



FISA 'reform': Groundhog Day edition

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For over six months, Congress, national security bureaucrats and civil liberties groups have engaged in the surveillance law equivalent of the 1993 Bill Murray movie “Groundhog Day.” It is a process that has happened repeatedly since the first PATRIOT Act reauthorization battle in 2005.

The script is always the same. In Act I, fresh abuses of surveillance authorities by federal law enforcement and intelligence agencies are revealed in the press. Act II involves civil society organizations ritualistically denouncing the abuses and calling for changes in the law that are sold as a means to prevent future abuse. Act III involves a tiny handful of congressional surveillance opponents vainly trying to prevent the respective leaderships of their parties from passing a “reform” bill that actually makes future abuses a virtual certainty. Act IV is the denouement, where the anti-reform “reform” bill passes both chambers and is signed into law, with at least one “sunset” (i.e., expiration) provision tacked on to ensure the “Groundhog Day”-like political theater will be repeated a few years later.

In the movie, it was a change in the attitude of Bill Murray’s character that finally ended the time loop. In December 2005, it was the New York Times’ revelation of President George W. Bush’s unconstitutional STELLAR WIND warrantless electronic surveillance program that started such a cycle. But after a more than two-year, very public battle in the press and Congress over the scandal, Congress elected to make the illegal STELLAR WIND (or at least portions of it) legal via the FISA Amendments Act in 2008—since reauthorized twice.

Seven years ago, it was thought that the revelations of yet more massive, warrantless surveillance of Americans’ telephone traffic by NSA contractor-turned-whistleblower Edward Snowden would augur in real reforms—particularly after it was revealed that the PATRIOT Act telephone metadata program in question had never stopped a single terrorist attack on the United States.

Indeed, in his new book “Dark Mirror: Edward Snowden and the American Surveillance State,” journalist Bart Gellman posits that “The Snowden effect shifted popular culture. It brought about legal, diplomatic, political and legislative challenges to the prevailing model at the NSA.” (p. 351)

In reality, genuine legislative efforts to reverse NSA surveillance overreach—even one that passed the House with 293 votes—were all sabotaged by House and Senate leadership, on a bipartisan basis. Instead, Congress in 2015 passed the USA Freedom Act, which we now know

did not at all end the failed NSA telephone metadata program. That legislation also had a “sunset” provision, which brings us to the current iteration of our failed surveillance reform time loop.

It began last fall, when the Trump administration announced it would seek to extend three PATRIOT Act authorities set to expire in December 2019, including authority for the failed NSA telephone metadata program despite its alleged termination earlier in 2019. Civil liberties groups again called for an end to the program and the legal authority to ever restart it.

At the end of 2019, Congress temporarily extended the authorities in question through March 2020, at which time reformers seemed to get at least part of what they wanted—the statutory death of the telephone metadata program. But it was a pyrrhic victory, as then-Senate Intelligence Committee Chairman Richard Burr (R-NC) disclosed on the Senate floor that NSA could conduct exactly the same types of surveillance under EO 12333. Reformers did ultimately get a deal for a vote on three additional amendments to the legislation after yet another temporary extension of the expiring authorities, which lapsed earlier this month.

But once again, Senate Majority Leader Mitch McConnell (R-Ky.) outmaneuvered reformers by putting a 60-vote threshold on the proposed amendments, causing the most important one—offered by Sens. Ron Wyden (D-Ore.) and Steve Daines (R-Mont.)—to come up just one vote short. Had it passed, the Wyden-Daines amendment would’ve imposed a warrant requirement for law enforcement to obtain the internet web browsing and internet search histories of an American citizen.

However, since the bill has to go back to the House for final action, reformers are pushing to get a House version of Wyden-Daines amendment voted on this week. It appears that reformers have secured a vote on an amendment by Rep. Zoe Lofgren (D-Calif.) that allegedly largely mirrors the Wyden-Daines proposal. Even if Lofgren and her allies prevail on the House floor, the bill would once again have to go back to the Senate. The question now is whether the 15-year surveillance reform Groundhog Day cycle will finally be broken.

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