

We Are The 49%

by Lauren Henry
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Secret NSA program uses a standard which concedes that up to 49% of the people subject to extensive warrantless electronic surveillance are in the U.S.

If you were given 51% odds of emerging unharmed from a carnival ride, would you get on? Would you sign up for an elective surgery that you had a 51% likelihood of surviving? Common sense suggests that one should not take 50/50 odds where the results matter. However, NSA agents conducting a U.S. government surveillance program are willing to use these odds of committing a constitutional-level violation of the rights of people in the U.S.

According to [the Washington Post](#) [1], the National Security Agency (NSA) project PRISM requires just 51% confidence in what NSA agents term a person's "foreignness" to access their audio and video chats, photographs, emails, documents, and connection logs. The government's purported authority for the program comes from the Foreign Intelligence Surveillance Act (FISA) Amendments Act.

Congress passed the FISA Amendments Act in 2008 at the request of intelligence agencies. They had complained that they needed authority to compel communications service providers to assist with interception of foreign-to-foreign communications passing through the United States. Information flowing over the Internet does not necessarily take the most direct path between its source and its destination. Much of the world's communications run through the U.S. because much of Internet's infrastructure is in the U.S.

However, the statute empowers the NSA far beyond this modest goal. Instead of targeting foreign-to-foreign communications, FISA Amendments Act surveillance need only target people reasonably believed to be abroad. The Act empowers the Attorney General and the Director of National Intelligence to formulate guidelines for achieving "the targeting of persons reasonably believed to be located outside the U.S. to acquire foreign intelligence information." The targeting procedures must be "reasonably designed" to target people "reasonably believed to be located outside the United States." According to the Washington Post report, NSA agents are interpreting this to permit them to set intelligence collection parameters so they have at least 51% confidence that the targets are foreign. That's a low bar—one that Congress did not intend—and one that belies claims that collection of communications of people in the U.S. is merely "incidental" to the collection of communications of people targeted abroad.

The NSA's authorization to access your personal information is completely unrelated to whether you have engaged in any behavior that would suggest you present a national security threat. The only criterion subject to judicial authorization that protects people in the U.S. against collection of the content of their communications is "foreignness." The U.S. Constitution bounds what the American government has the authority to do, and it protects the right not to be searched without a warrant. That is why FISA surveillance that targets people in the U.S. is conducted under a more stringent standard; for people in the U.S., the FISA Court must find that there has to be probable cause to believe that the target of surveillance is a terrorist, spy or other agent of a foreign power. Although the Constitution may not apply to non-U.S. citizens in foreign countries, it is of grave concern when any country impinges upon the civil liberties it promises its people, especially a country that holds itself out as a human rights role model and global leader. Furthermore, while not covered by the United States Constitution, people outside of the United States are protected by human rights doctrine, which the United States has committed to uphold. A [recent report](#) [2] by the United Nations Special Rapporteur on the freedom of opinion and expression highlights growing concerns about the impact of widespread government surveillance on the privacy and free expression rights of citizens around the world.

The [secretiveness of the NSA](#) [3] generally and of PRISM in particular, may have emboldened these

intelligence officials to overreach. The NSA's opportunistically low standard for "foreignness" shows that it may not, without further transparency, be able to strike an appropriate balance between security and preserving constitutionally protected civil liberties. Secrecy is thwarting accountability. In a free society, the debate about where to strike the balance between surveillance and privacy must be a public discussion that includes the people and their representatives.

- [NSA](#)

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[1] http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.htm

[2] http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

[3] http://www.washingtonpost.com/world/national-security/no-such-agency-spies-on-the-communications-of-the-world/2013/06/06/5bcd46a6-ceb9-11e2-8845-d970ccb04497_story.html