Fixing FISA

The rules for domestic electronic surveillance need a careful updating.

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TECHNOLOGY and the nature of threats to U.S. security have both changed enormously since Congress in 1978 passed the Foreign Intelligence Surveillance Act (FISA), which governs intelligence agencies' ability to conduct electronic surveillance in the United States. The law has been amended repeatedly since then, including after the Sept. 11, 2001, attacks, but it's reasonable to think that another overhaul might be in order. For one, the law could be read to impose the burdensome requirement of preparing a warrant and obtaining court approval to intercept phone calls or e-mails that begin and end entirely outside the United States but that, by technological happenstance, are routed through the United States. Everyone from civil liberties groups to spymasters seems to agree that this is silly. Sen. Dianne Feinstein (D-Calif.) and Rep. Jane Harman (D-Calif.) have proposed workable remedies for this unintended glitch.

The Bush administration, however, is seeking far broader changes in the law -- on which we would urge Congress to proceed with extreme caution. The administration says that it simply wants to modernize the law to make it "technologically neutral," applying equally to communications that take place through the air and by wire. Sounds sensible, but the administration proposes to deal with that problem in a way that could dangerously expand the scope of surveillance that the government could engage in free from court oversight.

The biggest change would come in the definition of what constitutes "electronic surveillance" subject to FISA. The administration would require that FISA be followed only if the monitoring of international communications were directed at a "particular, known" U.S. citizen or resident located in this country. Civil liberties groups warn that this language could allow widespread warrantless interception of calls and e-mails of U.S. citizens and residents coming from or going to foreign countries. This would go far beyond the administration's previously revealed warrantless wiretapping program, which, we are told, has now been put under court oversight.
supervision. The administration's proposal, however, has no requirement that the person at the other end of the communication be a suspected terrorist. The administration says its intent isn't to operate this kind of huge vacuum cleaner, free of FISA's rules. If so, the language it has proposed needs to be tightened to make that clear.

There is a threshold issue that lawmakers need to address before they rewrite FISA: whether they're engaging in a farcical enterprise. FISA says that it sets out the "exclusive" rules under which intelligence agencies can spy electronically on Americans. Other presidents have asserted that their constitutional power under Article II may allow them to do more than FISA allows, but President Bush is the first to have actually ignored FISA's requirements with the "terrorist surveillance program."

Perhaps a more accommodating, updated FISA would encourage the administration to follow the law rather than circumvent it, but the administration's testimony before the Senate intelligence committee last week on that subject was hardly reassuring. Sen. Russell Feingold (D-Wis.) asked if the administration had "any plans to do any surveillance" outside of FISA. "None that we are formulating or thinking about currently," replied the director of national intelligence, Mike McConnell. "But I'd just highlight, Article II is Article II, so in a different circumstance, I can't speak for the president what he might decide." With answers like this, how can lawmakers trying to fix this statute have any confidence the administration will live by the rules Congress lays out?

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