



Written by [Joe Wolverton, II, J.D.](#) on March 19, 2018

GOP Senators Try to Sneak Massive Surveillance Expansion Into Spending Bill

The unconstitutional surveillance of American citizens by agents of their own government could soon expand exponentially, should a controversial act be included in the forthcoming spending bill.

The legislation, called the “Clarifying Lawful Overseas Use of Data Act,” or CLOUD Act, is sponsored by Senators Hatch, Coons, Graham, and Whitehouse, and they are trying to get the measure attached to the forthcoming spending bill.



Specifically, the CLOUD Act would increase unconstitutionally the authority of the executive branch of the federal government, granting it power to decide when and how data collected by law enforcement should be shared with foreign governments.

An article published by Electronic Freedom Foundation (EFF) summarizes the way that the bill breaks down the wall placed by the Fourth Amendment around the liberty of Americans. EFF reports:

The CLOUD Act has two major components. First, it empowers U.S. law enforcement to grab data stored anywhere in the world, without following foreign data privacy rules. Second, it empowers the president to unilaterally enter executive agreements with any nation on earth, even known human rights abusers. Under such executive agreements, foreign law enforcement officials could grab data stored in the United States, directly from U.S. companies, without following U.S. privacy rules like the Fourth Amendment, so long as the foreign police are not targeting a U.S. person or a person in the United States.

When foreign police use their power under CLOUD Act executive agreements to collect a foreign target’s data from a U.S. company, they might also collect data belonging to a non-target U.S. person who happens to be communicating with the foreign target. Within the numerous, combined foreign investigations allowed under the CLOUD Act, it is highly likely that related seizures will include American communications, including email, online chat, video calls, and internet voice calls.

As one might imagine, given their habit of trying to prevent the surveillance state from growing and ignoring the Constitution, Senator Ron Wyden (D-Ore.) and Senator Rand Paul (R-Ky.) issued a joint statement calling on Senate leadership to exclude the CLOUD Act from the spending bill and to require a separate debate and vote on the proposal.

After explaining that the act would remove the requirement that government agencies receive a warrant from a federal judge before conducting such surveillance sharing, the pair expressed their opposition to such overreach.

The CLOUD Act places far too much power in the President’s hands and denies Congress its critical oversight role. Specifically, the CLOUD Act permits the executive branch to enter into agreements



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with foreign governments and gives the House and Senate just 90 days to pass a resolution of disapproval to block it from going into effect. Instead of supplying a blanket pre-approval of these agreements, Congress should examine each agreement and determine — on an individual basis — whether the prohibitions on warrantless surveillance of stored and real-time communications should be waived with respect to each country.

It is a sobering fact that we have arrived as a country so far removed from our Constitution that senators would have to nearly beg the body's leadership to uphold the Fourth Amendment to the Constitution.

To refresh your memory, the Fourth Amendment — the part of the Bill of Rights that would be legislatively repealed should the CLOUD Act be included in the spending bill — reads: "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."

While it seems unlikely that the Republican leaders in the Senate, particularly the members of the Senate Appropriations Committee, will uphold their oaths office and "preserve, protect, and defend" this fundamental component of the Constitution, there is historical precedent for such a surveillance plan, a combination of powerful legislators that promote it, and courageous citizens standing up in defense of their liberty.

Given the role that rebellion against the unreasonable, unwarranted searches and seizures by government played in igniting the spark that lit the fires of armed resistance in America and the War for Independence that raged for eight years, it is remarkable that that liberty now is once again under attack from a powerful central government.

James Otis is a name that is almost completely forgotten by contemporary Americans, but he was once the most famous lawyer in the colonies, and it was his renowned recrimination of unreasonable searches in Boston that earned him fame and influenced his countrymen to resist the tyranny of these deprivations.

At a trial challenging the constitutionality of the General Writs of Assistance, Otis spoke eloquently and persuasively in favor of freedom from the unreasonable searches being carried out by 18th-century government agents:

Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and, when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware; so that these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-day Acts, or that of profane swearing. As soon as he had



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finished, Mr. Ware asked him if he had done. He replied, “Yes.” “Well then,” said Mr. Ware, “I will show you a little of my power. I command you to permit me to search your house for uncustomed goods” — and went on to search the house from the garret to the cellar; and then served the constable in the same manner.

In 1788, nearly three decades after the speech of Otis in defense of the right to be free from unwarranted searches and seizures, his equally eminent sister, Mercy Otis Warren, echoed her brother’s bold attack on despotism. Writing under the pseudonym “Columbian Patriot,” Warren said:

There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence — the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure.

These are not the days of our Founders, though, and we have proven ourselves to be very cowardly posterity of that remarkable generation.

Today we live in the post-9/11 era where we meekly “subject ourselves” to the insolence of having our data forcibly seized from us.

It is for this reason that Senators Wyden and Paul felt compelled to unite in defense of these fundamental liberties — liberties once the common inheritance of all Americans.

For the efforts of these lawmakers, Americans should remember the wise words of Mercy Otis Warren and be grateful to “the patriots who counteracted” the government’s assault on this most precious prerogative.

The spending bill must be passed by March 23 at midnight or the federal government will shut down for the third time this year.

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