

QUARTZ

Rand Paul's Patriot Act stand hurts Republicans more than it does the NSA

Benjamin Dean, Gregory Koger

June 02, 2015

On Sunday at midnight, three key provisions of the US government's Patriot Act, including section 215 (the law the government uses to collect phone and other business records in bulk) expired. The man at the center of the political drama was Kentucky Republican senator—and presidential candidate—Rand Paul. But just how instrumental was Paul in the demise of the Patriot Act? And what will be the impact of the expiry of the infamous section 215? As we wait to see what the US Senate does next, we asked a panel of scholars to look at these questions and more.

Senate leadership has a lot to answer for

Gregory Koger, University of Miami: Senator Rand Paul's actions have exasperated the White House and the rest of the Senate Republican conference, who insinuate he is grandstanding to attract attention and donations for his presidential campaign.

The Republicans' anger probably stems from a combination of sincere belief that federal authorities need these enhanced powers and concern that Rand Paul's actions diminish the Republican "brand name" advantage on security issues.

Security, both at home and abroad, was a key issue in the 2014 campaign and could be a Republican talking point again in 2016... unless a prominent Republican candidate confuses the debate by forcing the expiration of Patriot Act provisions.

But let's step back: how was a single senator able to block the passage of a full re-authorization of the Patriot Act (Senate majority leader Mitch McConnell's preference), a House bill that limited bulk data collection as well as a short term extension of the Act's existing authority?

The simple answer is that Senate rules allow a single senator to slow the passage of any bill.

Paul had the right to debate and offer amendments: the Senate's "cloture" process for limiting these rights require a supermajority of 60 votes and, critically, several days to implement. When the Senate reconvened to debate just eight hours before the deadline, it put the issue at the mercy of Rand Paul—or indeed of any other senator.

The obvious strategy for Mitch McConnell, then, was to bring up Patriot Act re-authorization with plenty of time to overcome Rand Paul's delaying tactics. The deadline was no mystery: McConnell has known that June 1 was going to be the date since May 26, 2011, when the last extension passed. All he had to do was to schedule a full debate on the Patriot Act anytime during the first five months of the 114th Congress.

After all, so far the Senate has found time to take four weeks off from legislating, to debate a doomed Keystone XL pipeline bill for three weeks, and to spend three weeks deciding if and how to fund the Homeland Security department this year.

It appears, though, that McConnell does not want a full Senate debate on the tension between security and liberty. A similar pattern played out in 2011. Patriot Act re-authorization four years

ago did not come to the Senate floor until the very last day before the expiration of the controversial provisions.

By waiting until the eleventh hour, McConnell (and his predecessor, Harry Reid) have dared other senators to block the legislation and take the blame for exposing the nation to increased risk of terrorism. Back in 2011, Paul, for one, agreed to let the bill pass as long as the Senate voted on two of his proposed amendments.

This time around, McConnell waited to bring up Patriot Act extension until May 21—right before senators were planning to leave town for the Memorial Day holiday weekend.

McConnell also hoped to block the House's compromise legislation so that Congress would be forced to choose between adopting a full extension of the expiring powers and a full expiration of the Patriot Act. His gambit failed when a majority of senators rejected full extension, 45-54.

Rand Paul is now taking the blame for demanding a full debate on an issue that is central to his political principles and career, but at least some of the blame lies with Senate leaders who have tried to circumvent real public discussion and votes on domestic security.

Still lots of ways for the feds to collect data

Benjamin Dean, Columbia University: Expiration of section 215 of the Patriot Act is a symbolic victory for the privacy and civil liberties advocacy groups that have fought against its renewal. However, its expiration does very little to reduce the capabilities of the NSA or FBI to collect communications and metadata (the data about data).

Firstly, the USA Freedom Act is still under debate. In its current form, this act will allow the phone metadata activities previously run under section 215 of the Patriot Act to continue, albeit with several restrictions.

Agencies still have to receive approval from the Foreign Intelligence Surveillance (FISA) court for access to phone records. The changes mean that phone companies will now be possession of the metadata, not the NSA. There will also be added transparency provisions such as when the FISA court attempts to significantly reinterpret elements of the USA Freedom Act.

Secondly, even if the USA Freedom Act weren't to pass, there are still many other legal avenues available to the NSA to collect phone metadata. The Cato Institute's Julian Sanchez has pointed out that a "grandfather clause" in section 215 allows for phone metadata to, "remain available for investigations already open at the time of sunset, as well as new investigations into offenses committed before the sunset." Arizona State University/New America fellow Shane Harris similarly observes that national security letters could still be used to, "collect phone, Internet, and financial records."

Thirdly, the expiration of section 215 does not curtail the bulk collection of internet and other online communication data and metadata. Indeed, for non-US persons, the expiration of section 215 will have no impact on the collection of their phone or internet records by US agencies. All these programs will continue given that they are justified under other authorities including section 214 of the Patriot Act, which is still in place, Executive Order 12333 (for non-US persons) and section 702 of the FISA Amendments Act (also for non-US persons).

That the renewal of section 215 was not rubber-stamped is significant in and of itself. It indicates that there is a debate happening where, before, there wasn't.

Instead, the Senate voted to advance the USA Freedom Act (termed "on cloture on the motion to proceed"), which is the first move to limit NSA activities since the 1970s. However, there is a long road ahead for those who wish for greater oversight of the bulk data collection activities of intelligence and law enforcement agencies both in the US and globally.