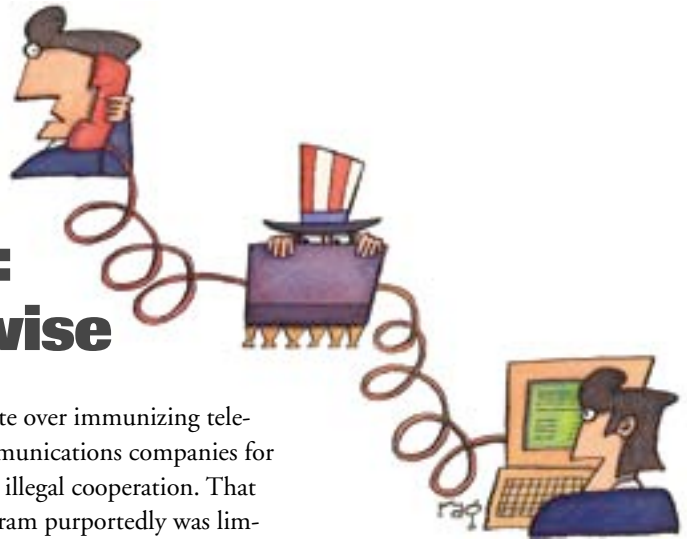




SOUNDING OFF

BY LISA GRAVES
AND KATE RHUDY



Warrantless Wiretapping: Unconstitutional and Unwise

Tapping into the American telecommunications infrastructure to monitor e-mails and phone calls of people in the United States, without the warrants required by the Fourth Amendment, is unconstitutional. For nearly three decades, the Foreign Intelligence Surveillance Act (FISA) provided reasonable procedures to ensure that surveillance undertaken to protect against terrorism and spying was conducted in accordance with the rule of law and Americans' constitutional rights.

The Protect America Act (PAA), which Congress passed hastily last August under pressure from the Bush administration, fundamentally altered this balance. Although technically an amendment to FISA, the PAA eviscerated longstanding protections FISA had provided—namely the requirement to obtain a judicial warrant, based on individualized probable cause, to acquire communications to or from persons in the U.S.

Since FISA's passage in 1978, the Foreign Intelligence

Surveillance Court had issued warrants using closed-door proceedings that protected sensitive intelligence information and allowed rapid turnaround—judges even approved warrants from their homes in the middle of the night. These procedures ensured that continuous monitoring of Americans' phone calls and e-mails was not based merely on determinations by the President or his advisors that it is reasonable.

The PAA turned this regime on its head by allowing surveillance without any individualized and independent check whenever one end of the communication is outside the U.S. and the goal is gathering foreign intelligence. Under this system, Americans' international e-mails and calls can be collected, analyzed and stored—without any court finding reason to suspect terrorist involvement or other wrongdoing.

The PAA authorizes far more warrantless surveillance than the President claims occurred under the "Terrorist Surveillance Program," which is the subject of the well-publicized

debate over immunizing telecommunications companies for their illegal cooperation. That program purportedly was limited to communications involving al Qaeda. The PAA more closely resembles "Operation Shamrock," a pre-FISA program revealed through 1970s congressional investigations, in which the National Security Agency analyzed, without warrants, nearly all international telegrams sent to or from America.

The PAA not only undermines Fourth Amendment rights—it squanders national security resources on gathering and analyzing communications that have nothing to do with real threats. Yet the Administration has refused reasonable alternatives to ensure that such extraordinary powers are properly focused and subject to meaningful judicial review.

The PAA expired in February 2008, but access to American phone and Internet companies authorized under the Act remains in effect until August. The Bush Administration has lobbied hard for Congress to replace the PAA with

a law retaining the same constitutionally dubious powers. The House of Representatives has stood up to White House bullying, passing two bills that add needed accountability and take steps to restore Americans' rights. Unfortunately, the President has threatened to veto any bill that does not give him everything he wants.

We will need to revisit this issue once President Bush leaves office. Only then will we have an opportunity to determine how many Americans' communications were seized under the President's unauthorized warrantless wiretapping and the unconstitutional wiretapping allowed by the PAA. ■

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