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Surveillance "Reform": The Fourth Amendment's Long, Slow, Goodbye

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Over 16 years after the 9/11 attacks and the subsequent repeated passage or renewal of draconian "temporary" but "emergency" domestic surveillance laws in response, it's fair to ask: Have we officially abandoned the Fourth Amendment in the Bill of Rights?

With the expiration of Section 702 of the FISA Amendments Act (FAA) less than three months away, now is a good time to review the effects of these surveillance laws in the seemingly endless "War on Terror." But first, a quick recap of America's embrace of mass surveillance in the post-9/11 era.

Within six weeks of the terrorist attacks in 2001, and with virtually no serious debate, Congress passed the behemoth PATRIOT Act. The law created vast new government surveillance powers that abandoned the Fourth Amendment's across-the-board probable cause warrant requirement. In an October 11, 2001 speech discussing the Senate version of the legislation, Sen. Diane Feinstein (D-Calif.) assured terrified civil libertarians that the PATRIOT Act's five-year "sunset" clause governing 15 of the bill's provisions would serve "as a valuable check on the potential abuse of the new powers granted in the bill."

Unbeknownst to the public and most members of Congress, the Bush administration allowed key authorities of the PATRIOT Act to be abused, a fact only brought to light in 2013 by Edward Snowden's revelations of mass telephone surveillance conducted under Section 215 of the PATRIOT Act.

Section 215 is one of the 15 "temporary" provisions that has been renewed repeatedly since 2001, making a mockery of Feinstein's assurance that the "sunset" provision would act as a "check" on any abuse of the law. Today, 12 of those 15 "temporary" and "emergency" surveillance measures are permanent law.

Thanks to another document made public by Snowden, we know that three days after the 9/11 attacks, then-NSA Director Michael Hayden initiated a *secret* warrantless surveillance program encompassing Americans in contact with anyone in Afghanistan. Over the ensuing weeks, it would become a multi-pronged warrantless spying effort code-named STELLAR WIND. After the *New York Times* revealed this unconstitutional surveillance in December 2005, thanks to the help of a whistleblower at the Justice Department, the Congress and the Bush administration

spent the next two years trying to make the illegal surveillance legal. Their final product, passed in 2008, was the FAA—renewed with little debate in 2012 and now, because of a "sunset" provision, is set to expire on December 31.

The key provision of the FAA that is the primary focus of debate is Section 702, which allows the government to target the communications of foreign entities even if the government knows it will likely sweep up the emails, text messages, and phone calls of innocent Americans in the process.

Have FAA's authorities been used to subvert the Fourth Amendment and the constitutional rights of Americans, just as the PATRIOT Act has? Yes. Repeatedly.

In September, the politically progressive group Demand Progress issued a scathing report on documented abuses of the FAA, drawing directly from partially declassified Foreign Intelligence Surveillance Court (FISC) records. The findings showed that aspects of the government's Section 702 information collection, revealed in 2011, acquired "non-targeted, entirely domestic communications," violating the Fourth Amendment. Indeed, the FISC found that the NSA engaged for 12 years in types of surveillance that FISC would eventually deem unlawful, with NSA only ceasing the violations under repeated—but ultimately empty—threats of criminal sanctions.

This report was preceded earlier this year by the publication of Stanford law professor (and *Just Security* editor) Jennifer Granick's excellent book *American Spies*, which chronicles in detail the rights violations and false claims of effectiveness of the PATRIOT Act and the FAA by NSA and FBI officials.

Sixteen years after creating the biggest unconstitutional mass surveillance dragnet in American history, we have documentary evidence—from the federal government's own records—of repeated, systemic abuses of these authorities. We also know they're costing taxpayers, whose digital communications are swept up by these programs, tens of millions of dollars annually. What we don't have is any public evidence that these surveillance practices have made us safer.

What's the response of Congress? It's proposing to reauthorize the same Section 702 program, which has led to these abuses.

On Oct. 6, on a bipartisan basis, the House Judiciary Committee introduced the ill-named USA Liberty Act (HR 3989). In my initial analysis of the bill, I noted that the proposed legislation ignored every major problem highlighted in the Demand Progress report. The bill's authors also ignored an even longer list of Section 702 reform proposals put forward by nearly 60 civil society groups.

Meanwhile, the Director of National Intelligence Dan Coats, NSA Director Adm. Mike Rogers, and FBI Director Christopher Wray have mounted a public campaign to renew Section 702 unchanged. At a meeting with reporters on Sept. 25, Coats and his colleagues argued that 702 is a vital surveillance authority that has helped thwart numerous terrorist plots. On background, I asked one of the reporters who attended that meeting whether Coats, Rogers, or Wray offered a single example of 702 stopping an attack on the United States. They did not—which tracks with Granick's findings in *American Spies*.

Despite the lack of public, independently confirmed evidence that 702 has prevented terrorist attacks on America, Coats, Rogers, and Wray are winning the argument that 702 should remain the law of the land.

If you think about it, the indifference of the House Judiciary Committee leadership to these proposals is not terribly surprising. The overwhelming majority of the groups calling for changes to a surveillance law that should never have existed have no political power.

Unlike the National Rifle Association, they operate no political action committee or similar electoral vehicle that could be used to strike fear into House or Senate members who dare to put forward such proposals. Thus, House and Senate members know that they can safely ignore these groups, no matter how many press releases, Facebook posts, or completely fact-based reports about surveillance abuses they churn out–just as they have ignored these same groups for nearly 20 years as Congress has passed or reauthorized laws that, bit by bit, have eviscerated the Fourth Amendment.

My prediction: Absent another Snowden-like revelation, Section 702 of the FAA will be reauthorized largely without change, and any changes will be cosmetic, and almost certainly abused. Whether it has a "sunset" provision or not is now politically and practically meaningless.

After this latest assault on the Bill of Rights has been signed into law by President Donald Trump later this year or early next, opponents will have one more—and probably final—chance to roll back the damage already done when the three remaining PATRIOT Act provisions subject to "sunset" come due at the end of 2019. Unless the privacy and civil liberties community revamps its entire approach and structure for advocacy on these issues, the long, slow goodbye to the Fourth Amendment will come to an end just before Christmas in 2019.

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