

Print

Friday, May 27, 2011 5:26 PM EDT

Patriot Act Extension: What Were Senators Udall and Wyden Trying to Warn Us About?

By Jeremy B. White

As the deadline for extending provisions of the Patriot Act approached yesterday, Sen. Ron Wyden (D-OR) and Sen. Tom Udall (D-NM) delivered [impassioned speeches](#) testifying to the outrage Americans would feel if they understood the full scope of the law. The Senate voted to reinstate the provisions, and President Obama's autopen signature ushered in four more years of broad surveillance powers.

But the question lingers: what, exactly, were Wyden and Udall talking about? It's impossible to know, given the impenetrable secrecy obscuring the true nature of the Patriot Act.

"I think the whole problem with the Patriot Act all along is that the American people know so little about how it's being used," said Susan Herman, president of the American Civil Liberties Union. "The fact that we don't even know what they're talking about makes it so deep and pernicious."

Still, it is possible to speculate, based upon hints Wyden and Udall dropped, about the contours of the abuses they were describing. Of the three provisions being considered, the so-called "business-records provision" seems most ripe for abuse (Wyden acknowledged this in an interview with Wired Magazine). Formally known as Section 215, the provision allows investigators to seize any "tangible things" they deem to be relevant to an investigation. They are not required to provide evidence demonstrating probable cause, as would be the case for a conventional search warrant. Tangible things can entail anything from phone records to hospital records, and can belong to third parties rather than terrorism suspects themselves.

Kevin Bankston, senior staff attorney at the Electronic Frontier Foundation, noted that Udall specifically mentioned the government's power to obtain cell phone records, something that may be considered egregious but within the context of the law is "not by itself scandalous." He added that Udall seemed more disturbed by the use of Section 215, which was invoked fewer than 100 times last year, than by the Federal Bureau of Investigation issuing about 25,000 national security letters, essentially subpoenas requiring no judicial oversight, in the same space of time. That Udall's concern over the small number of 215 uses outweighs his concern over the national security letters suggests that the number of people encompassed by each use of Section 215 could be enormous, Bankston said.

"The question is what could they be doing that these senators would find objectionable?" Bankston said. "My guess would be bulk collection, collection of masses of phone records for some sort of data mining."

Bankston added that such broad-based data collection would hardly be unprecedented, pointing to the broad-based surveillance program undertaken by the Bush administration and subsequently exposed by the New York Times.

Julian Sanchez, a research fellow at the Cato Institute, has a more radical theory. He also surmised that Wyden and Udall were sounding the alarm about collecting

data from broad swathes of the population, but he went a step further. He noted that the Justice Department employs a legal argument known as the "hybrid theory" that opens access to "pen registers," or data that allows investigators to roughly monitor someone's physical location through their cell phone. This ability to track a person's location, fused with the ability to obtain huge amounts of private records, could allow the government to know where many different people are at a given moment.

"It's one thing if [surveillance] involves suspects and their known associates, it would be another thing altogether if it involved and mining lots of people's records who had no first or second degree connection to the target of the investigation," Sanchez said. "It would be yet another thing if the business record provision would be tied to the pen registers to allow not just the acquisition of historical records but real time tracking."

Bolstering Sanchez's argument is the fact that Wyden recently [drafted legislation](#) to curb law enforcement officers' ability to track the locations of cars and cell phones. Sanchez acknowledged that his theory is "a little science fiction-y, even a little dystopian," but he noted that there are companies that readily advertise the capability to monitor cell phones.

Ultimately this is all guesswork. And that, Bankston stressed, is the heart of the problem.

"Anyone who's talking in specifics about what this provision is being used for is speculating without any knowledge," he said. "To the extent that there is an aggressive interpretation of 215 that implicates America's privacy we should know that. Our guesses about what might be happening are beside the point."