Wyden Makes the Case

NSA Spying Violates U.S. Constitution

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The following excerpts from statements by Sen. Ron Wyden (D-Ore.) make the cogent case for how President Obama's surveillance policy is violating the U.S. Constitution.

Statement of Sen. Ron Wyden on Patriot Act Reauthorization; May 26, 2011:

Mr. President, the United States Senate is now preparing to pass another four-year extension of the USA Patriot Act. I have served on the Intelligence Committee for a decade, and 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. And they will be asking senators, "Did you know what this law actually permits?" "Why didn't you know before you voted on it?" The fact is that anyone can read the plain text of the Patriot Act, and yet many members of Congress have no idea how the law is being secretly interpreted by the executive branch, because that interpretation is classified.

It's almost as if there are two Patriot Acts, and many members of Congress haven't even read the one that matters. Our constituents, of course, are totally in the dark. Members of the public have no access to the executive branch's secret legal interpretations, so they have no idea what their government thinks this law means....

wyden.senate.gov

In a speech on the Senate floor last December, Sen. Ron Wyden (D-Ore.) compared Obama's unconstitutional surveillance program to the suppression of rights in the American colonies by the British Empire.

Statement of Sen. Ron Wyden on FISA Amendments Act of 2008; Dec. 27, 2012:

Today on the Senate floor we will be debating another extremely important matter: the extension of the FISA Amendments Act of 2008. This is a major surveillance law that was passed in 2008 as the successor to the warrantless wiretapping program that operated under the Bush Administration. This law gave the government new authorities to collect the communications of foreigners outside the United States, and the bill before the Senate today would extend this law for another five years.... This is likely to be the only floor debate that the Senate will have on this law during this nine-year period (2008-2017), which obviously makes today's discussion very important....

This story really begins in early America, when the colonists were famously subjected to a lot of taxes by the British government. The American colonists thought this was unfair, because they were not represented in the British parliament, and they argued that if they weren't allowed to vote for their own government then they shouldn't have to pay taxes.... Because there were a lot of taxes on things like tea and sugar and paint and paper, and also because many colonists believed these taxes were unjust, there was a lot of smuggling going on in the American colonies. People would

import things like sugar and simply avoid paying the tax on them. Naturally the King of England didn't like this very much—he wanted the colonists to pay taxes whether they were allowed to vote or not.

So the English authorities began issuing general warrants, which were called "writs of assistance," that authorized government officials to enter any house or building they wanted in order to search for smuggled goods. These officials weren't limited to only searching in certain houses, and they weren't required to show any evidence that the place they were searching had smuggled goods in it. Basically, government officials were allowed to say that they were looking for smuggled goods and then go searching through any house they wanted to see if they could find some.

The problem, of course, is that if you let government officials search any house they want, they're going to search through the houses of a lot of people who haven't broken any laws at all. And the American colonists had a huge problem with that. They said that it's not okay to just go around invading people's privacy unless you have some specific evidence that they've done something wrong.

The law said that these writs of assistance were good until the king died. So when King George the Second died and the authorities had to get new writs, many colonists tried to challenge them in court. In Boston, James Otis denounced this mass invasion of privacy, reminding the court that "A man's house is his castle." Mr. Otis described the writs of assistance as "a power that places the liberty of every man in the hands of every petty officer." Unfortunately, the court ruled that these general orders permitting mass searches without individual suspicion were legal, and English authorities continued to use them.

The fact that English officials went around invading people's privacy without any specific evidence against them was one of the fundamental complaints that the American colonists had against the British government. So naturally America's Founding Fathers made certain to address this complaint when they wrote the Bill of Rights.

The Bill of Rights ensured that strong protections for individual liberties were included within our Constitution itself. And the Founding Fathers included strong protections for personal privacy in the Fourth Amendment.... This was a direct rejection of the authority that the British had claimed to have when they ruled the American colonies. The Founding Fathers said that our government does not have the right to search any house that government officials want to search, even if it helps them do their job. Government officials may only search someone's house if they have evidence that someone is breaking the law and they show that evidence to a judge to get an individual warrant....

As time passed and the United States entered the 20th century, advances in technology gave government officials the power to invade individual privacy in ways that the Founding Fathers never dreamed of, and Congress and the courts sometimes struggled to keep up....

When the Foreign Intelligence Surveillance Act, or FISA, was written in 1978, Congress applied this same principle to intelligence gathering. The original FISA statute states that if the government wants to collect an American's communications for intelligence purposes, the government must go to a court, show evidence that the American is a terrorist or a spy, and get an individual warrant. This upheld the same principle that the Founding Fathers fought for in the Revolution and enshrined in the Bill of Rights—government officials are not allowed to invade Americans' privacy unless they have specific evidence and individual warrants....

Congress passed the FISA Amendments Act of 2008, which replaced the warrantless wiretapping program with new authorities for the government to collect the phone calls and emails of people who are believed to be foreigners outside the United States. The centerpiece of the FISA Amendments Act is a provision that is now section 702 of the FISA statute....

Unlike traditional FISA authorities, and unlike law enforcement wiretapping authorities, section 702 does not involve obtaining individual warrants. Instead, it allows the government to get programmatic warrants that last for an entire year and authorize the government to collect a potentially large number of phone calls and emails, with no requirement that the senders or recipients be connected to terrorism or espionage. If that sounds familiar, it should. General warrants that allowed government officials to decide whose privacy to invade were the exact sort of abuse that the American colonists protested, and that led the Founding Fathers to adopt the Fourth Amendment in the first place. For this reason, section 702 of FISA contains language that is specifically intended to limit the government's

ability to use these new authorities to spy on American citizens.

Let me emphasize that because it's very important: It is never okay for government officials to use general warrants to deliberately invade the privacy of law-abiding Americans. It wasn't okay for constables and customs officials to do it in colonial days, and it's not okay for the NSA to do it today [emphasis added]. So if the government is going to use general warrants to collect people's phone calls and emails, it is extremely important to ensure that this authority is only used against foreigners overseas, and not against Americans.

However, despite what you may have heard, this law doesn't actually prohibit the government from collecting Americans' phone calls and emails without a warrant. The FISA Amendments Act says that acquisitions made under section 702 may not "intentionally target" a specific American, and may not "intentionally acquire" communications that are "known at the time of acquisition" to be wholly domestic, but that still leaves room for a lot of circumstances under which Americans' phone calls and emails—including purely domestic phone calls and emails—could be swept up and reviewed without a warrant. . . .

[T]here is nothing in the law that prevents government officials from going to that pile of communications and deliberately searching for the phone calls or emails of a specific American, even if they don't have any actual evidence that the American is involved in nefarious activity. Again, if that sounds familiar, it should. General warrants allowing government officials to deliberately intrude on the privacy of individual Americans at their own discretion were one of the abuses that led America's Founding Fathers to rise up against the British, and they are exactly what the Fourth Amendment was written to prevent. If government officials want to search an American's house, or read their emails, or listen to their phone calls, they are supposed to show evidence to a judge and get an individual warrant. But this loophole in the law allows government officials to make an end-run around traditional warrant requirements and conduct "back-door searches" for Americans' communications.

After discussing secret law and the FISA Court's secret rulings, Wyden continued:

If you think back to colonial times, when the British government was issuing writs of assistance and general warrants, the colonists were at least able to challenge these warrants in open court. So when the courts upheld those writs of assistance, ordinary people could read about that decision, and people like James Otis and John Adams could publicly debate whether the law was adequately protecting the privacy of law-abiding individuals. But if the FISA Court were to uphold something like that today, in the age of digital communications and electronic surveillance, it could conceivably pass entirely unnoticed by the public—even by those people whose privacy was being invaded.

I was encouraged in 2009, when the Obama Administration wrote to Senator Rockefeller and me to inform us that they would be setting up a process for redacting and releasing those FISA Court opinions that contain significant interpretations of law. Unfortunately, over three years later, this process has produced literally zero results. Not a single redacted opinion or summary of FISA court rulings has been released. I can't even tell if the Administration still intends to fulfill this promise or not. I often get the feeling that they're hoping that people will just go away and forget that the promise was made in the first place. . . .

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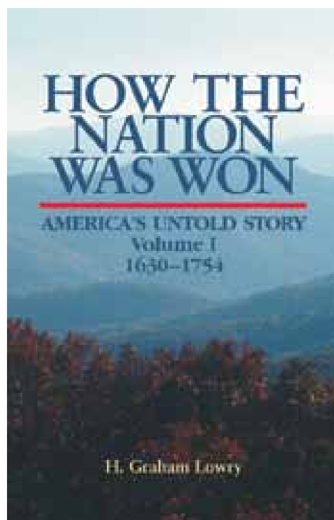

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