



No Surveillance Reform in Defense Policy Bill

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As I predicted 72 hours ago, the FY18 National Defense Authorization Act (NDAA) will not be a vehicle for reforming National Security Agency (NSA) surveillance authorities under Sec. 702 of the FISA Amendments Act (FAA). The twist is that while the House Rules Committee did disallow an amendment to prevent “back door” warrantless searches of the stored communications of Americans (the full NDAA amendment list is available here), the author of all three surveillance reform amendments to the bill, Rep. Ted Lieu (D-CA) withdrew the other two before a Rules Committee vote. Lieu’s office offered the author the following statement on the decision:

Mr. Lieu has always been a strong advocate for protecting our civil liberties and our privacy. He introduced these NDAA amendments (which have been offered previously by other Members) to prevent warrantless searches of Americans’ data under Section 702 of the Foreign Intelligence Surveillance Act. Warrantless searches are just one of many problems with the law, which is set to expire at the end of this year. The House Judiciary Committee is currently negotiating a package that reauthorizes the necessary foreign surveillance authorities while adding sweeping reforms to protect Americans’ civil liberties. We were asked to withdraw our amendments this week to allow those reform discussions to continue in good faith, and we obliged because we are optimistic about achieving our goals. The amendment decision in no way changes the fact that a broad, bipartisan coalition of Member’s will fight any attempt to reauthorize Section 702 without serious reform.

So where does that leave FAA reform prospects? That will depend in no small measure on how determined reformers are to push the House GOP leadership on the question. As I write these lines, House Judiciary Committee Chairman Bob Goodlatte (R-VA) and Ranking Member John Conyers (D-MI) are working on competing FAA bills; while I expect the Conyers bill to offer more sweeping reform proposals, Goodlatte will no doubt not allow the Conyers bill to get a vote in committee. All of this means that unless at least 5-6 GOP House Judiciary members make it clear to Goodlatte that any FAA Sec. 702 reform bill brought up in committee must be

amendable, what passes out of that committee and goes to the House floor for a vote may be just as anemic a reform measure as the 2015 USA Freedom Act.

What would real reform look like? In an ideal world, the FAA would simply sunset and become an historical footnote. If the American public was more politically engaged on this issue, that outcome would be within reach. Unfortunately, that's not the case at the moment. It's possible that further surveillance-related revelations in the "Russiagate" scandal might change that dynamic, but those pushing for real surveillance reform cannot rely on chance to achieve their aims. Pro-surveillance advocates are certainly leaving nothing to chance.

The Office of the Director of National Intelligence (ODNI) is pushing hard to maintain this surveillance authority, and if possible, see that it becomes permanent and remains unchanged otherwise. As I noted in *The American Conservative* earlier this year, there's plenty of reason to question the veracity of the executive branch's claims about the necessity and efficacy of Sec. 702 collection.

Accordingly, I'll judge any Sec. 702 reform bill by the following criteria. First, does it ban the collection & retention of U.S. Person data unless said data is collected pursuant to an authorized investigation governed by a probable cause-based warrant? Does it require the verified destruction of non-investigation relevant U.S. Person data extant in Intelligence Community IT systems? Does it require mandatory compliance audits by (preferably) the Government Accountability Office or (2nd choice) the Intelligence Community Inspector General? Does it ban so-called "about" collection, as suggested by Rep. Tulsi Gabbard (D-HI)? Does it mandate efficacy and cost audits?

If the bill that comes out of the House Judiciary Committee does not do all of these things (and ideally several more), then it's just another edition of the old Capitol Hill "Let's-Not-But-Say-We-Did" legislative shell game.

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