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The FY 2024 National Defense Authorization Act: Another ‘surveillance hawk’ triumph

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It’s not really a huge surprise, but last week the latest effort by domestic surveillance opponents to rein in the activities of federal agencies like the FBI and National Security Agency (NSA) ran into the legislative buzzsaw that is the House Rules Committee. It’s just the latest legislative setback for efforts to curb law enforcement and intelligence agency data collection on Americans.

On July 11, the committee rejected a number of amendments to the National Defense Authorization Act (NDAA) that would have, among other things, barred federal agencies from trying to undermine private encryption and prohibit the acquisition of geolocation or biometric data absent express congressional authorization. The encryption-related amendment was offered by four Democrats: Representatives Katie Porter, Ted Lieu, and Ro Khanna of California, and Suzan DelBene of Washington. The other relevant amendment was offered by Republican Scott Perry of Pennsylvania.

The fact that the effort to achieve surveillance and privacy reform came from rank-and-file members of both parties is a significant and hopeful “silver lining” to an otherwise dismal outcome.

Unfortunately, the fact that the GOP-controlled Rules Committee shot down the amendments is a reminder that House Speaker Kevin McCarthy, R-California, and Majority Leader Steve Scalise, R-Louisiana, remain, at least at this point, committed to allowing FBI and NSA to continue operating pretty much as they have been since the 9/11 attacks. Both men have supported reauthorization of major surveillance programs in the past.

Had McCarthy’s position shifted significantly on domestic surveillance reform, he could’ve directed Rules Committee Chairman Tom Cole, R-Oklahoma, to ensure those amendments were approved for floor action. That McCarthy chose not to is a potentially bad sign for prospects of reforming Section 702 of the Foreign Intelligence Surveillance Act (FISA), which is set to expire on New Year’s Eve 2023.

Indeed, with the calendar year half gone and only about 50 actual House legislative days left in 2023, to date no bill has been introduced as yet to reform FISA Section 702. In fact, only one bill dealing with FISA or the PATRIOT Act has been introduced this session: H.R. 4267 by Rep. W. Greg Steube, R-Florida, which would *repeal in their entirety* the PATRIOT Act and the FISA Amendments Act (the law containing FISA Section 702).

I love the idea, and nearly 10 years ago I helped my then-boss, Rep. Rush Holt, D-New Jersey, try to accomplish that very goal via the Surveillance State Repeal Act (H.R. 2818).

Less than three months before Holt introduced H.R. 2818, Edward Snowden's amazing and horrifying revelations about federal government surveillance abuses had made headlines around the world. Many inside and outside of Congress initially thought that Snowden's action might just be what was needed to get the House and Senate to reexamine, if not end, the ineffective and draconian dragnet surveillance powers that had been given to the Executive branch after the September 11, 2001 terrorist attacks on America.

Instead, Snowden was indicted by the Justice Department and attacked by multiple House and Senate members for exposing the FBI's and NSA's surveillance-related abuses. Holt's bill went nowhere, and given what just happened with the NDAA surveillance reform amendments, I doubt Steube's bill will fare any better.

It is still possible that a stand-alone FISA Section 702 reform bill will be introduced before its December 31, 2023 expiration deadline. It's even possible that an attempt will be made to try to attach such a bill to "must pass" legislation or that such a bill will, via the normal legislative meat grinder process, make its way to the House or Senate floor for a vote.

But unless enough rank-and-file House and Senate members make it clear to their respective party leaderships that the domestic surveillance status quo is over (by credibly threatening to let the FISA Section 702 program expire without ever getting a vote), our post-9/11 American Surveillance State stands a good chance of remaining a permanent, and liberty-crushing, fact of life.

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