

ADMINISTRATION FEEDS JOURNALISTS HINTS OF MORE SECRET LAW ... JOURNALISTS INSTEAD PARROT “RUSSIAN ROULETTE” LINE

Back in January, Charlie Savage revealed that in 2007 the FISC approved a secret interpretation of the Roving Wiretap provision, one of the provisions due to sunset Sunday night. To support a domestic content collection order targeting al Qaeda targets overseas, Judge Roger Vinson rubber-stamped DOJ’s argument that – because Congress had let it wiretap individual targets without naming each of the phones they were using, that also meant it could target al Qaeda as a target – without naming each of the phones and email addresses it was targeting until after tasking them [this sentence updated for accuracy].

Judge Vinson ruled that this procedure was a legitimate interpretation of FISA because of a provision Congress had added to the surveillance law in the Patriot Act. The provision created so-called roving wiretap authority, which allows the F.B.I. to get orders to swiftly follow targets who switch phones, telling the court about the new numbers later.

Public discussion of the purpose and meaning of roving wiretap authority has focused on targeting individual terrorists or spies who seek to evade detection. But Judge Vinson accepted a Justice Department proposition that the target could be Al Qaeda in general, so if the N.S.A. learned of a new Qaeda suspect, it could immediately collect

his communications and get after-the-fact approval.

The government stopped using this particular application as it transitioned to Protect America Act (though it even grandfathered some of the existing targets tasked under the prior argument). But the premise – that DOJ can target entire communication nodes based on the argument that a specific target is using unknown accounts passing through that node – surely remains on the books.

This secret interpretation of the law may not be as outrageous as FISC's redefinition of the word "relevant" to mean "all," but it is nevertheless a fairly breathtaking argument, with potentially dangerous ongoing implications.

Yet, in spite of the fact that a top journalist (not some dirty hippie like me!) revealed this secret interpretation, the journalists who transcribed Administration claims that sunseting PATRIOT would amount to playing "national security Russian roulette" have also transcribed Administration claims that they're only using Roving Wiretaps individually.

A second tool is the "roving wiretap," which enables the FBI to use one warrant to wiretap a spy or terrorist suspect who is constantly switching cellphones. Those two in particular are of "tremendous value," the first official said.

We don't know they're using Roving Wiretaps to tap entire circuits anymore. But we know they can. That detail should be included in any description before a journalist parrots the Administration claim this is an "uncontroversial" authority. If it's not controversial, it should be.

Ditto the Lone Wolf provision.

Reporters are reporting something that – 11

years after passage of the Lone Wolf provision – ought to raise serious questions (note: Lone Wolf was actually not part of the PATRIOT Act; it was passed in 2004 as part of the Intelligence Reform and Terrorism Prevention Act).

A third tool allows the FBI to surveil a “lone wolf” suspect who cannot be tied to a foreign terrorist group such as al-Qaeda. It has never been used, but officials said it is a valuable authority they do not want to lose.

That provision has been on the book for 11 years, and the FBI *still* says they have never used it but even though they have never used it is a valuable authority. It was not used in cases – such as that of Khalid Ali-M Aldawsari – that solidly fit the definition of a Lone Wolf. Even if the FBI found someone who they thought was an international terrorist but didn’t know to what group he belonged, they could get an emergency wiretap to help them find evidence.

So what “value” does the Lone Wolf provision have, if it’s not to authorize the wiretapping of Lone Wolves?

I think there’s increasing reason to ask whether this, like the Roving Wiretap, serves to justify some other secret law, allowing the government to spy on people against whom it has no evidence of ties to al Qaeda or any other terrorist group, but on whom it nevertheless wants to use its terrorist authorities against.

We’re on the fifth or so reauthorization debate where FBI has said “we don’t use this thing but we find it very valuable anyway.” At some point, we need to start assuming that when they say they haven’t “used” it, they only mean in the literal sense, and they’re using it to support some secret, unintended purpose.

Rather than parroting Administration claims of “Russian roulette,” shouldn’t journalists be asking why, after 11 years, their claims of

necessity make no sense?