

AFTER THE AD HOMINEM APPROACH TO SURVEILLANCE REAUTHORIZATION FAILS, SPOOKS NOW REVERT TO SECRECY

As I have noted, thus far the surveillance boosters' favored approach to Section 702 reauthorization has been to engage in ad hominem attacks against people engaging in good faith in the legislative process (even while they, themselves, make what would most charitably be called significant errors). Even when people make a concerted effort to avoid such sloppy attacks – as FBI Director Christopher Wray did at a recent appearance – they still accuse others of believing in myths while ignoring their own myth-making.

But now Richard Burr and the spooks he caters to are adopting another approach: legislating in secret.

The SSCI is reportedly moving to mark up their own version of Section 702 reauthorization this week – a bill crafted by Senators Burr, Warner, Feinstein, and Cornyn. The make-up of the team is key: because Cornyn and Feinstein are also on Senate Judiciary, they can sink any alternate bill that moves through that committee (something Feinstein has been doing since at least 2009).

As Wyden says in a letter objecting to the secret mark-up,

Section 702 has been the subject of extensive public testimony, while relevant FISA Court orders, minimization procedures and other documents have been declassified and released to the public. In this context, the public is right to

expect that Congress debate the reauthorization of this authority in the open. Indeed, a transparent legislative process is a fundamental hallmark of our democracy.

A bunch of NGOs have also called on Burr to make this mark-up public.

There are several likely reasons why Burr and the spooks want to craft their legislation in secret.

Perhaps most importantly, by holding a closed session, you delay by about a month and a half what happened in the session, what the cleared Senators debated, and the tactical means the Chair (in this case Burr) used to shut down reform suggestions. That's what happened in 2012, when Feinstein delayed the release of the bill report for about that long, hiding details about Ron Wyden's attempt to get a count of US persons affected by 702 (see these three posts – one, two, three – for details, though Wyden did manage to call Feinstein out for lying about FISC always finding the collection to be constitutional).

Indeed, I'd bet a lot of money that one reason Burr wants to have a secret mark-up is to the very same thing Feinstein did four years ago: hide the government's lies about their alleged inability to do a count of how many Americans get sucked up as part of 702, and how.

But the other reason Burr and the spooks likely want to have a mark-up in secret is **precisely because of the transparency won since 2013**, they don't have winning arguments anymore. While courts, because of the secrecy reviewing cases without any adversarial process and often not getting a full picture of how 702 works, have found 702 itself constitutional (though the Ninth Circuit largely dodged the question of back door searches), as more and more people understand how it works (and as white men watching the Mike Flynn case come to understand

how fragile life can get for those picked up incidentally), the program seems problematic.

And even those who believe 702 in its current form serves an irreplaceable role in our surveillance system can see the need for no-nonsense reforms, such as requiring an amicus help review yearly reauthorization.

In other words, by hiding this mark-up, Burr is conceding that he can't win this legislative battle democratically. He, and the spooks, have to cheat. And they're willing to do so, to codify parts of this program that likely wouldn't pass court review if done in a real adversarial process.

We are at a critical tipping point with surveillance in this country, as the government chips away at the technologies that allow individuals to retain some kind of privacy. And to ensure we slide over that tipping point and down the dangerous slope on the other side, a bunch of spooks and their servants are cowering from democracy.