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If We Acknowledged the Secret Law, It Wouldn't Be a Secret

Jacob Sullum | September 23, 2011

This week Sens. Ron Wyden (D-Ore.) and Mark Udall (D-Colo.) sent Attorney General Eric Holder a letter complaining about the Justice Department's "misleading statements pertaining to the government's interpretation of surveillance law." For months Wyden and Udall, both members of the Senate Intelligence Committee, have been warning that the Obama administration relies on a "secret interpretation" of the PATRIOT Act to justify surveillance that the general public does not realize is happening. The interpretation involves Section 215 of the law, which authorizes the FBI to demands business records or any other "tangible things" it deems useful "for an authorized investigation...to protect against international terrorism or clandestine intelligence activities." Cato Institute privacy specialist Julian Sanchez (a *Reason* contributing editor) has made a plausible case that Wyden and Udall—who cannot be too specific without revealing classified information—are referring to the use of Section 215 as a legal authority for the mass collection and analysis of cell phone geolocation data. The public would indeed be surprised to learn that the government is dredging these data without individualized suspicion, based on nothing more than the secret, cursory approval of the Foreign Intelligence Surveillance Court.

But instead of addressing "the gap that currently exists between the public's understanding of government surveillance authorities and the official, classified interpretation of these authorities," Wyden and Udall say, the Justice Department pretends the gap does not exist. A DOJ spokesman, for example, recently declared that "Section 215 is not a secret law, nor has it been implemented under secret legal opinions by the Justice Department." But it *has* been implemented based on secret interpretations of the law by the Foreign Intelligence Surveillance Court. "In our judgment," the senators write, "when the government relies on significant interpretations of public statutes that are kept secret from the American public, the government is effectively relying on secret law."