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Time Is Running Out on NSA Reform

Nearly two years after Edward Snowden's explosive revelations, surveillance reform remains in doubt as the window of opportunity closes.

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There's another national security clock ticking in Congress.

Lawmakers have less than 100 days left to decide whether they want to reform the National Security Agency's controversial bulk collection of U.S. call data—or risk losing the program entirely. Core provisions of the post-9/11 Patriot Act are due to sunset on June 1, including Section 215, which grants intelligence agencies the legal authority they need to carry out mass surveillance of domestic metadata—the numbers and timestamps of phone calls but not their actual content.

Government officials have said they have no backup plan for replacing the intelligence void if Congress fails to reauthorize the law in some fashion. And earlier this week, Director of National Intelligence James Clapper suggested lawmakers should bear the brunt of blame if the program lapses and the homeland is struck by terrorism.

Yet despite the agitation of the administration, which endorsed reform legislation that narrowly died in the Senate last year, lawmakers have publicly done nothing to move forward on limiting the NSA's domestic phone dragnet, which was first exposed by Edward Snowden nearly two years ago. Closed-door negotiations are ongoing, but so far supporters of the USA Freedom Act have not found the Goldilocks language needed to appease both the privacy crowd and the security hawks.

And in the wake of the Charlie Hebdo attacks, more brutality by the Islamic State, and fears of a nuclear Iran, it remains unclear whether there is enough appetite among congressional leadership to move forward on anything that could be perceived as undermining national security.

Reflecting the hawkish climate, several Republicans vying for the White House are staking out even more bullish stances supportive of the NSA's surveillance apparatus. In January, Sen. Marco Rubio said the programs were so vital to national security that he called for a permanent extension of their authorities. And in February, Jeb Bush defended mass surveillance as "hugely important."

Reformers in Congress insist they can still get a deal done, and that for the first time the wind is at their backs from the still-ongoing deluge of Snowden disclosures.

"I can tell you it wasn't very long ago—in this room, the handful of people who were for this were talking [and] we joked we could meet in a phone booth," Sen. Ron Wyden, a leading civil-liberties hard-liner, told National Journal last month during an interview in his office. "We went back over the votes and we had a handful, and we got up to the point a couple summers ago where we had maybe 20 write a letter expressing concern, and now we got close."

It was more than close. In November, the USA Freedom Act, championed by Democratic Sen. Patrick Leahy, came two votes short of advancing, as it failed to overcome a Republican-led filibuster flamed by fears that restricting the intelligence community could potentially aid groups like the Islamic State. The defeat came despite support for the bill from the White House, the intelligence community, tech companies and privacy advocates, and even a small cohort of tea-party conservatives, like Sens. Ted Cruz and Mike Lee, crossing the aisle.

Now, reformers face the specter of another last-minute, clean re-up of the Patriot Act.

"The concern I have is that the less time for debate there is, the more that tends to work in favor of the side that is trying to stoke fears," said Julian Sanchez, a senior fellow at the libertarian Cato Institute. "We've often seen very little discussion or debate until the eleventh hour, and then invariably the argument is, 'Well, it'd be nice to have a more robust debate, but we can't let the program lapse, so let's authorize it for another five years.'"

Privacy advocates bristle at the notion that a domestic dragnet in any way contributes to the fight against the Islamic State or other terrorist groups. The Freedom Act, they argue, would have prohibited only the government's carte-blanche collection of metadata, but would have still allowed the government to obtain those records from phone companies after earning judicial approval. And it would have extended the Patriot Act provisions for two years, but with tougher privacy protections—an option Clapper and others have said poses far less a threat to national security than letting the program expire entirely.

"It's possible for the United States government to obtain phone records of terrorists and bad actors without just going out there and vacuuming up millions of phone records, vacuuming up personal information of millions of law-abiding people," Wyden said.

Further complicating matters is that some NSA critics, including Sen. Rand Paul, would just as soon let the Patriot Act's provisions expire entirely—a viewpoint that gained traction with a #Sunset215 hashtag after the Freedom Act died in the Senate. But many lawmakers, including Rep. Jim Sensenbrenner, the original author of the Patriot Act who also introduced the House's version of the Freedom Act, have indicated they are reticent to go that far.

Those disagreements may ultimately lead to a face-off like the recent one over funding for the Department of Homeland Security.

"The bill I proposed was a good bipartisan bill," Leahy told National Journal after the Freedom Act stalled last year. "People are going to wish they had that this time next year."