

## Spying on Americans in Plain Sight

The DOJ, the NSA and the FBI all claim the lawful authority to spy on all persons in America — American and foreign — without a search warrant

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*Last week, the Biden administration asked Congress to permit its agents to continue to spy on Americans without search warrants. The actual request was to re-authorize Section 702 of the Foreign Intelligence Surveillance Act of 1978. FISA requires warrants from the FISA Court for all domestic spying. Section 702 is a 2008 amendment to FISA. It expressly authorizes warrantless spying of foreign persons.*

The Supreme Court has characterized spying as surveillance and surveillance as a search under the Fourth Amendment. That amendment requires search warrants issued by judges and based upon probable cause of crime demonstrated to the judges under oath and specifically describing the place to be searched or thing to be seized for the surveillance to be lawful.

Since FISA Court warrants — issued by a secret court in Washington, D.C. — are not based on probable cause of crime, and since Section 702 does away altogether with the warrant requirement when foreign persons are even peripherally involved, both FISA and its Section 702 are unconstitutional.

Here is the backstory.

After the resignation of President Richard Nixon in 1974 and the full extent of his use of the FBI and the CIA for domestic warrantless surveillance became known, Congress enacted FISA. It proclaims itself to have established the only lawful method for surveillance outside of the Fourth Amendment. This proclamation is a profound constitutional error — an oxymoron — as all surveillance in defiance of the Fourth Amendment is unconstitutional.

That amendment was written in the aftermath of British agents executing general warrants on the colonists. General warrants were not based on probable cause of crime, but rather governmental need. And they did not specifically describe the place to be searched or the

person or thing to be seized.

Rather, general warrants — issued by a secret court in London — authorized the bearer in America to search wherever he wished and seize whatever he found. The agents ostensibly were looking for proof of tax payments. They were really engaged in spying. They were looking for subversive, revolutionary materials.

After the Revolutionary War was won and the Constitution was ratified, the Bill of Rights was ratified. The Fourth Amendment in the Bill of Rights protects all “people” from unreasonable searches and seizures by the government — both law enforcement and spies. The courts have interpreted “unreasonable” to mean “without a search warrant.”

The amendment’s drafters’ intentional employment of the word “people” makes it obvious that the amendment protects every person from every search and every seizure by anyone from the government without a warrant. It is not limited to Americans or adults or good people or people the government likes; rather, it protects all people.

In a linguistic effort to accommodate the warrant requirement and its probable cause precondition, the congressional drafters of FISA required that the FISA Court may issue warrants for surveillance based on probable cause, not of crime, but of being a foreign government agent. The FISA Court then, on its own, morphed foreign agency into foreign personhood, and then morphed that into communicating with a foreign person.

So, if you text or email or call your cousin in Geneva or an art dealer in Florence, you become a target for a FISA surveillance warrant — merely by communicating with a foreign person.

Even this loosening of Fourth Amendment protection by the Orwellian re-definition of probable cause was not enough to satisfy the rapacious appetite of the government to spy. Thus, President George W. Bush ordered the National Security Agency — the federal government’s 60,000-person strong cadre of domestic spies — to engage in warrantless spying, in defiance of FISA, and on a scale vastly greater than that which Nixon had ordered of the FBI and CIA in the 1970s.

When Congress learned of the warrantless spying, rather than defunding it, it enacted Section 702 as an exception to FISA, and thereby made warrantless spying on foreign persons in America legal. In a direct affront to the Fourth Amendment, Section 702 permits the NSA and its cousins in the 16 other federal spying agencies to spy without warrants on all communications involving foreign persons.

What happens when a foreign person communicates with an American? Section 702 permits warrantless surveillance of Americans who communicate with foreign persons, permits the NSA to maintain a database of all such American persons, permits the FBI to search those databases without a search warrant, and if the NSA learns of evidence of criminal behavior without a warrant, requires it to share that evidence with the FBI.

It gets worse.

Since Department of Justice lawyers have persuaded the FISA Court to issue warrants to spy on Americans who communicate with foreigners out to the sixth degree of communication, the NSA has contended that Section 702 also permits it to spy out to the sixth degree.

How many persons can be spied upon if the NSA's interpretation of 702 is lawful? Call your cousin in Geneva and NSA can spy on everyone with whom you speak and everyone to whom they speak, and so on, out to the sixth level of communication.

The FBI reported that in 2021, it searched 3.4 million names in the NSA database of Americans who communicated with foreigners. If you take those 3.4 million out to the sixth degree of their American communications, the number grows exponentially. You will have reached 330 million Americans before completion of the process.

Stated differently, the Biden administration, the DOJ, the NSA and the FBI all claim the lawful authority to spy on all persons in America — American and foreign — without a search warrant, without probable cause, without articulable suspicion; and these deep state denizens want that lawful authority congressionally extended beyond its expiration date at the end of this year.

Any member of Congress who votes to do so is unfit for office. Such a vote would be an assault on the Constitution.

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