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U.S Surveillance Law Questioned

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Senator Ron Wyden (D-Ore.) says that Congress and the American people know too little of the extent to which U.S. citizens' private conversations and e-mails are being captured by intelligence agencies as incidental data. He spoke July 25 at the Cato Institute. (Gary Feuerberg/ The Epoch Times)

WASHINGTON–Concerns that have been raised about privacy violations, including large-scale over collection of Americans' e-mails and phone calls, have some members of the United States Congress worried that the Fourth Amendment's guarantee of individual privacy is routinely violated.

Pursuing those concerns, Democratic Senator Ron Wyden from Oregon, a strong champion of privacy rights and restraints on government surveillance, contacted the Office of Director of National Intelligence (ODNI) via classified correspondence, and told them he believed the surveillance law, which was intended for non-U.S. citizens, had violated U.S. citizens' rights. In a surprising response, the ODNI admitted to Wyden that his conclusions were true and granted permission to allow the findings to be declassified.

The ODNI coordinates the work of 16 U.S. intelligence agencies, including the National Security Agency, which conducts electronic surveillance, according to Bloomberg News.

On July 20, Wyden made public the letter from the ODNI.

The letter admitted that at least on one occasion the federal government, in its collection of data under the Foreign Intelligence Surveillance Act (FISA) Amendment Act (FAA) of 2008, had violated the Fourth amendment. The letter also acknowledged that in the judgment of the FISA court, the spirit of the law had been violated.

The Fourth Amendment prohibits violations of Americans' privacy with unreasonable searches and seizures.

Speaking at the D.C. based Cato Institute on July 25, Wyden said, "Last week was the first instance where the government has admitted that a violation of Fourth Amendment privacy rights has taken place."

When the intelligence community admits that at least one time, violations of the privacy rights of individuals were violated, that doesn't mean only one person, but that "it could be a large number of Americans scooped up all at once in a wide-ranging operation," noted reason.com.

It should be stated that the ODNI letter, signed by Legislative Director Kathleen Turner who is a top aide to ODNI Director James Clapper, requests that when Wyden makes public the violations, he should note that his concerns have been remedied and that current procedures are "reasonable" under the Fourth Amendment.

FISA Amendment Act (FAA) Threat to Privacy

Wyden is skeptical that the FAA is working the way it was intended. He said that when FISA was passed in the 1970s, wiretapping for intelligence purposes was controlled. If there was evidence of a spy or member of an international terrorist group, law enforcement would go to a judge and show "probable cause" to obtain a warrant to wiretap. When intelligence agencies wanted to wiretap, obtaining a warrant was felt necessary under the Fourth Amendment.

After 9/11, the Bush Administration claimed they needed additional surveillance authority. This led to a warrantless wiretapping program that was secret for a number of years.

Congress amended FISA in 2008, and made "legal" the warrantless program retroactive under section 702, thereby giving immunity to telecommunications companies which were being sued by private citizens for warrantless surveillance.

For purposes of foreign intelligence information, FAA authorized the government to eavesdrop on Americans' phone calls and e-mails without a probable-cause warrant so long as one of the persons is "reasonably believed" to be outside the United States. Government officials conducting such surveillance for the acquisition of foreign intelligence no longer had to obtain an individual warrant specifying the name of an individual under surveillance.

New York Times reporter Eric Lichtblau, who spoke at the Cato event, reported in June 2009 based on three intelligence officials who spoke anonymously, that the number of intercepted private e-mail messages and phone calls was massive, and that one FISA court was displeased at the "overcollection."

The American Civil Liberties Union (ACLU) obtained documents through the Freedom of Information Act (FOIA) that suggested that the government was "not always able to determine whether a target is a U.S. person and therefore entitled to heightened protections," writes Michelle Richardson who spoke at Cato.

Because of media reports of lax regard for privacy of mobile users, Rep. Edward Markey (D-Mass.) sent letters in May to nine mobile carriers, such as AT&T, Sprint, T-Mobile and Verizon, requesting information of requests made from federal, state, and local on law enforcement, including location tracking data, phone records, and text message records. Markey said that his inquiry uncovered more than 1.3 million demands of wireless carriers from law enforcement agencies seeking information of mobile users in 2011 alone.

Reauthorization

Because section 702 departed from the traditional way of wiretapping authority, Wyden said Congress used "language that specifically intended to limit the government's use of these authorities to deliberately spy on law-abiding Americans."

Last year Sen. Wyden and Mark Udall (D-Colo.) asked the ODNI for a "rough estimate" of the number of law-abiding Americans that have had their communications collected and reviewed under FAA—a law which was intended to cover surveillance of foreigners. If the number is small, then the 702 provision is working as intended, but if it is a large number, Wyden says we need to discuss how to reform the law.

The ODNI responded: "It is not reasonably possible to estimate the number of people located in the United States whose communications may have been reviewed under the authority of the FAA."

Wyden reported at the Cato talk that NSA leadership informed him that "trying to come up with an estimate would in itself violate the privacy of U.S. persons." Wyden described that answer as "too far-fetched even by Washington standards," and said that he would press for transparency on this point.

Section 702 also set an expiration date, Dec. 2012, to give Congress another opportunity to review its use, Wyden said.

The Obama administration is seeking its reauthorization through June 2017. The Senate Committee on Intelligence, May 22, recommended, in secret, approval of reauthorization and sent it for a floor vote, according to Wyden.

Wyden doesn't want the bill rubber-stamped and is seeking a full debate on the reauthorization. To ensure that happens, on June 11, he placed a public hold on the bill.

"One of the central questions that Congress needs to ask, are these procedures working as intended? Are they keeping the communications of law-abiding Americans from being swept up under this authority that was designed to apply to foreigners?" according to techdirt.com.

One reform that Wyden wants discussed is his concern that warrantless data collection could be used to locate the communications of a specific American without a warrant. That, he says, is “a backdoor warrantless search” of Americans —a “loophole” that he insists must be closed.