

The Deceptions of Freedom: Reviving the Patriot Act

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Even as talk about the expiry of various parts of the USA Patriot Act was taking place, the background was never going to move that much. Assumptions of security – or its other side, paralytic insecurity – are so entrenched in the complex of power that they tend to win out. Empires on the run tend to seek ways of affirming their demise.

That said, media outlets would speak about how, “For the first time since the September 11, 2001 attack triggered a massive US counterterrorism response, the US Congress is curtailing the broad electronic spying authority given to the National Security Agency” (*Al Jazeera*, Jun 2). Had Edward Snowden’s revelations from 2013 on warrantless mass surveillance won the day?

Elizabeth Goitein, co-director of the Liberty and National Security Project at the Brennan Centre for Justice at New York University slipped into hyperbole in thinking so, calling it “a new day. We haven’t seen anything like this since 9/11.” The vote came in at a convincing 67-32 for the panacea coated USA Freedom Act, a term that says as much about the fetishistic nature of freedom in US legislation as it does about its illusions. If freedom needs to be mentioned in text, you know the political taxidermist is getting ready to stuff it into a cabinet.

The United States Court of Appeals for the Second Circuit’s ruling handed down last month had put the skids under the bulk collection of phone metadata, providing impetus for the legislation specifically on the issue of section 215 and the NSA’s collection of domestic calling records. In *American Civil Liberties v Clapper*, the bench found that the bulk collection of every American’s telephone metadata was illegal.[1] The court, however, seemed to lob the issue of bulk collection by the NSA back into the corridors of Congress for deliberation.

Those voting against the bill were convinced it would open the doors to vulnerability. Sneaky and enterprising terrorists would continue to adapt, finding devious ways of attacking the Republic. Republican Orrin Hatch was fuming and alarmist, suggesting that the USA Freedom Act would “hamper our ability to address the terrorist threat”.

He took particular umbrage at the amicus provision, which “threatens to insert left-wing activists into an incredibly sensitive and already well-functioning process, a radical move that would stack the deck against our law enforcement and intelligence communities.”

But Hatch and the dissenters had little reason to worry. The Rand Paul juggernaut had seemingly run out of puff while Senator Mitch McConnell got busy adding his own touches on Sunday.[2] While these did not make it through, it spelled out the determination of opponents determined to hollow out the Freedom Act.

The US Senate on Tuesday was not going to let various provisions quietly expire, even if section 215 was supposedly going to an anticipated death. There were some changes that received the approving nod – a public advocate will supposedly pitch in as representative for that wonderfully vague entity called the public, though it is by no means a full blooded legal measure.

The beast of security, the bogeyman of fear, still needed some means of survival. To that end, the Senate went about resurrecting various provisions with stealth and, perhaps, a good deal of manufactured ignorance. The spying, in other words, is set to continue.

One continuing measure is the way records are retained by means of bulk telephony. The previous legislation enabled the NSA to obtain such data as those connected with banking and phone communications provided a warrant was obtained from the Foreign Intelligence Surveillance (FISA) Court. The request would have to show that the records were relevant to the relevant investigation.

The new provision does not do away with the bulk collection process. Instead, it shifts the onus of retention to telecommunication companies, effectively privatising data collection. This brings with it a whole set of issues with data security and access by private citizens under Freedom of Information legislation. The metadata in question includes phone numbers of the parties in question, international mobile subscriber identity (ISMI), numbers of calling cards, time and length of calls.

The principle of access by authorities does not change – merely the means by which data will be stored. Provided that one party is overseas, and provided the data is relevant to the terrorism investigation, the government can continue to make use of the FISA Court, which has been all too enthusiastic in acceding to requests over the years.

Other provisions which had briefly expired were also given the kiss of life. They included the “lone wolf” provisions targeting those operating individually. These will continue, despite the inability on the part of law enforcement to link gathering such data with actual offences.

Another renewal took the form of a procedural bypassing measure where a suspect might change devices – the so-called rove wiretapping provisions. The communications of the terror suspect is thereby captured, obviating the need to go via the FISA process.[3] It is not even a requirement that the Court know who the target is – deference to expertise is assumed.

Unmentioned in the debate are those areas of surveillance that remain in place, untouchable expanses that tend to avoid the space of congressional scrutiny. As the ACLU’s deputy legal director Jameel Jaffer explained, “The bill leaves many of the government’s most intrusive and overbroad surveillance powers untouched, and it makes only very modest adjustments to disclosure and transparency requirements.”[4]

The security complex that feeds off the carrion of the Republic continues, invasive, hefty and voracious. This legislation was merely the most minor adjustment, the most modest of changes in diet.

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Notes:

- [1] <https://www.aclu.org/cases/aclu-v-clapper-challenge-nsa-mass-call-tracking-program>
- [2] <http://www.nationaljournal.com/tech/rand-paul-won-t-get-amendments-on-nsa-reform-bill--but-mitch-mcconnell-will-20150601>
- [3] <http://arstechnica.com/tech-policy/2015/06/let-the-snooping-resume-senate--revives-patriot-surveillance-measures/>
- [4] <http://www.theguardian.com/us-news/2015/jun/02/congress-surveillance-reform-edward-snowden>

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