THE HILL

NSA reform: Not dead yet

By Patrick G. Eddington
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The headlines were predictably lurid:

NSA Reform Dies In The Senate

USA Freedom Act Fails To Move Forward... For Incredibly Stupid Reasons

Congress Has Killed NSA Reform

Civil liberties groups vow to fight on after Senate kills NSA reform bill

So are those headlines accurate? Are prospects for reforming NSA surveillance authorities history?

Hardly.

What happened on the Senate floor On Tuesday night is what often happens on the Senate floor: Senate surveillance hawks rounded up just enough votes to procedurally kill a bill that should have been brought up under a genuinely open process. As my Cato colleague Julian Sanchez noted, the bill--if it had been enacted in its current form--really wouldn't have changed much as far as how the National Security Agency (NSA) operates its signals intelligence (SIGINT) programs. Therein lies both the problem and the opportunity.

The problem is that NSA reform advocates could write the tightest possible *authorizing* language imaginable, and NSA's lawyers--with help from colleagues at the Department of Justice (DoJ) and likely the Office of Legal Counsel (OLC)--would find a creative way to effectively evade any proposed legislative restrictions, unless those restrictions were outright prohibitions, backed up with the threat of funding cuts. And that brings me to the opportunity.

On June 19, 2014 the House passed the only real restrictions on NSA activities in the post-Snowden era. They came in the form of an amendment to the Fiscal Year 2015 Defense Department Appropriations bill (HR 4870) offered by Reps. Tom Massie (R-Ky.), Zoe Lofgren (D-Calif.), Rush Holt (D-N.J.), Ted Poe (R-Texas) and about a dozen others from both sides of the aisle. That two-part amendment is as simple as it is clever. First, it prohibits funding for any searches of the FISA Amendments Act Sec. 702 database--the one containing the contents of the emails and other stored communications of American citizens--in the absence of an ongoing

investigation against a U.S. person per other FISA authorities. Second, it prohibits the government from spending taxpayer money to pressure technology companies into building flawed encryption or other "back doors" into their products to facilitate U.S. government surveillance.

This latter issue has become a huge concern for Silicon Valley companies in the wake of revelations that NSA was intercepting tech products in the U.S. supply chain, bugging them, then sending them onto their destination. This followed the March 2014 revelation about NSA efforts to subvert encryption standards for surveillance access purposes. Cisco CEO John Chambers made his feelings clear on the matter in a letter to President Obama in May.

Indeed, the battle over U.S. government surveillance practices has both constitutional and economic dimensions.

It's bad enough that Americans feel that their constitutional rights are being technologically subverted in the name of national security. The problem is compounded when the global consumers of American technology and services start believing that those products and services are nothing more than gateways for NSA to spy on them as well. Last year, the Information Technology and Innovation Foundation estimated that U.S. economic losses stemming from the surveillance scandal could run into the tens of billions of dollars. NSA's out-of-control surveillance activities thus not only threaten the constitutional rights of all Americans, they threaten the nation's economic security as well.

In June 2014, Massie, Lofgren, Holt and their ad-hoc progressive-libertarian coalition delivered some of the protections Chambers and his colleagues were seeking, with the House voting by a veto-override majority to pass the amendment.

An obvious question arises: did Democratic House losses weaken this coalition to the point a repeat of that vote is no longer possible?

Again, no.

While House Dems did lose about a dozen members (a majority of whom voted for the amendment), two incoming Republicans--Dave Brat of Virginia and Rod Blum of Iowa--are on record supporting NSA surveillance authority reform. So in that respect, the prospects of that progressive-libertarian coalition keeping NSA reform moving via the *appropriations* process remains quite real, provided the DoD spending bill itself does not become a casualty of the looming confrontation between the Obama administration and congressional Republicans over immigration reform.

If the administration elects to move on immigration reform unilaterally (through executive orders, for example), the House GOP leadership could include riders on any FY15 funding measure (be it an omnibus or a continuing resolution) to prevent any funds from being used to implement said executive orders. If the DoD appropriations bill (which includes the NSA reform amendment) gets included in a larger omnibus spending bill with immigration riders, a presidential veto seems likely—and that would certainly represent another lost opportunity to use

the power of the purse to bring NSA surveillance activities back into line with the Fourth Amendment. But the setback would likely only be a temporary one--because for NSA surveillance proponents, the clock is ticking.

In June 2015, three key PATRIOT Act authorities are set to expire: the controversial Sec. 215 "metadata" collection program, the so-called "lone wolf" provision, and "roving wiretap" authority. It is this last provision that Intelligence Community insiders fear losing the most--and that fear, and the ticking clock, are what give NSA surveillance reform advocates the wedge issue they need to get the concessions necessary to rein in NSA's most questionable collection activities and prevent further harm to America's technology sector and its citizen's rights. Far from being over, the fight over NSA surveillance reform is entering a new and critical phase.

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