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The Minimalist Surveillance Reforms of USA Freedom

By Patrick Eddington

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On April 30, the House Judiciary Committee will take up a warmed-over version of last year's USA Freedom Act. The committee has offered a rather optimistic claim of the surveillance reforms the bill will accomplish if passed — an optimism I do not share (and my skepticism is buttressed by the concerns of transparency advocates and other well-informed NSA critics).

Passing the USA Freedom Act in its current form would effectively represent a repeat of the Protect America Act fiasco of the previous decade — an act of Congress that made legal a previously illegal surveillance program that did exactly nothing to protect the country, while costing billions and subjecting Americans to continued mass surveillance. And the decline of a real Congressional institutional ethic for holding the executive branch accountable for its misdeeds in the intelligence arena is a major reason why this is happening.

My doubts about the bill's likely effect are also based on the executive branch's well-documented penchant for playing legal word games with surveillance law — a practice key supporters of this bill have complained about loudly and often. But even if we suspend disbelief and assume the more optimistic interpretations of the legislation's effects come to pass, and that the executive branch will abide by the intent of the bill's authors, how will that reform compare with what's been revealed about the scope of NSA's activities since 9/11?

The revelations about the abuses of the Patriot Act Sec. 215 metadata program are what ignited this surveillance reform debate. Yet even the current version of the USA Freedom Act would not end the executive branch's authority to collect metadata; it would (assuming the best case scenario) simply narrow the scope of such metadata collection. It's a curious course of action given the fact that Obama's own Review Group on Intelligence and Communications Technology found that the metadata program prevented zero attacks on the United States. And as the *New York Times* recently reported, multiple government audits of this and other post-9/11 surveillance programs found them essentially useless in the fight against foreign terrorist organizations.

Perhaps the most remarkable thing about this debate — such as it is — is the refusal of the bill's proponents to actually deal with the fact that these surveillance authorities should never have existed in the first place, that they have been repeatedly renewed despite false claims of their effectiveness and their dubious constitutionality, and that existing oversight mechanisms have failed to correct executive branch surveillance over-reach in multiple areas.

Consider what this bill is not addressing:

- The "back door" searches conducted under Sec. 702 of the FISA Amendments Act.
- The expansive collection of U.S. Person data under Executive Order 12333.
- The targeting of anyone using internet anonymization technology such as Tor.
- NSA's subversion of encryption standards, supply chain interdiction operations, and espionage and spy recruitment efforts against international standards bodies.

The elephant in the room is the absolutely wretched state of the congressional response to the Surveillance State, demonstrated by the gap between the Congress's response to NSA's transgressions in the 1970's and it's post-Snowden oversight posture. As I noted in a recent *Washington Examiner* piece:

Contrast that with the Watergate era. The Congressional investigation into NSA domestic spying programs known as Shamrock and Minaret took place in 1975, and reforms under the Foreign Intelligence Surveillance Act (FISA) became law in 1978.

Those reforms were driven the most exhaustive congressional investigations of the US Intelligence Community in American history—an investigation that led to the creation of the House and Senate intelligence oversight committees and a ban on the domestic surveillance of Americans by those same agencies. Until 9/11, STELLAR WIND, and all that came after.

And despite the very real need for a similarly exhaustive examination of executive branch surveillance programs (including others, such as the DEA's own metadata collection program), Congress appears to have no appetite for taking that much needed step.

In his new book, *Democracy in the Dark*, former Church Committee chief counsel Fritz Schwartz, commenting on the problems with Congressional oversight of the Intelligence Community, notes that:

It is a truism that oversight bodies in both the public and the private sphere tend to be coopted by becoming too close to those they oversee. But truisms are often true. It is striking that…members of the intelligence committees generally…do not usually make waves or challenge the exclusivity of their super-secret access to secret information or their presumed lack of power to do anything about it.

With a very few prominent exceptions, that observation is now applicable to the Congress as a whole where executive branch surveillance excesses are concerned.

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