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USA Liberty Act: More of the Same Old Surveillance State Games

Every time Section 702 of the Foreign Intelligence Surveillance Act (FISA) is set to expire, the surveillance hawks prop it back up, give it a fresh coat of paint, and promise to (*really, this time*) protect the privacy of American citizens. And every time, the "reforms" succeed in refueling the surveillance machine so that it can continue to bulldoze citizens' rights in the name of national security. With the surveillance programs authorized under Section 702 set to expire on December 31, 2017, the surveillance hawks are at it again.

On Thursday, House Judiciary Committee Chairman Bob Goodlatte (R-Va.) and Ranking Member John Conyers, Jr. (D-Mich.), along with Reps. Jim Sensenbrenner (R-Wis.) and Sheila Jackson Lee (D-Texas), held a press conference to announce the introduction of the USA Liberty Act (a misnomer not to be confused with the equally misnamed USA Freedom Act, though — given that they both promise "liberty" and "freedom" while empowering the surveillance state to strip Americans of those very things — your confusion would be easily forgiven).

Section 702 is deservedly one of the most controversial portions of FISA, since it authorizes the collection of massive amounts of data from a wide variety of sources with so little real oversight and almost no real restrictions. The Center for Democracy & Technology (CDT) aptly describes Section 702 as:

> Section 702 of the Foreign Intelligence Surveillance Act (FISA) is a statute that authorizes the collection, use, and dissemination of electronic communications content stored by U.S. internet service providers (such as Google, Facebook, and Microsoft) or traveling across the internet's "backbone" (with the compelled assistance of U.S. telecom providers such as AT&T and Verizon). Section 702 sunsets on December 31, 2017.

CDT also acknowledges that the "restrictions" that ostensibly keep Section 702 in line are inadequate to the task, stating:

> Unlike "traditional" FISA surveillance, Section 702 does not require that the surveillance target be a suspected terrorist, spy, or other agent of a foreign power. Section 702 only requires that the targets be non-U.S. persons located abroad, and that a "significant purpose" of the surveillance be to obtain "foreign intelligence information" (the primary purpose of the surveillance can be something else entirely).

That is an accurate (if incomplete) assessment, since, while many claim that the powers granted by Section 702 are abused, the reality is that they are designed for abuse. The surveillance hawks love Section 702 because it allows that abuse.

The Electronic Frontier Foundation (EFF) — an organization dedicated to defending digital liberty in an age of nearly ubiquitous surveillance — describes the surveillance that takes place under the authority of Section 702 as "warrantless" and "suspiciousness." EFF's description goes on to say:

> The U.S. government uses Section 702 to justify the collection of the communications of innocent people overseas and in the United States by tapping into the cables that carry domestic and international Internet communications through what's known as Upstream surveillance. The government also forces major U.S. tech companies to turn over private communications stored on their servers through a program often referred to as PRISM. While the programs under Section 702 are theoretically aimed at foreigners outside the United States, they constantly collect Americans' communications with no meaningful oversight from the courts.

The type of surveillance conducted under Section 702 was first brought to the attention of Americans as part of the Snowden revelations. American citizens, outraged by what they learned, demanded reform of the surveillance state. The surveillance hawks promised reform and in June 2015 delivered the USA Freedom Act — equal parts smoke and mirrors. As this writer reported in December 2015, when that act took effect:

> The USA FREEDOM Act, like the USA PATRIOT Act of 2001, is a misnomer. The name is a not-very-subtle manipulation, designed to hide from the American people the real nature of the law. The architects of the USA PATRIOT Act used the word "patriot" to persuade Americans that the "patriotic" way to confront the specter of terrorism was to trade liberty for security. It took the one but never delivered the other. Likewise, in the USA FREEDOM Act, the use of the word "freedom" is designed to convince Americans that their freedom is being returned to them by "reforming" the surveillance state. In fact, no such reform is taking place.

The USA Freedom Act was not a reform; it was merely the next piece of sleight-of-hand in a shell game being played by the surveillance state with American citizens as the victims. Predictable and systemic abuses of Section 702 powers are well documented and — while they appear to have reached a peak in 2015/2016 — have not halted, even with the advent of the USA Freedom Act.

The problem is that warrantless surveillance is — regardless of the reasons given — a violation of the Fourth Amendment guarantee against unreasonable searches. As Dr. Ron Paul explained, "There is no 'terrorist' exception in the Fourth Amendment. Saying a good end (capturing terrorists) justifies a bad means (mass surveillance) gives the government a blank check to violate our liberties."

After passing the cleverly misnamed USA Freedom Act off on the American people in a successful bid to keep the surveillance machine running at full steam, the surveillance hawks in both the intelligence community and Congress knew that they would need another piece of crafty legislation to keep the game going once the sunset provision for Section 702 came up again. That crafty piece of legislation is the USA Liberty Act. The name — and the content — of this bill are an insult to the intelligence of the American people.

As the Project On Government Oversight (POGO) explains:

> The Project On Government Oversight has pushed for reforms to be made to FISA that adequately protect American citizens' civil liberties while keeping the country safe from harm. This piece of legislation fails to accomplish either of these goals and we are specifically concerned with three areas of the newly unveiled legislation.

The three areas of concern for POGO are:

1. Whistleblower Protections for Intelligence Community Contractors — about which POGO says:

> As written, the bill lacks teeth to enforce the provisions against retaliation for blowing the whistle, and we call on the sponsors to add stronger enforcement mechanisms to this bill for both contractors and federal employees through the committee process before sending it to the Floor for a vote. Until these employees feel comfortable blowing the whistle because they know they will be protected from retaliation, Congress is creating an incentive to go outside of proper reporting channels.

2. Exemptions for Privacy and Civil Liberties Oversight Board (PCLOB) — about which POGO says:

> This draft bill purports to exempt the essential oversight board from the Government in the Sunshine Act, an exemption that would allow the members of the board to meet in secret to discuss issues under its purview.
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> We are sympathetic to the argument that open-meeting laws may complicate the ability of the board to complete its mission, but a full exemption from transparency laws is not the responsible way to address this problem. We urge the committee to work with civil society to find a common ground that promotes adequate transparency without hindering the work of this oversight board.

3. Surveillance Program Still Puts Americans' Civil Liberties at Risk — about which POGO says:

> While this draft bill attempts to provide a fix for the backdoor search loophole, it does not go far enough to ensure Americans' civil liberties are protected. By allowing an exception for foreign intelligence searches with an overly broad definition of such searches, Americans may still find their Fourth Amendment rights violated.
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> We applaud the inclusion of reporting to Congress of an estimate of the number of Americans' communications that have been subject to "incidental" collection under section 702, but we encourage the committee to make this report available to the public. We also encourage the committee to consider further provisions to increase public oversight over these programs.

CDT, EFF, and POGO are far from alone in their concerns about the continuance of the Section 702 game under the so-called USA Liberty Act. Tom's Hardware — a website that devotes its attention to tech news about new gadgets and computer parts — weighed in on the topic with an article titled "USA Liberty Act: New 'Foreign' Intelligence Law Will Legalize Spying On Americans." The article points out that, "although the bill does aim to curtail some illegal NSA activities and abuses that shouldn't have happened in the first place, it also codifies into law the bulk collection of Americans' data. It also codifies the NSA's ability to share data with other domestic agencies." The article goes on to say:

> President Obama also expanded some executive rules last year that allowed the NSA to share raw intelligence data without a warrant with 16 other agencies. Because the shared data is raw, Americans' data can be seen by agents from any of the 17 agencies, without any judicial approval. Such broad access may also put this data at risk from cyber attacks.
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> It's not clear if the new USA Liberty Act, which does require a warrant when Americans' communications content is accessed by the other 16 agencies, including the FBI, overrides those rules. The USA Liberty Act is also much more relaxed when it comes to metadata (phone or email records, etc.), requiring only a supervisor's approval for access.
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> What is clear is that until last year, the so-called "incidental" data collected on Americans through foreign intelligence programs was supposed to be minimized and then automatically purged.

> However, President Obama's expanded rules now allow 17 agencies to scour through that data before any minimization or purging happens.
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> Meanwhile, the USA Liberty Act seems to imply that data will be kept long enough that there will be enough time for domestic agencies to get warrants from judges or other type of approvals to obtain it. In other words, the supposed "incidental" collection is starting to seem less incidental and more purposeful.

And there is the rub; the NSA and other intelligence agencies have made it so normal for the exceptions to outnumber the rules that it is obvious to all but the most casual of observers that the rules are designed to give way to exceptions.

The American people deserve better. And all Americans who are concerned about preserving liberty should call and write their senators and representatives and tell them to vote "no" on the USA Liberty Act.

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