

Sensenbrenner NSA reform bill faces competing proposals

USA Freedom Act passes committee unanimously, clearing major hurdle

by Polo Rocha
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Rep. Jim Sensenbrenner, R-Menomonee Falls, feels misled.

Sensenbrenner, who authored the Patriot Act in the weeks following the Sept. 11 attacks, says the National Security Agency under both Presidents George W. Bush and Barack Obama grossly misinterpreted the 2001 law and is gathering data on average Americans. So Sensenbrenner is now leading efforts to ensure that NSA practices reflect the law's intent.

“The phone records of innocent Americans do not relate to terrorism whatsoever, and they are not reasonably likely to lead to information that relates to terrorism,” Sensenbrenner said at a Cato Institute forum in Washington. “Put simply, the phone calls we make to our friends, our families and business associates are private and have nothing to do with terrorism or the government's efforts to stop it.”

Three weeks later, on Oct. 29, Sensenbrenner teamed with U.S. Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., to introduce the USA Freedom Act in a bipartisan effort “to rein in the dragnet collection of data” by the NSA and other government agencies. After sitting in the House Judiciary Committee for months, the bill passed the committee unanimously Wednesday.

Sensenbrenner's USA Freedom Act is competing against other reform proposals, including one proposed by Obama, but privacy advocates say Sensenbrenner's bill provides the strongest protections against bulk data collection. Negotiations are ongoing, and although the final outcome of which legislation will prevail is uncertain, observers agree the Patriot Act author's influence in the process is clear.

“It carries more weight than if he were a Rand Paul clone,” said Norm Ornstein, a resident scholar at the American Enterprise Institute, referring to the Kentucky GOP senator and possible 2016 presidential contender who's a libertarian.

The NSA debate comes after government contractor Edward Snowden leaked documents to The Guardian and The Washington Post detailing numerous NSA programs that had not been public before — leaks that NSA officials say have made the country less safe.

A senior intelligence official, carrying a copy of the Constitution he's had for more than 20 years, defended the agency's work. He said a crucial part of the NSA's mission is to protect Americans' privacy while keeping the country safe from terrorist attacks.

“Look around you. Who do you think works at the NSA?” the official said during a background briefing in Maryland near the NSA headquarters. “It's your neighbor, it's the same people that you go to worship with or you work on a community project or go to soccer [with]. They're as interested in protecting and defending rights as you and I are.”

Bill Combs, a spokesperson for the NSA, was blunt when addressing a perception that NSA analysts can listen in on Americans' phone calls or read their emails.

“You know what happens when we break a rule?” Combs said. “We go to jail. We get fired. We go to jail.”

Still, privacy groups say even if the NSA does not look at Americans' information, collecting data on average Americans is still problematic.

“From our perspective, and I think from the perspective of the public, the collection itself, even if no one is looking at it right now, the collection itself is harmful,” said Harley Geiger, senior counsel at the Center for Democracy and Technology.

Pew found in January 2014 that 53 percent of Americans disapprove of NSA surveillance, compared to 40 percent who support it. The poll also found a major split within the Republican Party, with 68 percent of tea party-aligned Republicans opposing NSA surveillance, compared to 52 percent opposition from non-tea party Republicans.

USA Freedom Act up against other reform bills

Obama's proposal hasn't been fully released yet, but in a March speech he called for the end of bulk phone metadata collection, which two review panels said was largely ineffective and violated Americans' privacy. That program collects numbers dialed and called from, as well as the time of the call and its duration, but it does not collect the content of the phone calls.

The Obama proposal requires intelligence agencies get approval from the surveillance court to go to telephone companies and ask for records in specific instances, rather than getting records in bulk.

But reports indicate Obama's proposal only looks at ending bulk phone records collection, which leaves the door open for collection of other types of records like Internet metadata, emails or financial records.

Sensenbrenner's bill is broader, ending bulk collection of various types of records in addition to phone records, similar to a bipartisan bill from the House Intelligence Committee.

Like Obama's proposal, Sensenbrenner's bill would require prior surveillance court approval for agencies to get records relevant to terrorism investigations. But the House Intelligence Committee bill does not require prior court approval, which has privacy advocates concerned, although courts can ask agencies to get rid of records if data collection was too broad.

Both the Sensenbrenner bill and the House Intelligence bill add transparency to secret surveillance court rulings that change how a law is interpreted. That's a move that Tom Blanton, director of the National Security Archive, praised; his nonprofit holds the largest collection of government documents obtained through open records laws.

"All the critics have agreed on that the wiretap court has been doing way too much substantive interpretation of the law in secret," Blanton said. "The more checks and balances, and the more transparency you can bring [to the court], the better off we'll all be."

Combs, the NSA spokesperson, said the agency would work with "whatever Congress decide[s] to go with ... they tell us what to do."

Privacy advocates encouraged after shift in NSA debate

The debate over the NSA has seen a massive shift in position by both Obama and House Intelligence Committee Chair Mike Rogers, R-Mich., both of whom defended the phone metadata program last summer but this year called to limit or end the program.

"I'm confident [my proposal] allows us to do what is necessary in order to deal with the dangers of a terrorist attack, but does so in a way that addresses some of the concerns that people had raised," Obama said in late March.

Two courts weighed in and split on the issue of whether the bulk phone metadata collection program is constitutional.

Meanwhile, two review panels, including a White House committee, agreed the metadata program wasn't very effective and violated privacy. Observers said the panels' recommendations likely changed Obama's thinking on the NSA and led him to push for reforms.

The phone metadata bulk collection program still has its defenders, including Stewart Baker, who was the NSA general counsel in the early 1990s and Bush's assistant secretary for policy in the Department of Homeland Security.

Baker said the phone metadata program is legal, adhering to the Fourth Amendment that forbids unreasonable search and seizures, adhering to the Patriot Act and having appropriate oversight from Congress and the courts.

“There’s no doubt that this is constitutional. ... The statutory argument is a closer call, but I think it’s a reasonable interpretation of the statutes,” Baker said.

Baker also said the program is effective, and if Obama’s proposal or others make it harder for intelligence agencies to collect telephone records, the country’s safety could suffer.

“The only way you’re going to find some numbers is if we collect all of them,” Baker said. “If you put limits on what the government collects, it will miss the calls that are most important.”

At a Georgetown University forum in November, Sensenbrenner defended the intent of the Patriot Act while challenging the NSA’s broad interpretation of the Patriot Act’s provision that requires data collected to be relevant to a terrorism investigation.

“If everything is relevant, then the term ‘relevance’ ceases to have any legal significance,” said Sensenbrenner, who was unavailable for an interview. “If Congress intended to allow bulk collection, it would have authorized bulk collection. Instead, we attempted to set limits on what the government could obtain.”

Privacy groups said the call from Obama and Rogers to end the current program, which Snowden called a “turning point,” is a significant shift in the debate.

“The fact that we have these power centers converging on a consensus to end or change this program is significant progress,” Geiger, the Center for Democracy and Technology lawyer, said. “It is something people should take note of. ... We think this is a milestone, or at least we’re on our way toward a milestone.”

Wisconsin delegation largely supports Sensenbrenner bill

Sensenbrenner’s bill has wide support among the 10 members of Wisconsin’s congressional delegation. The three who haven’t signed on as co-sponsors are Reps. Paul Ryan, R-Janesville, and Ron Kind, D-La Crosse and GOP Sen. Ron Johnson.

The offices of Ryan and Johnson did not respond to requests for comment. Kind said in an interview while he supports some elements of the bill, he’s still trying to decide whether ending bulk phone metadata collection would endanger the country.

“[The bill’s cosponsors] have already made the determination that the metadata calling program is not necessary for national security purposes, and I think some of us aren’t quite there at that conclusion,” Kind said.

The rest of the congressional delegation, meanwhile, backs Sensenbrenner’s proposal.

Democratic Sen. Tammy Baldwin, who voted against the Patriot Act in 2001, said in a statement she’s glad Sensenbrenner and others “have realized government surveillance has crossed the line and are now working on reforms.”

Rep. Gwen Moore, D-Milwaukee, said in a statement she's a "proud cosponsor" of the bill since she thinks "we must balance our need for national security with our right to privacy."

Rep. Reid Ribble, R-Sherwood, said in an interview the NSA's bulk data collection of everyone was a "step too far," and called Sensenbrenner a "force in the House of Representatives" that can bring others to support his reforms.

Rep. Tom Petri, R-Fond du Lac, said in a statement he supports Sensenbrenner's bill because the country needs an "adequate firewall... to prevent misuse of [data collection] and to ensure Americans' right to privacy."

Democratic Rep. Mark Pocan of Madison said in an interview he commends Sensenbrenner for the "brave stance" he's taken in ensuring the NSA doesn't go further than the law intended. He also noted "this is some of the very stuff [former Sen.] Russ Feingold warned people about when he was the single [Senate] vote against the Patriot Act."

"You can find a balance between security and privacy, and I think we've erred far too much on the security side. ... What we are doing right now is assuming everyone does something wrong," Pocan said.

Rep. Sean Duffy, R-Ashland, also co-sponsored Sensenbrenner's bill. Duffy's office did not respond to a request for comment.

Bipartisan support reflects growing division within GOP

The bipartisan support in Wisconsin reflects an alliance between numerous Democrats and Republicans nationwide who support efforts from those like Sensenbrenner.

That alliance was tested out — and narrowly lost — last summer in a House vote on an amendment to defund the NSA phone metadata collection program, a loss that some privacy advocates claimed was a victory of sorts due to how close the vote was.

That amendment, from Reps. Justin Amash, R-Mich., and Rep. John Conyers, D-Mich., failed 217 to 205. House Speaker John Boehner, R-Ohio, who as speaker usually doesn't vote, voted against the amendment.

Elizabeth Goitein, co-director of the Brennan Center for Justice's Liberty and National Security Program, said the vote reflected a growing number of Republicans concerned with civil liberties. Those Republicans are joining some in the Democratic Party that previously didn't have enough support to make similar votes that close, she said.

"This is an alliance that should've happened a long time ago," Goitein said.

The division within the GOP was clear when the Republican National Committee approved on a voice vote a resolution condemning the NSA. The resolution asked GOP lawmakers to "immediately take action to halt current unconstitutional surveillance programs."

The RNC resolution got a strong rebuke from prominent Republican intelligence officials, according to The Daily Beast, which obtained a letter from those officials to RNC Chair Reince Priebus that said, "Count us out."

While there may be a growing libertarian sentiment within the Republican Party, Ornstein said the resolution was likely a reflection of Republicans' desire to criticize Obama and wouldn't have happened if a Republican were in the White House.

A Rand Paul 2016 candidacy for the GOP presidential nominee could once again highlight the split within Republicans on national security. Ornstein said if he runs, Paul could pick up younger voters who are more concerned about privacy issues.

Still, Ornstein noted the neoconservatives in the party remain strong and heavily funded, ready to challenge prominent GOP libertarians like Paul in a 2016 primary.

"Even if they're no longer as dominant as they used to be, the internationalist neoconservative wing of the party is still very strong on the establishment side and on the financial side," Ornstein said. "Paul can get plenty of money from libertarian hedge fund guys, but you'd see some mobilization against him if he really emerged as a serious contender for the nomination, and I think there's a very real chance he could."