



The Senator who tried to warn us about the Snowden leaks is warning us again

Daniel Rivero

April 14, 2016

Years before NSA whistleblower Edward Snowden alerted Americans to the federal government's bulk collection of their phone call and email metadata, Oregon Senator Ron Wyden (D) hinted at the classified secrets that the Snowden papers would later reveal.

In 2011—two years before the leak—during a Congressional hearing to renew the Patriot Act, Wyden sounded an alarm.

“I want to deliver a warning this afternoon: When the American people find out how their government has secretly interpreted the Patriot Act, they will be stunned and they will be angry,” he said.

When the Snowden leaks came out, people *were* taken aback, as he predicted. Later, a federal court concluded that the bulk data collection that he was alluding to, was in fact unconstitutional, noting that the government's interpretation of the law was “irreconcilable with the statute's plain text.”

Which is why we should pay attention closely when Wyden is again sounding the alarm.

In a letter to Attorney General Loretta Lynch and an amicus brief he filed with a federal court, Wyden claims that the Department of Justice is not telling the truth about yet another classified legal opinion. The American Civil Liberties Union sued to declassify the opinion because it thinks that it will reveal more about how the government partners with the private sector for surveillance. Specifically, the ACLU says that it believes the opinion has to do with “common

commercial service agreements,” like those signed when entering into a contract with a cell phone carrier.

Little is known of its contents, except that it was written by Judge John Yoo in 2003, and that it relates to the Bush Administration’s post-9/11 warrantless wiretapping program. Wyden has also suggested that it is directly relevant to the Cybersecurity Act of 2015, a law which broadens the powers of network operators to conduct surveillance for cybersecurity purposes. The ACLU says that “the law, when read in conjunction with the opinion, may implicate Americans’ privacy even more significantly than publicly known.”

The DOJ has been fighting to dismiss the lawsuit, and prevent the opinion from becoming public.

“I am greatly concerned that the DOJ’s March 7, 2016, memorandum of law contains a key assertion which is inaccurate,” the Senator wrote in a letter to Lynch, dated March 24. “This assertion appears to be central to the DOJ’s legal arguments, and I would urge you to take action to ensure that this error is corrected.”

In the court filing, the Senator attached classified documents for the judge to review, saying it serves as a “counterweight to the DOJ’s one-sided, and potentially false, narrative.”

“The ACLU cannot present this rebuttal evidence because it is classified, and the very existence of the DOJ’s March 7, 2016 memorandum of law indicates that the DOJ failed to provide this crucial evidence on its own initiative,” reads the court brief.

The move is seemingly unprecedented, Julian Sanchez, a senior fellow at the CATO Institute who has followed Wyden’s allusions over the years, told Fusion.

“I can’t think of anything comparable in terms of a sitting lawmaker using his knowledge of classified documents to intervene in a case involving litigation, and claiming that the DOJ is not being truthful about what they are saying in court,” said Sanchez.

Wyden has spoke out in the past using his knowledge of classified information to intervene, but never in the courts, said Sanchez.

“I think it’s safe to say that he is going as far as he can reasonably go without breaching classification,” he said.

Wyden argues that the classified opinion should be declassified.

Keith Chu, a spokesman for Sen. Wyden, told Fusion that similar letters requesting the opinion be made public were sent to former Attorney General Eric Holder. “The Senator believes that the opinion is relevant to the entire cybersecurity debate that has been going on over the last few years,” said Chu.

In 2013, Wyden pressed outgoing Office of Legal Counsel head Caroline Krass on the opinion, how it is used, and why it is not withdrawn if it is not relied upon for legal guidance. Krass responded that it would be “extremely unusual” for the office to withdraw an opinion, but rather said that he should seek “assurance from the relevant elements of the Intelligence Community

that they would not rely on the opinion.” For her part, she said she would not rely on the opinion for her new post as CIA general counsel.

Wyden’s latest move against the DOJ in the courts is part of the Senator’s ongoing battle against what he calls “secret laws” — where pieces of legislation are covertly interpreted in “ways that are different than the stated text of the bill,” spokesman Chu said.

We don’t know what’s in the opinion. But clearly, something is going on here that is worth fighting over. Watch this space.