
POLITICO

Civil libertarians: What to do now

By David Nather – June 7, 2013

So you're mad that the government is looking at your phone calls. What are you going to do about it?

Turns out, there's not much any one person can do, but there are a few options on the table for Congress or civil liberties groups — especially if they are willing to lawyer up.

And now that reports suggest Verizon handed over records on millions and millions of phone calls to the government, that could provide a lot of potential plaintiffs.

Whether these options can really curb the power of the NSA is up for debate, but here's a rundown of what the programs' critics can do — and the odds that they'll get anywhere.

Lawsuits

Option: Sue the Obama administration to challenge the broad scope of the surveillance.

Odds of a suit being filed: Fairly likely. Civil liberties groups have challenged the federal government's surveillance programs before, and groups like the American Civil Liberties Union and the Electronic Frontier Foundation are looking closely at what they could do with the NSA's sweeping collection of phone records and the PRISM program's surveillance of Internet activities.

But the past lawsuits have always run into two problems: The groups haven't been able to prove they were directly harmed by the surveillance, and the government has claimed "state secrets" to say they can't even discuss the surveillance programs in court.

This time, legal experts say a lawsuit could get a bit further on both fronts.

They see the NSA phone record collection program as more ripe for a lawsuit than the PRISM program, simply because of the massive scope of the Verizon court order that allows the agency to collect phone records.

In February, the Supreme Court rejected a lawsuit over global wiretapping. In that case, *Clapper vs. Amnesty International*, the court ruled that the groups that filed the lawsuit couldn't prove they were swept up in the surveillance — so they didn't have the legal “standing” to sue.

Now, some legal experts say the Verizon court order is so broad that it makes it easier for just about anyone to argue they were caught up in it.

“At the very least, you now have a factual basis for saying, ‘I know my phone records have been acquired,’” said Julian Sanchez, a research fellow at the Cato Institute who specializes in privacy and civil liberties.

That doesn't mean a legal victory would be guaranteed. Sanchez points out that the courts could still shoot down a lawsuit by ruling that the phone records belong to Verizon, not the customer.

But the ground still may have shifted enough to make civil liberties groups take a new look at lawsuits. “These are the very questions we're looking into right now,” said Alexander Abdo, a staff attorney at the ACLU. “It's certainly a different world than it was when we litigated *Clapper vs. Amnesty*.”

And legal experts say it will probably be harder for the Obama administration to argue “state secrets” in any lawsuit — because now the administration has acknowledged the existence of both programs. In fact, Obama himself talked about them at length at a health care event in California on Friday.

“There are legal challenges to be brought here, and the government's acknowledgment of these programs makes it easier to get around the standing issue, and it might even make it easier to get around the state secrets issue,” said Elizabeth Goitein, director of the liberty and national security program at New York University's Brennan Center for Justice.

Change the law

Options: Rewrite the Patriot Act or the Foreign Intelligence Surveillance Act amendments that authorize surveillance.

Odds: Unlikely. Obama almost seemed to dare Congress to do something about it in his Friday remarks. “These programs are subject to congressional oversight and congressional reauthorization and congressional debate. And if there are members of Congress who feel differently, then they should speak up,” he said in California.

But even though Democrats and Republicans have been complaining about the revelations, there's no sign yet that anyone is threatening a big rewrite of the intelligence laws — especially when the top two members of the Senate Intelligence Committee, Chairwoman Dianne Feinstein and ranking Republican Saxby Chambliss, defended the program right out of the box.

There are two issues in the intelligence gathering laws. The NSA's Verizon court order appears to be based on Sec. 215 of the Patriot Act, which allows the FBI to get a court order requiring companies to turn over “any tangible things (including books, records, papers, documents, and other items)” that could be relevant in a terrorism investigation.

The PRISM program comes more broadly from the 2008 rewrite of the FISA law that authorizes foreign surveillance, according to the Washington Post, which disclosed the program. Obama voted for that law as a senator, in the heat of his first presidential campaign. And when Congress renewed the law late last year, the few amendments that were offered were shot down.

Democratic Sens. Ron Wyden and Mark Udall have been sounding the alarms that the Patriot Act language was being interpreted too broadly, but they haven't said what they might do now that the NSA program has been revealed. Senate Judiciary Committee Chairman Patrick Leahy has suggested taking a new look at "legal authorities in the PATRIOT Act that could authorize broad government surveillance," but hasn't gotten specific.

And Republican Sen. Rand Paul is proposing a ban on government searches of phone records without probable cause — but he hasn't threatened another old-style filibuster, like the one he staged to protest the Obama administration's drone program, to force a vote on it.

Put strings on their money

Option: Limit the programs by imposing new conditions on next year's funding for the Justice Department and the Defense Department.

Odds: Unlikely. Congress always has the "power of the purse" — when it wants to use it. House Appropriations Committee Chairman Hal Rogers threatened to use it this week on the IRS, when he suggested to acting IRS Commissioner Daniel Werfel that lawmakers "may want to consider putting conditions on your funding" to require changes to address the targeting of conservative groups.

That could be an option with the surveillance programs. Steven Aftergood, director of the Federation of American Scientists' Project on Government Secrecy, suggested that Congress could add stricter requirements on the programs through the annual appropriations process.

There's no sign of that happening yet, though. Senate Appropriations Committee Chairwoman Barbara Mikulski and Majority Whip Dick Durbin, the chairman of the Defense appropriations subcommittee that has jurisdiction over the NSA, both expressed reservations about the NSA program on Thursday, but their aides didn't respond to questions Friday about whether they'd impose new conditions through the spending bills.

Hold hearings

Option: Use congressional hearings — classified or unclassified — to ask tough questions about the programs.

Odds: Fairly likely. At the very least, the growing public outcry over the programs could put pressure on the Intelligence or Judiciary Committees to hold hearings — just as congressional committees began to hold more hearings on the drone program as the controversy grew over targeted killings.

They may not be open hearings — especially if they're held by the Intelligence Committees. But watch for public hearings on legislation that at least touches on the issue, like Leahy's bill with Sen. Mike Lee (R-Utah) to update the Electronic Communications Privacy Act.

“Maybe there’s no alternative, maybe the programs work fine, maybe they’ve proven their value, but we should not have to take anybody’s word for it,” said Aftergood.