

Myth v. Fact: Amash-Conyers Amendment and NSA Surveillance

MYTH 1: *The Amash-Conyers amendment is a “blunt approach [and] is not the product of an informed, open, or deliberative process.”—Jay Carney, White House Press Secretary*

Fact: **The Amash-Conyers amendment is a modest proposal to rein in among the most troubling NSA surveillance that has been disclosed so far.**

The Amash-Conyers amendment ends NSA’s blanket collection of Americans’ telephone records. It does this by requiring the FISA court under Sec. 215 to order the production of records that pertain only to a person under investigation.

The amendment does not defund NSA. It does not defund all NSA surveillance under the Patriot Act’s Sec. 215. It does not require a warrant for NSA to get Americans’ car reservations, hotel receipts, or telephone records. NSA does not even have to suspect that a crime has occurred. The amendment simply requires that there be a reasonable connection between the documents sought and the person under investigation. Far from blunt, the Amash-Conyers amendment is narrow and modest and is only a first step towards protecting Americans’ records from NSA surveillance.

There’s some irony in being criticized for not having an “informed, open, or deliberative” debate by the very people and groups who have obscured how NSA’s surveillance programs work. Over the last two months, the public and especially Congress have been given significant information about the activity at issue here: the suspicionless, blanket surveillance of ordinary Americans’ telephone records. NSA and the intelligence committees have hosted numerous classified and unclassified hearings, including an extraordinary four-hour seminar with NSA director Keith Alexander yesterday. Congress has been given ample opportunity to consider the question: Does Congress oppose the suspicionless collection of every American’s phone records?

MYTH 2: *The Amash-Conyers amendment prevents the bulk collection of data on foreigners.*

Fact: **The Amash-Conyers amendment does not restrict the surveillance of foreign-to-foreign communications in any way.**

FISA simply does not apply to the surveillance of purely foreign communications. *See* 50 U.S.C. § 1802. FISA court orders under Sec. 215 cover local telephone calls (wholly within the U.S.) and calls between the U.S. and abroad. In other words, NSA’s Sec. 215 phone surveillance program covers only calls in which at least one side of the conversation is in the U.S. Because foreign-to-foreign communications are beyond the scope of the Sec. 215 surveillance program, those communications are not addressed by the Amash-Conyers amendment.

MYTH 3: *The Amash-Conyers amendment raises constitutional concerns.*

Fact: **The Amash-Conyers amendment is entirely constitutional, and despite allegations of “concerns,” no one really believes the amendment is unconstitutional. In fact, the Amash-Conyers amendment helps restore Fourth Amendment protections of Americans’ phone records.**

The Amash-Conyers amendment allows NSA to execute FISA court orders only if the orders limit the collection of documents to those documents that pertain to a person under a Patriot Act investigation. The amendment does not place a mandate on the FISA court; the amendment couldn’t even if that was Mr.

Amash's intention because the FISA court is not funded through the Department of Defense appropriations bill. Although the Amash-Conyers amendment does not require the FISA court to include specific language in its order, it is important to note that Sec. 215 *already requires the FISA court to include at least five sets of specific limitations in its court orders*. See 50 U.S.C. § 1861(c). Reading the current language in Sec. 215 reveals that this "constitutional concern" is wholly without merit.

MYTH 4: *Americans don't have a reasonable expectation of privacy in their telephone records.*

Fact: Americans do have a reasonable expectation of privacy in their telephone records, and the Supreme Court appears poised to rule definitively on that issue.

Proponents of NSA's suspicionless surveillance like to say that Americans have no reasonable expectation of privacy in their telephone records. The Fourth Amendment reads, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." The collection of every American's telephone records certainly is a "seizure" of those records. And ordinary Americans believe the intimate details of their phone calls are private.

Smith v. Maryland, a case the Supreme Court decided more than three decades ago, is not clearly applicable to NSA's suspicionless surveillance. The person whose data was collected in that case was suspected of wrongdoing before the data collection, and the technology of that era did not allow for the type of mass record surveillance and retention that we have today. In *United States v. Jones*, a case from last year that held certain government GPS tracking unconstitutional, Supreme Court justices began to rethink privacy in the age of digital technology.

If proponents of NSA blanket surveillance are right, if Americans lose constitutional protections when they make a call or send an e-mail, then any data stored in "the cloud" is fair game for the government without a warrant. Do we think it's good policy to have every iPhone picture stored in iCloud subject to warrantless government confiscation? Is that reasonable?

MYTH 5: *The Amash-Conyers amendment would take away a tool that has proved effective in fighting terrorism.*

Fact: Proponents of NSA's blanket collection of Americans' telephone records have not put forward publicly a single, solid example of a "success" under the program.

The amendment does not take away a tool that has proved effective in the fight against terrorism. The administration claims that surveillance conducted under FISA Sec. 702, including the PRISM program, has disrupted terrorist plots, including the New York subway plot. The Amash-Conyers amendment does not address FISA Sec. 702 in any way. The amendment concerns Patriot Act Sec. 215 alone, not Sec. 702. The administration's one and only public example of a Sec. 215 "success" is the conviction of a taxi driver for sending money to a Somali group. Reports suggest that the Somali group posed no direct threat to the U.S., the investigation did not uncover an imminent threat, and the data could have been obtained without Sec. 215. For that "success," the government has collected billions of Americans' records.