USA FREEDOM DOES NOT REIN IN THE SPIES

Honest. I started writing about this David Cole column asking, "Can Congress rein in the spies?" before John Brennan admitted that, contrary to his earlier assurances, his spooks actually had been spying on their Congressional overseers and also before President Obama announced that, nevertheless, he still has confidence in Brennan.

Cole's column isn't about the the Senate Intelligence Committee's struggles to be able to document CIA torture, however. It's about how Patrick Leahy introduced his version of USA Freedom Act "not a moment too soon."

I don't want to gripe with the column's presentation of Leahy's version of Freedom; with a few notable exceptions (one which I'll get to), it accurately describes how Leahy's bill improves on the bill the spies gutted in the House.

I first wanted to point to why Cole says Leahy's bill comes not a moment too soon.

> Leahy's bill comes not a moment too soon. Two reports issued on Monday bring into full view the costs of a system that allows its government to conduct dragnet surveillance without specific suspicions of wrongdoing. In *With Liberty to Monitor All*, Human Rights Watch and the ACLU make a powerful case that mass surveillance has already had a devastating effect on journalists' ability to monitor and report on national security measures, and on lawyers' ability to represent victims of government overreaching. And the same day, the New America Foundation issued *Surveillance Costs*, a report noting the widespread economic harm to US tech companies that NSA surveillance

> has inflicted, as potential customers around the world take their business elsewhere.
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> Together, these reports make concrete the damaging effects of out-of-control surveillance, even to those with "nothing to hide." Our democracy has long rested on a vibrant and vigorous press and open legal system. On matters of national security, journalists probably serve as a more important check on the executive than even the courts or Congress.
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> [snip]
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> And, it turns out, tech companies also need to be able to promise confidentiality. Customers of Internet services or cloud computing storage programs, for example, expect and need to be certain that their messages and stored data will be private. Snowden's revelations that the NSA has been collecting vast amounts of computer data, and has exploited vulnerabilities in corporate encryption programs, have caused many to lose confidence in the security of American tech companies in particular.

Cole describes the great costs out-of-control surveillance imposes on journalists, lawyers, and cloud providers, and implies we cannot wait to reverse those costs.

Then he embraces a bill that would not protect journalists' conversations with whistleblowers (Leahy's Freedom still permits the traditional access of metadata for counterintelligence purposes as well as the Internet dragnet conducted overseas) or alleged terrorists, would not protect lawyers' discussions with their clients (the known attorney-client protected collections happened under traditional FISA, EO 12333, and possibly Section 702, none of which

get changed in this bill), and would expose American companies' clouds even further to assisted government access under the new Call Detail Record provision.

Cole does admit the bill does not address Section 702; he doesn't mention EO 12333 at all, even though both the HRW and NAF reports did.

> Senator Leahy's bill is not a cure-all. It is primarily addressed to the collection of data within the United States, and does little to reform Section 702, the statute that authorizes the PRISM program and allows the government to collect the content of electronic communications of noncitizens abroad, even if they are communicating with US citizens here. And it says nothing about the NSA's deeply troubling practice of inserting vulnerabilities into encryption programs that can be exploited by any hacker. It won't, therefore, solve all the problems that the HRW and New American Foundation reports identify. But it would mark an important and consequential first step.

But he doesn't admit the bill does little to address the specific sources of the costs identified in the two reports. It's not a minute too soon to address these costs, he says, but then embraces a bill that doesn't really address the actual sources of the costs identified in the reports.

That is mostly besides the point of whether Leahy's bill is a fair apples-to-oranges trade-off with the status quo as to represent an improvement — an answer to which I can't yet give, given some of the obvious unanswered questions about the bill. It is, however, a testament to how some of its supporters are overselling this bill and with it anyone's ability to rein in the intelligence community.

But it's one testament to that that bugs me most

about Cole's column. As I noted, he does mention Leahy's failure to do anything about Section 702. Nowhere in his discussion of 702, however, does he mention that it permits warrantless access to Americans' content, one which FBI uses when conducting mere assessments of Americans. Which of course means Cole doesn't mention the most inexcusable part of the bill — its exemption on already soft reporting requirements to provide the numbers for how many Americans get exposed to these back door searches.

I'm not a fancy Georgetown lawyer, but I strongly believe the back door searches — conducted as they are with no notice to anyone ultimately prosecuted based off such information — are illegal, and probably unconstitutional. When retired DC Circuit Court judge Patricia Wald raised these problems with the practice, Director of National Intelligence Counsel Bob Litt simply said it would be "impracticable" to add greater oversight to back door searches. And in spite of the fact that both the President's Review Group and PCLOB advised significant controls on this practice (which implicates the costs identified in both the HRW and NAF reports), the version of USA Freedom Act crafted by the head of the Senate Judiciary Committee — the Committee that's supposed to ensure the government follows the law — not only doesn't rein in the practice, but it exempts the most egregious part of the practice from the transparency applauded by people like Cole, thereby tacitly endorsing the worst part of the practice.

And all that's before you consider that the IC also conducts back door searches of EO 12333 collected information — as first reported by me, but recently largely confirmed by John Napier Tye. And before you consider the IC's explicit threat — issued during the passage of the Protect America Act — that if they don't like any regulation Congress passes, they'll just move the program to EO 12333.

The point is, Congress *can't* rein in the IC, and

that’s only partly because (what I expect drives the Senate’s unwillingness to deal with back door searches) many members of Congress choose not to. The have not asserted their authority over the IC, up to and including insisting that the protections for US persons under FISA Amendments Act actually get delivered.

In response to the news that Brennan’s spies had been spying on its Senate overseers, Patrick Leahy (who of course got targeted during the original PATRIOT debate with a terrorist anthrax attack) issued a statement insisting on the importance of Congressional oversight.

> Congressional oversight of the executive branch, without fear of interference or intimidation, is fundamental to our Nation’s founding principle of the separation of powers.

Yet his bill — which is definitely an improvement over USA Freedumber but not clearly, in my opinion, an improvement on the status quo — tacitly endorses the notion that FBI can conduct warrantless searches on US person communications without even having real basis for an investigation.

That’s not reining in the spies. That’s blessing them.