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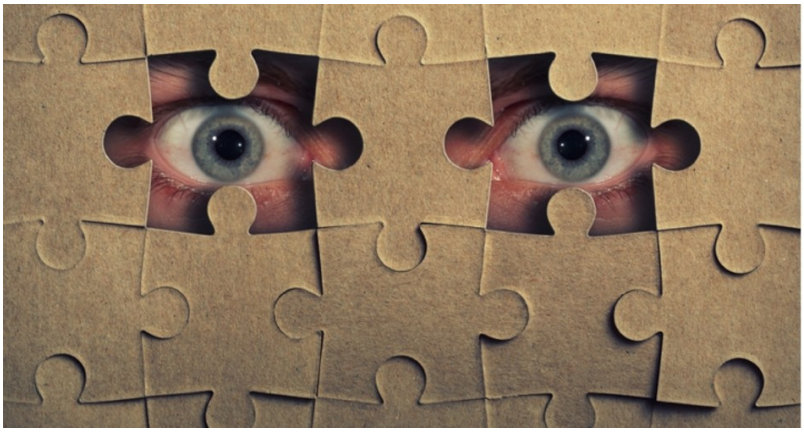
Justice Dept. Rule Change Bypasses Congress in Expansion of Surveillance Authority



If two senators have their way, it may soon be harder for the government to search and seize information stored on electronic devices around the globe.

Senators Ron Wyden (D-Ore.) and Rand Paul (R-Ky.) are cosponsoring a bill that would halt the implementation of a newly promulgated change to the Federal Rules of Criminal Procedure, a rule that privacy advocates have denounced as a "massive expansion of the surveillance state."

What is perhaps most disturbing about this proposed rule change is the fact that Congress, the only body in the federal government possessed of lawmaking authority, was not even involved in writing it and, in fact, was never consulted, or allowed to consider the new language at all.

The Obama administration's Justice Department wants a magistrate to be able to issue a warrant to search, seize, and copy data within the judge's own district, and outside of the judge's district "when the district where the media or information is located has been concealed through technological means."

It should come as no surprise that the FBI is trying to backdoor its way into greater computer surveillance power.

The Obama Justice Department has asked that a committee be empaneled to amend Rule 41 of the Federal Rules of Criminal Procedure (FRCP).

Section (b) of that provision begins:

> Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:
>
> (1) a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;
>
> (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed.

"This is a major policy change," Wyden told the *LA Times*. "This has been buried from the public and from their elected officials. And they should know about it. This is not just a modest administrative change."

In other words, the American people are about to have a significant piece of their right to be free from government surveillance removed not by their elected representatives, but by bureaucrats at the Justice Department acting as petty tyrants.

Senator Paul's office informed Reuters last Thursday that the libertarian-leaning former presidential hopeful would be the first Republican cosponsor of Wyden's bill.

Paul is no stranger to asserting his senatorial authority in the defense of the fundamental civil liberties once enjoyed by Americans.

In February 2014, Paul filed suit in federal court challenging the constitutionality of the dragnet surveillance program of the National Security Agency (NSA).

Then, in May 2015 Paul famously filibustered on the floor of the Senate for over 10 hours, trying to thwart renewal of provisions of the PATRIOT Act he believed violated the Bill of Rights.

There's a huge and growing swell of protest in this country of people who are outraged that their records are being taken without suspicion, without a judge's warrant and without individualization," Paul said, standing outside the U.S. District Court for the District of Columbia where the federal complaint was filed in 2014.

Several privacy advocacy groups are standing with the senators.

The Electronic Frontier Foundation has fought the fight against the growth of the surveillance state for years and they're praising Paul and Wyden for their efforts to expose the expansion of the dragnet.

In a recent blog post covering the issue, EFF explained that the new rule could "override privacy-protection tools to safeguard one's location … such as Tor … or [those] people who deny access to location data for smartphone apps because they don't like sharing their location with ad networks."

There could also be a chilling effect on journalists who count on encryption and other technological safeguards to protect the identities of their sources.

One of the expectable effects of the rule change could be the promotion of the practice of "judge shopping" by federal agents. In other words, agents anxious to get the go-ahead for some surveillance plans would seek out magistrates or judges known to be sympathetic to the searching and seizing of electronic information and known to be disdainful of the constitutional protections against government intrusion.

Other news outlets have promoted the proposed rule change as a useful tool in combatting terrorism and tracking criminals.

When the plan to amend the language of Rule 41 first surfaced, *National Journal* praised the promise of the expansion of power:

> Law-enforcement investigators are seeking the additional powers to better track and investigate criminals who use technology to conceal their identity and location, a practice that has become more common and sophisticated in recent years. Intelligence analysts, when given a warrant, can infiltrate computer networks and covertly install malicious software, or malware, that gives them the ability to control the targeted device and download its contents.

Something interesting about *National Journal's* summary of the FBI's request is its use of the word "criminal" to describe the owner of the computer that the government wants to track and tap.

In the United States, a person is not a "criminal" until he has been subject to the due process of law, specifically: a charge of committing a crime, a hearing by an impartial tribunal on the merit of those charges, an opportunity for the accused to answer those charges, and finally, conviction of having the committing the crime.

In the Magna Carta as amended in 1354, the phrase "due process of law" appeared for the first time. The updated British bill of rights reads: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."

This fundamental restraint on the royal presumption of the power to lop off heads on command was incorporated by our Founders in the Bill of Rights, particularly in the Fifth Amendment that says in relevant part: "No person shall … be deprived of life, liberty, or property, without due process of law."

Again, what the federal government fails to understand is that their word is not the law. The Constitution is the law, and that document requires that a warrant be issued and that such a warrant be "supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Furthermore, "bad guys" are not "bad guys" until the due process of law has determined them to be such. Until that time, they are just citizens whose rights must be protected if we are to remain a free Republic ruled by law rather than the edicts of would-be despots.

It's unclear when and if the Senate will take up Wyden's bill.

Time is running out to stop the surveillance state from getting secretly and significantly larger. The Supreme Court — in a secret vote — already approved the suggested change to Rule 41 and the changes will take effect on December 1 unless Congress intervenes.

Unless that happens, the damage to due process will already have been done, and all three branches of the federal government will be guilty once again of colluding to regulate the Constitution, and the fundamental liberties it protects, out of existence.