

Remarks As Prepared for Delivery for the Center for American Progress Event on NSA Surveillance

Thank you for having me this morning. The Center for American Progress and the noted privacy hawk John Podesta have long been pursuing thoughtful intelligence policy. Since opening your doors in 2003 you have been making the case that security and liberty are not mutually exclusive, and your work is well-known in my office and throughout Washington.

When the Patriot Act was last reauthorized, I stood on the floor of the United States Senate and said “I want to deliver a warning this afternoon. When the American people find out how their government has interpreted the Patriot Act, they are going to be stunned and they are going to be angry.” From my position on the Senate Intelligence Committee, I had seen government activities conducted under the umbrella of the Patriot Act that I knew would astonish most Americans.

At the time, Senate rules about classified information barred me from giving any specifics of what I'd seen except to describe it as Secret Law -- a secret interpretation of the Patriot Act, issued by a secret court, that authorizes secret surveillance programs - programs that I and colleagues think go far beyond the intent of the statute.

If that is not enough to give you pause, then consider that not only were the existence of and the legal justification for these programs kept completely secret from the American people, senior officials from across the government were making statements to the public about domestic surveillance that were clearly misleading and at times simply false. Senator Mark Udall and I tried again and again to get the executive branch to be straight with the public, but under the classification rules observed by the Senate we are not even allowed to tap the truth out in Morse code - and we tried just about everything else we could think of to warn the American people.

But as I've said before, one way or another the truth always wins out.

Last month, disclosures made by an NSA contractor lit the surveillance world on fire. Several provisions of secret law were no longer secret and the American people were finally able to see some of the things I've been raising the alarm about for years. And when they did, boy were they stunned, and boy are they angry.

You hear it in the lunch rooms, town hall meetings, and senior citizen centers. The latest polling, the well-respected Quinnipiac poll, found that a plurality of people said the government is overreaching and encroaching too much on Americans' civil liberties. That's a huge swing from what that same survey said just a couple years ago, and that number is trending upward. As more information about sweeping government surveillance of law-abiding Americans is made public and the American people can discuss its impacts, I believe more Americans will speak out. They're going to say, in America, you don't have to settle for one priority or the other: laws can be written to protect both privacy and security, and laws should never be secret.

After 9/11, when 3,000 Americans were murdered by terrorists, there was a consensus that our government needed to take decisive action. At a time of understandable panic, Congress gave the government new surveillance authorities, but attached an expiration date to these authorities so that they could be deliberated more carefully once the immediate emergency had passed. Yet in the decade since, that law has been extended several times with no public discussion about how the law has actually been interpreted. The result: the creation of an always expanding, omnipresent surveillance state that -- hour by hour -- chips needlessly away at the liberties and freedoms our Founders established for us, without the benefit of actually making us any safer.

So, today I'm going to deliver another warning: If we do not seize this unique moment in our constitutional history to reform our surveillance laws and practices, we will all live to regret it. I'll have more to say about the consequences of the omnipresent surveillance state, but as you listen to this talk, ponder that most of us have a computer in our pocket that

potentially can be used to track and monitor us 24/7.

The combination of increasingly advanced technology with a breakdown in the checks and balances that limit government action could lead us to a surveillance state that cannot be reversed.

At this point, a little bit of history might be helpful. I joined the Senate Intelligence Committee in January 2001, just before 9/11. Like most senators I voted for the original Patriot Act, in part, because I was reassured that it had an expiration date that would force Congress to come back and consider these authorities more carefully when the immediate crisis had passed. As time went on, from my view on the Intelligence Committee there were developments that seemed farther and farther removed from the ideals of our Founding Fathers. This started not long after 9/11, with a Pentagon program called Total Information Awareness, which was essentially an effort to develop an ultra-large-scale domestic data-mining system. Troubled by this effort, and its not exactly modest logo of an all-seeing eye on the universe, I worked with a number of

senators to shut it down. Unfortunately, this was hardly the last domestic surveillance overreach. In fact, the NSA's infamous warrantless wiretapping program was already up and running at that point, though I, and most members of the Intelligence Committee didn't learn about it until a few years later. This was part of a pattern of withholding information from Congress that persisted throughout the Bush administration - I joined the Intelligence Committee in 2001, but I learned about the warrantless wiretapping program when you read about it in the New York Times in late 2005.

The Bush administration spent most of 2006 attempting to defend the warrantless wiretapping program. Once again, when the truth came out, it produced a surge of public pressure and the Bush administration announced that they would submit to oversight from Congress and the Foreign Intelligence Surveillance Court, also known as the FISA Court. Unfortunately, because the FISA Court's rulings are secret, most Americans had no idea that the Court was prepared to issue incredibly broad rulings, permitting the massive surveillance that finally made

headlines last month.

It's now a matter of public record that the bulk phone records program has been operating since at least 2007. It's not a coincidence that a handful of senators have been working since then to find ways to alert the public about what has been going on. Months and years went into trying to find ways to raise public awareness about secret surveillance authorities within the confines of classification rules.

I and several of my colleagues have made it our mission to end the use of secret law.

When Oregonians hear the words secret law, they have come up to me and asked, "Ron, how can the law be secret? When you guys pass laws that's a public deal. I'm going to look them up online." In response, I tell Oregonians that there are effectively two Patriot Acts -- the first is the one that they can read on their laptop in Medford or Portland, analyze and understand. Then there's the real Patriot Act -- the secret interpretation of

the law that the government is actually relying upon. The secret rulings of the Foreign Intelligence Surveillance Court have interpreted the Patriot Act, as well as section 702 of the FISA statute, in some surprising ways, and these rulings are kept entirely secret from the public. These rulings can be astoundingly broad. The one that authorizes the bulk collection of phone records is as broad as any I have ever seen.

This reliance of government agencies on a secret body of law has real consequences. Most Americans don't expect to know the details about ongoing sensitive military and intelligence activities, but as voters they absolutely have a need and a right to know what their government thinks it is permitted to do, so that they can ratify or reject decisions that elected officials make on their behalf. To put it another way, Americans recognize that intelligence agencies will sometimes need to conduct secret operations, but they don't think those agencies should be relying on secret law.

Now, some argue that keeping the meaning of surveillance laws secret is

necessary, because it makes it easier to gather intelligence on terrorist groups and other foreign powers. If you follow this logic, when Congress passed the original Foreign Intelligence Surveillance Act back in the 1970s, they could have found a way to make the whole thing secret, so that Soviet agents wouldn't know what the FBI's surveillance authorities were. But that's not the way you do it in America.

It is a fundamental principle of American democracy that laws should not be public only when it is convenient for government officials to make them public. They should be public all the time, open to review by adversarial courts, and subject to change by an accountable legislature guided by an informed public. If Americans are not able to learn how their government is interpreting and executing the law then we have effectively eliminated the most important bulwark of our democracy. That's why, even at the height of the Cold War, when the argument for absolute secrecy was at its zenith, Congress chose to make US surveillance laws public.

Without public laws, and public court rulings interpreting those laws, it is

impossible to have informed public debate. And when the American people are in the dark, they can't make fully informed decisions about who should represent them, or protest policies that they disagree with. These are fundamentals. It's Civics 101. And secret law violates those basic principles. It has no place in America.

Now let's turn to the secret court- the Foreign Intelligence Surveillance Court, the one virtually no one had heard of two months ago and now the public asks me about at the barber.

When the FISA court was created as part of the 1978 FISA law its work was pretty routine. It was assigned to review government applications for wiretaps and decide whether the government was able to show probable cause. Sounds like the garden variety function of district court judges across America. In fact, their role was so much like a district court that the judges who make up the FISA Court are all current federal district court judges.

After 9/11, Congress passed the Patriot Act and the FISA Amendments Act. This gave the government broad new surveillance powers that didn't much resemble anything in either the criminal law enforcement world or the original FISA law. The FISA Court got the job of interpreting these new, unparalleled authorities of the Patriot Act and FISA Amendments Act. They chose to issue binding secret rulings that interpreted the law and the Constitution in the startling way that has come to light in the last six weeks. They were to issue the decision that the Patriot Act could be used for dragnet, bulk surveillance of law-abiding Americans.

Outside the names of the FISA court judges, virtually everything else is secret about the court. Their rulings are secret, which makes challenging them in an appeals court almost impossible. Their proceedings are secret too, but I can tell you that they are almost always one-sided. The government lawyers walk in and lay out an argument for why the government should be allowed to do something, and the Court decides based solely on the judge's assessment of the government's arguments. That's not unusual if a court is considering a routine warrant request, but

it's very unusual if a court is doing major legal or constitutional analysis. I know of absolutely no other court in this country that strays so far from the adversarial process that has been part of our system for centuries.

It may also surprise you to know that when President Obama came to office, his administration agreed with me that these rulings needed to be made public. In the summer of 2009 I received a written commitment from the Justice Department and the Office of the Director of National Intelligence that a process would be created to start redacting and declassifying FISA Court opinions, so that the American people could have some idea of what the government believes the law allows it to do. In the last four years exactly zero opinions have been released.

Now that we know a bit about secret law and the court that created it, let's talk about how it has diminished the rights of every American man, woman and child.

Despite the efforts of the intelligence community leadership to downplay

the privacy impact of the Patriot Act collection, the bulk collection of phone records significantly impacts the privacy of million of law-abiding Americans. If you know who someone called, when they called, where they called from, and how long they talked, you lay bare the personal lives of law-abiding Americans to the scrutiny of government bureaucrats and outside contractors.

This is particularly true if you're vacuuming up cell phone location data, essentially turning every American's cell phone into a tracking device. We are told this is not happening today, but intelligence officials have told the press that they currently have the legal authority to collect Americans' location information in bulk.

Especially troubling is the fact that there is nothing in the Patriot Act that limits this sweeping bulk collection to phone records. The government can use the Patriot Act's business records authority to collect, collate and retain all sorts of sensitive information, including medical records, financial records, or credit card purchases. They could use this authority to

develop a database of gun owners or readers of books and magazines deemed subversive. This means that the government's authority to collect information on law-abiding American citizens is essentially limitless. If it is a record held by a business, membership organization, doctor, or school, or any other third party, it could be subject to bulk collection under the Patriot Act.

Authorities this broad give the national security bureaucracy the power to scrutinize the personal lives of every law-abiding American. Allowing that to continue is a grave error that demonstrates a willful ignorance of human nature. Moreover, it demonstrates a complete disregard for the responsibilities entrusted to us by the Founding Fathers to maintain robust checks and balances on the power of any arm of the government.

That obviously raises some very serious questions. What happens to our government, our civil liberties and our basic democracy if the surveillance state is allowed to grow unchecked?

As we have seen in recent days, the intelligence leadership is determined to hold on to this authority. Merging the ability to conduct surveillance that reveals every aspect of a person's life with the ability to conjure up the legal authority to execute that surveillance, and finally, removing any accountable judicial oversight, creates the opportunity for unprecedented influence over our system of government.

Without additional protections in the law, every single one of us in this room may be and can be tracked and monitored anywhere we are at any time. The piece of technology we consider vital to the conduct of our everyday personal and professional life happens to be a combination phone bug, listening device, location tracker, and hidden camera. There isn't an American alive who would consent to being required to carry any one of those items and so we must reject the idea that the government may use its powers to arbitrarily bypass that consent.

Today, government officials are openly telling the press that they have the authority to effectively turn Americans' smart phones and cell phones into

location-enabled homing beacons. Compounding the problem is the fact that the case law is unsettled on cell phone tracking and the leaders of the intelligence community have consistently been unwilling to state what the rights of law-abiding people are on this issue. Without adequate protections built into the law there's no way that Americans can ever be sure that the government isn't going to interpret its authorities more and more broadly, year after year, until the idea of a telescreen monitoring your every move turns from dystopia to reality.

Some would say that could never happen because there is secret oversight and secret courts that guard against it. But the fact of the matter is that senior policymakers and federal judges have deferred again and again to the intelligence agencies to decide what surveillance authorities they need. For those who believe executive branch officials will voluntarily interpret their surveillance authorities with restraint, I believe it is more likely that I will achieve my life-long dream of playing in the NBA.

But seriously, when James Madison was attempting to persuade Americans

that the Constitution contained sufficient protections against any politician or bureaucrat seizing more power than that granted to them by the people, he did not just ask his fellow Americans to trust him. He carefully laid out the protections contained in the Constitution and how the people could ensure they were not breached. We are failing our constituents, we are failing our founders, and we are failing every brave man and woman who fought to protect American democracy if we are willing, today, to just trust any individual or any agency with power greater than the checked and limited authority that serves as a firewall against tyranny.

Now I want to spend a few minutes talking about those who make up the intelligence community and day in and day out work to protect us all.

Let me be clear: I have found the men and women who work at our nation's intelligence agencies to be hard-working, dedicated professionals. They are genuine patriots who make real sacrifices to serve their country. They should be able to do their jobs secure in the knowledge that there is

public support for everything that they are doing. Unfortunately, that can't happen when senior officials from across the government mislead the public about the government's surveillance authorities.

And let's be clear: the public was not just kept in the dark about the Patriot Act and other secret authorities. The public was actively misled. I've pointed out several instances in the past where senior officials have made misleading statements to the public and to Congress about the types of surveillance they are conducting on the American people, and I'll recap some of the most significant examples.

For years, senior Justice Department officials have told Congress and the public that the Patriot Act's business record authority - which is the authority that is used to collect the phone records of millions of ordinary Americans - is "analogous to a grand jury subpoena." This statement is exceptionally misleading - it strains the word "analogous" well beyond the breaking point. It's certainly true that both authorities can be used to

collect a wide variety of records, but the Patriot Act has been secretly interpreted to permit ongoing bulk collection, and this makes that authority very, very different from regular grand jury subpoena authority. Any lawyers in here? After the speech is over come up and tell me if you've ever seen a grand jury subpoena that allowed the government on an ongoing basis to collect the records of millions of ordinary Americans. The fact is that no one has seen a subpoena like that is because there aren't any. This incredibly misleading analogy has been made by more than one official on more than one occasion and often as part of testimony to Congress. The official who served for years as the Justice Department's top authority on criminal surveillance law recently told the Wall Street Journal that if a federal attorney "served a grand-jury subpoena for such a broad class of records in a criminal investigation, he or she would be laughed out of court."

Defenders of this deception have said that members of Congress have the ability to get the full story of what the government is doing on a classified basis, so they shouldn't complain when officials make misleading public

statements, even in congressional hearings. That is an absurd argument. Sure, members of Congress COULD get the full story in a classified setting, but that does not excuse the practice of half truths and misleading statements being made on the public record. When did it become all right for government officials' public statements and private statements to differ so fundamentally? The answer is that it is not all right, and it is indicative of a much larger culture of misinformation that goes beyond the congressional hearing room and into the public conversation writ large.

For example, last spring the Director of the National Security Agency spoke over at the American Enterprise Institute, where he said publicly that "we don't hold data on U.S. citizens." That statement sounds reassuring, but of course the American people now know that it is false. In fact, it's one of the most false statements ever made about domestic surveillance.

Later that same year, at the annual hackers' conference known as DefCon, the same NSA Director said that the government does not collect "dossiers" on millions of Americans. Now I've served on the Intelligence Committee for a dozen years and I didn't know what "dossiers" meant in

this context. I do know that Americans not familiar with the classified details would probably hear that statement and think that there was no bulk collection of the personal information of hundreds of millions of Americans taking place.

After the Director of the NSA made this statement in public, Senator Udall and I wrote to the Director asking for a clarification. In our letter we asked whether the NSA collects any type of data at all on millions or hundreds of millions of Americans. Even though the Director of the NSA was the one who had raised this issue publicly, intelligence officials declined to give us a straight answer.

A few months ago, I made the judgement that I would not be responsibly carrying out my oversight powers if I didn't press intelligence officials to clarify what the NSA Director told the public about data collection. So I decided it was necessary to put the question to the Director of National Intelligence. And I had my staff send the question over a day in advance so that he would be prepared to answer. The Director unfortunately said that

the answer was no, the NSA does not knowingly collect data on millions of Americans, which is obviously not correct. After the hearing, I had my staff call the Director's office on a secure line and urge them to correct the record. Disappointingly, his office decided to let this inaccurate statement stand. My staff made it clear that this was wrong and that it was unacceptable to leave the American public misled. I continued to warn the public about the problem of secret surveillance law over the following weeks, until the June disclosures.

Even after those disclosures, there has been an effort by officials to exaggerate the effectiveness of the bulk phone records collection program by conflating it with the collection of Internet communications under section 702 of the FISA statute. This collection, which involves the PRISM computer system, has produced some information of real value. I will note that last summer I was able to get the executive branch to declassify the fact that the FISA Court has ruled on at least one occasion that this collection violated the Fourth Amendment in a way that affected an undisclosed number of Americans. And the Court also said that the

government has violated the spirit of the law as well. So, I think section 702 clearly needs stronger protections for the privacy of law-abiding Americans, and I think these protections could be added without losing the value of this collection. But I won't deny that this value exists.

Meanwhile, I have not seen any indication that the bulk phone records program yielded any unique intelligence that was not also available to the government through less intrusive means. When government officials refer to these programs collectively, and say that "these programs" provided unique intelligence without pointing out that one program is doing all the work and the other is basically just along for the ride, in my judgment that is also a misleading statement.

And there have also been a number of misleading and inaccurate statements made about section 702 collection as well. Last month, Senator Udall and I wrote to the NSA Director to point out that the NSA's official fact sheet contained some misleading information and a significant inaccuracy that made protections for Americans' privacy sound much stronger than they actually are. The next day that fact sheet was taken down from the front

page of the NSA website. Would the misleading fact sheet still be up there if Senator Udall and I hadn't pushed to take it down? Given what it took to correct the misleading statements of the Director of National Intelligence and the National Security Agency that may well be the case.

So having walked you through how secret law, interpreted by a secret court, authorized secret surveillance, the obvious question is what is next? "Ron, what are you going to do about it?"

A few weeks ago more than a quarter of the U.S. Senate wrote to the Director of National Intelligence demanding public answers to additional questions about the use of the government's surveillance authorities. It's been two months since the disclosures by Mr. Snowden, and the signers of this letter - including key members of the senate leadership and committee chairs with decades of experience - have made it clear they are not going to accept more stonewalling or misleading statements.

Patriot Act reform legislation has also been introduced. The centerpiece of

this effort would require that the government show a demonstrated link to terrorism or espionage before collecting Americans' personal information.

Senators have also proposed legislation that would ensure that the legal analysis of secret court opinions interpreting surveillance law is declassified in a responsible manner. And I am collaborating with colleagues to develop other reforms that will bring openness, accountability, and the benefits of an adversarial process to the anachronistic operations of the most secretive court in America.

And most importantly, I and my colleagues are working to keep the public debate alive. We have exposed misleading statements. We are holding officials accountable. And we are showing that liberty and security are not incompatible.

The fact is, the side of transparency and openness is starting to put some points on the board.

As many of you are now aware, the NSA also had a bulk email records program that was similar to the bulk phone records program. This program operated under section 214 of the Patriot Act, which is known as the “pen register” provision, until fairly recently. My Intelligence Committee colleague Senator Udall and I were very concerned about this program’s impact on Americans’ civil liberties and privacy rights, and we spent a significant portion of 2011 pressing intelligence officials to provide evidence of its effectiveness. It turned out that they were unable to do so, and that statements that had been made about this program to both Congress and the FISA Court had significantly exaggerated the program’s effectiveness. The program was shut down that same year. So that was a big win for everyone who cares about Americans’ privacy and civil liberties, even though Senator Udall and I weren’t able to tell anyone about it until just a few weeks ago.

More recently, when the annual Intelligence Authorization bill was going through the Intelligence Committee late last year it included a few provisions that were meant to stop intelligence leaks but that would have

been disastrous to the news media's ability to report on foreign policy and national security. Among other things, it would have restricted the ability of former government officials to talk to the press, even about unclassified foreign policy matters. And it would have prohibited intelligence agencies from making anyone outside of a few high-level officials available for background briefings, even on unclassified matters. These provisions were intended to stop leaks, but it's clear to me that they would have significantly encroached upon the First Amendment, and led to a less-informed public debate on foreign policy and national security matters.

These anti-leaks provisions went through the committee process in secret, and the bill was agreed to by a vote of 14-1 (I'll let you all guess who that nay vote was). The bill then made its way to the Senate floor and a public debate. Once the bill became public, of course, it was promptly eviscerated by media and free speech advocates, who saw it as a terrible idea. I put a hold on the bill so that it could not be quickly passed without the discussion it deserved and within weeks, all of the anti-leaks provisions were removed.

A few months later, my colleagues and I were finally able to get the official Justice Department opinions laying out what the government believes the rules are for the targeted killings of Americans. You probably know this as the “drones” issue. These documents on killing Americans weren’t even being shared with members of Congress on a classified basis, let alone with the American people. You may have heard me say this before, but I believe every American has the right to know when their government thinks it is allowed to kill them. My colleagues and I fought publicly and privately to get these documents, used whatever procedural opportunities were available, and eventually got the documents we had demanded. Since then we’ve been looking them over and working out a strategy that would allow for the pertinent portions of these documents to be made public. I don’t take a backseat to anybody when it comes to protecting genuinely sensitive national security information, and I think most Americans expect that government agencies will sometimes conduct secret operations. But those agencies should never rely on secret law or authorities granted by secret courts.

We find ourselves at a truly unique time in our Constitutional history. The growth of digital technology, dramatic changes in the nature of warfare and the definition of a battlefield, and novel courts that run counter to everything the Founding Fathers imagined, make for a combustible mix. At this point in the speech I would usually conclude with the quote from Ben Franklin about giving up liberty for security and not deserving either, but I thought a different founding father might be more fitting today. James Madison, the father of our constitution, said that the the accumulation of executive, judicial and legislative powers into the hands of any faction is the very definition of tyranny. He then went on to assure the nation that the Constitution protected us from that fate. So, my question to you is: by allowing the executive to secretly follow a secret interpretation of the law under the supervision of a secret, non-adversarial court and occasional secret congressional hearings, how close are we coming to James Madison's "very definition of tyranny"? I believe we are allowing our country to drift a lot closer than we should, and if we don't take this opportunity to change course now, we will all live to regret it.