf provision effectively aims a Howitzer at a gnat, allowing souped-up tools designed for Al Qaeda and the KGB to be used against people more reasonably seen as criminal suspects-and in the process, against any Americans who happen to have interactions with them.

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