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Surveillance bill fails to curtail bulk of NSA activities

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The passage of the first bill since 9/11 to curtail government surveillance represents a dramatic shift in the politics surrounding terrorism in the US, but a much less significant change in the way the intelligence community actually operates.

The USA Freedom Act, which has been comfortably approved by both the Senate and the House, bars the government from collecting the phone records of millions of US citizens, a programme which became the focus of public fears about overbearing electronic surveillance.

The surveillance legislation reform still leaves the US intelligence community with formidable legal powers and tools to collect data and other online information for terrorism-related investigations, however.

Despite the tidal wave of revelations and public anger towards the National Security Agency following the 2013 leaks by Edward Snowden, congressional efforts to rein in the agency have so far not curtailed the bulk of its activities.

"The more savvy members of the intelligence community have been saying for some time, 'If this is the hit that we have to take, then so be it'," says Mieke Eoyang at the centrist Third Way think-tank in Washington, referring to the bulk telephone data collection programme.

The very first Snowden leak was a secret court order requiring Verizon to hand over the call records of its customers, in the process revealing an official dragnet that was capturing details about tens of millions of Americans.

Amid the many Snowden documents about the NSA that followed, it was this programme that crystallised public fears in the US that the government was abusing privacy rights in its zeal to monitor terrorist threats.

The Freedom Act is designed to tackle those concerns about the bulk collection programme. The legislation calls for telephone companies and not the government to store the information and requires a court order before the call data can be searched.

Supporters of the reform celebrated two further conditions in the bill. It limits the scope of government inquiries, so that officials cannot ask, for instance, for all calls in the 212 area code. And it requires that the secret foreign intelligence court publish legal opinions that change the scope of information that can be collected.

Beyond the specifics, the passage of the bill represents a landmark in the underlying politics of national security. Before the Snowden revelations, the political climate over terrorism would have made it routine to renew the sections of the post-9/11 Patriot Act that have now been replaced by the USA Freedom Act.

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Yet the reality is that for the past 18 months, the administration has been making a tactical retreat from the call records programme. A panel of experts appointed by the White House, which included former senior intelligence officials, said in December 2013 that the programme was "not essential" for preventing terrorist attacks. In early 2014, President Barack Obama called for many of the changes to the programme contained in the new legislation.

"This is something we can live with," says a former senior intelligence official of the USA Freedom Act.

Moreover, even the bill's biggest supporters among privacy advocates acknowledge that it leaves much of the intelligence collection conducted by the US untouched.

"We have now addressed the excesses from the very first Snowden story, so for that I am lifting a glass," says Julian Sanchez at the libertarian Cato Institute in Washington. "But there is a lot left. In terms of the total scope of surveillance conducted by the NSA, this is a tiny corner."

The bulk of the electronic data scooped up by the NSA comes from overseas and is based on separate legal authorities not touched by the USA Freedom Act — most notably Section 702 of the FISA (Foreign Intelligence Surveillance) Amendments Act and the Reagan-era Executive Order 12333.

Critics of the NSA in Congress, such as Michigan representative Justin Amash, worry that the new reform still leaves areas that the intelligence agencies can exploit. Some privacy activists fear that while the new law bans bulk collection, the government will still find ways to secure what they call "bulky" requests that involve large quantities of data, especially by using National Security Letters issued by the FBI which can compel the handover of a range of records without the approval of a judge.

The big question for the intelligence community is whether the Senate vote on Tuesday represents the peak in reform efforts or marks the start of more to come. Reform supporters in Congress are now focusing on calls by the FBI to loosen encryption standards for electronic

devices such as smartphones, while US technology companies with millions of foreign customers would like to see new restrictions on overseas information collection. The next big battle might come in 2017 when Section 702 of the FISA Act expires.

In this Congress more than most, it has been almost impossible to build support for complicated legislation. But as Ms Eoyang notes: “Once you start to get these types of coalitions of people from the left and right being formed, they can have a momentum of their own.”