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Fears NSA will seek to undermine surveillance reform

Privacy advocates are wary of covert legal acrobatics from the NSA similar to those deployed post-9/11 to circumvent congressional authority

Spencer Ackerman

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Privacy advocates fear the National Security Agency will attempt to weaken new restrictions on the bulk collection of Americans' phone and email records with a barrage of creative legal wrangles, as the first major reform of US surveillance powers in a generation looked likely to be a foregone conclusion on Monday.

The USA Freedom Act, a bill banning the NSA from collecting US phone data in bulk and compelling disclosure of any novel legal arguments for widespread surveillance before a secret court, has already been passed by the House of Representatives and on Sunday night the Senate voted 77 to 17 to proceed to debate on it. Between that bill and a landmark recent ruling from a federal appeals court that rejected a longstanding government justification for bulk surveillance, civil libertarians think they stand a chance at stopping attempts by intelligence lawyers to undermine reform in secret.

Attorneys for the intelligence agencies react scornfully to the suggestion that they will stretch their authorities to the breaking point. Yet reformers remember that such legal tactics during the George W Bush administration allowed the NSA to shoehorn bulk phone records collection into the Patriot Act.

Rand Paul, the Kentucky senator and Republican presidential candidate who was key to allowing sweeping US surveillance powers to lapse on Sunday night, warned that NSA lawyers would now make mincemeat of the USA Freedom Act's prohibitions on bulk phone records collection by taking an expansive view of the bill's definitions, thanks to a pliant, secret surveillance court.

"My fear, though, is that the people who interpret this work at a place known as the rubber stamp factory, the Fisa [Court]," Paul said on the Senate floor on Sunday.

Paul's Democratic ally, Senator Ron Wyden, warned the intelligence agencies and the Obama administration against attempting to unravel NSA reform.

“My time on the intelligence committee has taught me to always be vigilant for secret interpretations of the law and new surveillance techniques that Congress doesn’t know about,” Wyden, a member of the intelligence committee, told the Guardian.

“Americans were rightly outraged when they learned that US intelligence agencies relied on secret law to monitor millions of law-abiding US citizens. The American people are now on high alert for new secret interpretations of the law, and intelligence agencies and the Justice Department would do well to keep that lesson in mind.”

The USA Freedom Act is supposed to prevent what Wyden calls “secret law”. It contains a provision requiring congressional notification in the event of a novel legal interpretation presented to the secret Fisa Court overseeing surveillance.

Yet in recent memory, the US government permitted the NSA to circumvent the Fisa Court entirely. Not a single Fisa court judge was aware of Stellar Wind, the NSA’s post-9/11 constellation of bulk surveillance programs, from 2001 to 2004.

Energetic legal tactics followed to fit the programs under existing legal authorities after internal controversy or outright exposure. When the continuation of a bulk domestic internet metadata collection program risked the mass resignation of Justice Department officials in 2004, an internal NSA draft history records that attorneys found a different legal rationale that “essentially gave NSA the same authority to collect bulk internet metadata that it had”.

After a New York Times story in 2005 revealed the existence of the bulk domestic phone records program, attorneys for the US Justice Department and NSA argued, with the blessing of the Fisa Court, that Section 215 of the Patriot Act authorized it all along – precisely the contention that the 2nd circuit court of appeals rejected in May.

Despite that recent history, veteran intelligence attorneys reacted with scorn to the idea that NSA lawyers will undermine surveillance reform. Robert Litt, the senior lawyer for director of national intelligence James Clapper, said during a public appearance last month that creating a banned bulk surveillance program was “not going to happen”.

“The whole notion that NSA is just evilly determined to read the law in a fashion contrary to its intent is bullshit, of the sort that the Guardian and the left – but I repeat myself – have fallen in love with. The interpretation of 215 that supported the bulk collection program was creative but not beyond reason, and it was upheld by many judges,” said former NSA general counsel Stewart Baker, referring to Section 215 of the Patriot Act.

This is the section that permits US law enforcement and surveillance agencies to collect business records and expired at midnight, almost two years after the whistleblower Edward Snowden revealed to the Guardian that the Patriot Act was secretly being used to justify the collection of phone records from millions of Americans.

With one exception, the judges that upheld the interpretation sat on the non-adversarial Fisa Court, a body that approves nearly all government surveillance requests and modifies about a quarter of them substantially. The exception was reversed by the 2nd circuit court of appeals.

Baker, speaking before the Senate voted, predicted: "I don't think anyone at NSA is going to invest in looking for ways to defy congressional intent if USA Freedom is adopted."

The USA Freedom Act, a compromise bill, would not have an impact on the vast majority of NSA surveillance. It would not stop any overseas-focused surveillance program, no matter how broad in scope, nor would it end the NSA's dragnets of Americans' international communications authorized by a different law. Other bulk domestic surveillance programs, like the one the Drug Enforcement Agency operated, would not be impacted.

The rise of what activists have come to call "bulky" surveillance, like the "large collections" of Americans' electronic communications records the FBI gets to collect under the Patriot Act, continue unabated – or, at least, will, once the USA Freedom Act passes and restores the Patriot Act powers that lapsed at midnight on Sunday.

That collection, recently confirmed by a largely overlooked Justice Department inspector general's report, points to a slipperiness in shuttering surveillance programs – one that creates opportunities for clever lawyers.

The Guardian revealed in 2013 that Barack Obama had permitted the NSA to collect domestic internet metadata in bulk until 2011. Yet even as Obama closed down that NSA program, the Justice Department inspector general confirms that by 2009, the FBI was already collecting the same "electronic communications" metadata under a different authority.

It is unclear as yet how the FBI transformed that authority, passed by Congress for the collection of "business records", into large-scale collection of Americans' email, text, instant message, internet-protocol and other records. And a similar power to for the FBI gather domestic internet metadata, obtained through non-judicial subpoenas called "National Security Letters", also exists in a different, non-expiring part of the Patriot Act.

Jameel Jaffer, the deputy legal director of the ACLU, expressed confidence that the second circuit court of appeals' decision last month would effectively step into the breach. The panel found that legal authorities permitting the collection of data "relevant" to an investigation cannot allow the government to gather data in bulk – setting a potentially prohibitive precedent for other bulk-collection programs.

"We don't know what kinds of bulk-collection programs the government still has in place, but in the past it's used authorities other than Section 215 to conduct bulk collection of internet metadata, phone records, and financial records. If similar programs are still in place, the ruling will force the government to reconsider them, and probably to end them," said Jaffer, whose organization brought the suit that the second circuit considered.

Julian Sanchez, a surveillance expert at the Cato Institute, was more cautious.

“The second circuit ruling establishes that a ‘relevance’ standard is not completely unlimited – it doesn’t cover getting hundreds of millions of people’s records, without any concrete connection to a specific inquiry – but doesn’t provide much guidance beyond that as to where the line is,” Sanchez said.

“I wouldn’t be surprised if the government argued, in secret, that nearly anything short of that scale is still allowed, nor if the same Fisa Court that authorized the bulk telephone program, in defiance of any common sense reading of the statutory language, went along with it.”