

Hold Statement for Congressional Record on FISA Amendments Act
U.S. Senator Ron Wyden (D-Ore.)
June 11, 2012

M. President, the Select Committee on Intelligence has just reported a bill that would extend the FISA Amendments Act of 2008 for five more years. I voted against this extension in the Intelligence Committee's markup because I believe that Congress does not have enough information about this law's impact on the privacy of law-abiding American citizens, and because I am concerned about a loophole in the law that could allow the government to effectively conduct warrantless searches for Americans' communications. Consistent with my own long-standing policy and Senate rules, I am announcing with this statement for the Congressional Record that it is my intention to object to any request to pass this bill by unanimous consent.

I will also explain my reasoning a bit further, in case it is helpful to any colleagues who are less familiar with this issue. Over a decade ago the intelligence community identified a problem: surveillance laws designed to protect the privacy of people inside the United States were sometimes making it hard to collect the communications of people outside the United States. The Bush Administration's solution to this problem was to set up a warrantless wiretapping program, which operated in secret for a number of years. When this program became public several years ago many Americans – myself included – were shocked and appalled. Many members of Congress denounced the Bush Administration for this illegal and unconstitutional act.

However, members of Congress also wanted to address the original problem that had been identified, so in 2008 Congress passed a law modifying the Foreign Intelligence Surveillance Act, or FISA. The purpose of this 2008 legislation was to give the government new authorities to collect the communications of people who are believed to be foreigners outside the United States, while still preserving the privacy of people inside the United States.

Specifically, the central provision in the FISA Amendments Act of 2008 added a new section to the original FISA statute, now known as section 702. As I said, section 702 was designed to give the government new authorities to collect the communications of people who are reasonably believed to be foreigners outside the United States. Because section 702 does not involve obtaining individual warrants, it contains language specifically intended to limit the government's ability to use these new authorities to deliberately spy on American citizens.

The bill contained an expiration date of December 2012, and the purpose of this expiration date was to force members of Congress to come back in a few years and examine whether these new authorities had been interpreted and implemented as intended. Before Congress votes this year to renew these authorities it is important to understand how they are working in practice, so that members of Congress can decide whether the law needs to be modified or reformed.

In particular, it is important for Congress to better understand how many people inside the United States have had their communications collected or reviewed under the authorities granted by the FISA Amendments Act. If only a handful of people inside the United States have been surveilled in this manner, then that would indicate that Americans' privacy is being protected. On the other hand, if a large number of people inside the United States have had their communications collected or reviewed because of this law, then that would suggest that protections for Americans' privacy need to be strengthened.

Unfortunately, while Senator Udall of Colorado and I have sought repeatedly to gain an understanding of how many Americans have had their phone calls or emails collected and reviewed under this statute, we have not been able to obtain even a rough estimate of this number.

The Office of the Director of National Intelligence told the two of us in July 2011 that "it is not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed" under the FISA Amendments Act. I am prepared to accept that it might be difficult to come up with an exact count of this number, but it is hard for me to believe that it is impossible to even estimate it.

During the committee's markup of this bill Senator Udall and I offered an amendment that would have directed the Inspectors General of the Intelligence Community and the Department of Justice to produce an estimate of how many Americans have had their communications collected under section 702. Our amendment would have permitted the Inspectors General to come up with a rough estimate of this number, using whatever analytical techniques they deemed appropriate. We are disappointed that this amendment was voted down by the committee, but we will continue our efforts to obtain this information.

I am concerned, of course, that if no one has even estimated how many Americans have had their communications collected under the FISA Amendments Act, then it is possible that this number could be quite large. Since all of the communications collected by the government under section 702 are collected without individual warrants, I believe that there should be clear rules prohibiting the government from searching through these communications in an effort to find the phone calls or emails of a particular American, unless the government has obtained a warrant or emergency authorization permitting surveillance of that American.

Section 702, as it is currently written, does not contain adequate protections against warrantless "back door" searches of this nature – even though they are the very thing that many people thought the FISA Amendments Act was intended to prevent. Senator Udall and I offered an amendment during the committee's markup of this bill that would have clarified the law to prohibit searching through communications collected under section 702 in an effort to find a particular American's communications. Our amendment included exceptions for searches that involved a warrant or an emergency authorization, as well as for searches for the phone calls or emails of people who are believed to be in danger or who

consent to the search. I am disappointed that this amendment was also voted down by the committee, but I will continue to work with my colleagues to find a way to close this loophole before the FISA Amendments Act is extended.

I recognize that the collection that has taken place under the FISA Amendments Act has produced some useful intelligence, so my preference would be to enact a short-term reauthorization to give Congress time to get more information about the impact of this law on Americans' privacy rights and consider possible modifications. However, I believe that protections against warrantless searches for Americans' communications should be added to the law immediately.

An obvious question that I have not answered here is whether any warrantless searches for Americans' communications have already taken place. I am not suggesting that any warrantless searches have or have not occurred, because Senate and committee rules regarding classified information generally prohibit me from discussing what intelligence agencies are actually doing or not doing. However, I believe that we have an obligation as elected legislators to discuss what these agencies should or should not be doing, and it is my hope that a majority of my Senate colleagues will agree with that searching for Americans' phone calls and emails without a warrant is something that these agencies should not do.