They could be eavesdropping

By Carol Rose
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MASSACHUSETTS residents are on the verge of losing a fundamental protection from government spying if the Legislature and governor approve a bill to give prosecutors the power to seize Internet, telephone, and electronic communications records - without judicial oversight and without notifying a citizen they have done so.

The attorney general and district attorneys have attached their power grab to a bill aimed at increasing sentences for sex offenders, which is named "An Act to Further Protect Children" or "Jessica's Law." However, the power that they seek isn't limited to investigations of suspected sex offenders or child abuse cases. It is a general grant of unchecked power to district attorneys and the attorney general that can be used against all of us.

The provision would enable prosecutors to acquire private records from the Internet and other communications providers merely by issuing an "administrative subpoena" - a demand letter - without telling a person that those records are being sought. Local district attorneys and the attorney general would need only "reasonable grounds" to believe that the records were "relevant and material to an ongoing criminal investigation" - which is a low standard.

They won't need to take their request to a judge or magistrate before secretly obtaining records about phone calls, e-mails, or browsing habits. And despite assurances that they won't look at "content," the legislation itself never defines precisely what information will be collected. The bill also grants blanket immunity to cooperating telecoms, thus removing any incentive for either the companies or prosecutors to play by the rules.

It is alarming that the Legislature would approve such an unchecked grant of prosecutorial power. And it is outrageous that it would do so on the heels of a courageous and unanimous vote last week by the entire Massachusetts congressional delegation to oppose similar unchecked domestic spying legislation at the federal level.

The federal amendment to the Foreign Intelligence Surveillance Act was passed by Congress despite the Massachusetts delegation's opposition. It enables the federal government to eavesdrop on the communications of ordinary Americans without effective oversight. Worse, the FISA Amendment Act of 2008 effectively extends retroactive immunity to telecoms that participated in the
administration's illegal spying efforts, ensuring that Americans will never know the extent of illegal government spying that has taken place and that such snooping will continue, regardless of who sits in the White House.

One thing we do know is that the people being targeted for such spying are not just the "bad guys." Recent targets of government spying have included journalists reporting on stories skeptical of the administration, whistle-blowers critical of the government, peace activists, elected officials, and others whom prosecutors determine - without oversight by a court - to be worth "investigating."

Once prosecutors get this kind of power, they will use it. Since the Patriot Act expanded the power of the FBI to issue secret national security letters - another form of administrative subpoena - the government has used the power more than 200,000 times. It's hard to know the exact number, since this government snooping is done in secret, without judicial oversight and with a gag order attached. But two Inspector General reports have revealed widespread abuse and mismanagement of this federal subpoena power.

Our democracy rests on the fundamental notion that no branch of government should have unchecked power. When that system of checks and balances breaks down, abuse of power is inevitable.

Extending this grant of unchecked subpoena power to local district attorneys and the state attorney general would undermine the most basic privacy and constitutional rights of Massachusetts residents. For the sake of freedom, it should be rejected.

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