The Feinstein Reform Formula

By: Binoy Kampmark - November 2, 2013

It's clear that Feinstein thinks that if you're going to legalize bulk collection you've got to claim to be banning it. — Julian Sanchez, Cato Institute, Oct 31, 2013

Commentators should not be surprised. The public should not be surprised. Students of Congress' venal and sometimes vacuous antics should not be surprised. But Senator Dianne Feinstein of the Senate Intelligence Committee was always going to make good her promise to reform NSA practices while not reforming them at all.

So what does this very rough jewel of reform, the FISA Improvements Act of 2013, supposedly do? First, the candyfloss: making the NSA issue public reports about how often it consults and questions its databases; opening the FISA court process to greater involvement from external advocates by way of amicus briefs. The NSA will also report to Congress on significant FISA court opinions, though this will only come in the form of summaries. The full decisions will not be released.

Where the bill is an abysmal failure is the area most people have an interest in: the issue of bulk collection of calls and its presumptive violation of privacy. A reading of the bill suggests that it does prohibit bulk collection (section 2 (a)(i)) only to then explain extensively the various supplemental procedures that authorise the government to retain bulk records. As Adam Serwer noted, "The Senate intelligence committee just gave the National Security Agency the best bill it could have asked for" (MSNBC, Oct 31).

Feinstein's own statement is revealing about this double play. First, the program is legal and justified. "The NSA call-records program is legal and subject to extensive congressional and judicial oversight." The underlying message here is that reforming what is legal to begin with is hardly necessary. Then, she claims that "more can and should be done to increase transparency and build public support for privacy protections in place." This is Feinstein's Halloween gift to the American public, the song and dance routine on reform that ends with the status quo triumphant.

In June, it was revealed that the NSA had used a rather elastic interpretation of s. 215 some six years ago to engage on massive surveillance and gathering of every phone record in the United States. The provision had found its way into the Patriot Act in 2006 to authorise the use of secret warrants to gather virtually any type of "tangible" record. An unconstitutional program that commenced in 2001 was thereby expanded. As Trevor Timm of the Electronic Frontier Foundation explains, "This is not an NSA reform bill, it's an NSA entrenchment bill" (EFF, Oct 31).

According to Michelle Richardson of the ACLU, “I think they want to create a veneer of oversight and privacy without substantively changing the programs, and you just can’t do that.” Unfortunately, Feinstein thinks she can. In other words, the operative nature of s. 215 is that it can only be used if the rules are complied with, thereby allowing the codification of an insidious practice.

This peculiarity in legislation has precedent. A way of targeting a practice deemed inappropriate, if not patently illegal, is to legalise it. It is, in fact, one of the oldest rules in the book of legislation. Since surveillance is habitual, the collection of data on US citizens and non-citizens constant despite calls to the contrary, why not regulate it by congressional fiat?

This is reminiscent of the argument on torture warrants trotted out by a somewhat blunted Alan Dershowitz when water boarding by US agents became all the rage: torture might be illegal under US and international law but it is unavoidable. States and their agents can’t help themselves when confronted with terror suspects. Hence the need to regulate it via the judicial process. The only catch here is that no such process can ever be regulated. The emphasis must always be on absolute prohibition. Such laws cannot be picked, chewed and adjusted. Elasticity has no part to play in freedoms that should otherwise be indivisible.

The lawmakers on the Hill were always going to be divided on the subject of how to go forth “reforming” the NSA. Democratic Senator Patrick Leahy and Republic Rep. Jim Sensenbrenner are of the view that manic bulk gathering of data is an unjustified violation of privacy. Their own version of reform – the Leahy-Sensenbrenner bill, is also on the cards and will do battle with Feinstein’s version. The two senators on the Intelligence Committee who might have made a difference – Oregon Democratic Senator Ron Wyden and Colorado Democratic Senator Mark Udall – were outgunned in the committee, which fittingly held their meeting in hermetic, closed session. The bill passed 11-4.

Udall’s statement on Thursday was clear. “The NSA’s ongoing, invasive surveillance of Americans’ private information does not respect our constitutional values and needs fundamental reform – not incidental changes.” In the reform wars over the NSA, there is little doubt that the information gatherers and their backers have drawn first blood. But the days and battles promise to be long on this subject.