



The surveillance 'reform' charades begin

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On Wednesday morning at 10 a.m., the House Judiciary Committee will hear from executive branch witnesses on the alleged need to renew a counterterrorism surveillance program that has never stopped a single attack on America.

Everyone involved in this process knows the PATRIOT Act. Sec. 215 telephone metadata program has never worked. The Privacy and Civil Liberties Oversight Board (PCLOB) has said so. President Obama's own hand-picked experts said so. And earlier this year, the agencies these executive branch witnesses represent told the Congress they were shutting down the program because it didn't work. In fact, earlier this month the conservative/libertarian group FreedomWorks and the hard-left activist organization Demand Progress jointly released a damning report showing how frequently NSA and the FBI had abused the program, including misleading or even outright lying to Congress about its effectiveness.

So what changed?

The Trump administration decided to ask for its renewal anyway, telling key House and Senate leaders in a Aug. 14, 2019 letter that despite the telephone metadata program's failure, "as technology changes, our adversaries' tradecraft and communications habits will continue to evolve and adapt. In light of this dynamic environment, the Administration supports reauthorization of this provision as well."

If anything, changing technology and people's digital habits will make the program obsolete, and in fact may already have done so.

That's the thing about spies and cops, though: once you give them a legal authority to do something, they never want to give it up—even if it doesn't work, violates citizens' constitutional rights (as this program did), and waste gobs of taxpayer money. This program did all three. It should never have existed in the first place, and it certainly should not be renewed now.

Indeed, while Congress goes through another Ground Hog Day legislative exercise on the failed PATRIOT Act telephone metadata program, it's failing to address other, even more sweeping surveillance activities that are effectively unregulated.

Executive Order 12333 is the governing document for the day-to-day surveillance and intelligence activities carried out by CIA, NSA, the FBI and other federal intelligence components. Promulgated by President Reagan in 1981, Congress has never conducted comprehensive, open hearings to examine what kinds of activities are carried out under this executive order—and what constitutional violations may have been committed under it. That job was outsourced to the PCLOB, which has completed at least one and possibly as many as three reports on EO 12333 activities.

When I filed a Freedom of Information Act request earlier this year seeking any such reports and related data, the PCLOB stiffed me on it—and also declined to tell me whether executive branch intelligence agencies had refused to provide it with requested information. If they have—and I suspect it's true—allowing them to do so would effectively neuter PCLOB as an oversight body.

I may well end up litigating the matter in federal court, but the House Judiciary Committee could short circuit the process and do itself a favor by asking for all PCLOB EO 12333 reports right now. No surveillance legislation should move through either chamber until public hearings on any EO 12333 reports produced by PCLOB—or blocked by lack of Intelligence Community (IC) cooperation—have taken place. Anything less would be just another example of Congress shirking its duty to keep the IC and FBI on a tight leash.

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