

Spy-in-U.S. foes split on law redo

NSA's deadline heats up debate

By Andrea Peterson

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The latest version of the USA Freedom Act, a spying overhaul package that narrowly failed to advance in Congress last year, debuted Tuesday. It has already drawn mixed reactions from a privacy community divided on how to retool the contentious spying programs revealed by former government contractor Edward Snowden nearly two years ago.

The legislation comes on the heels of a proposal from Senate Majority Leader Mitch McConnell, R-Ky., that would reauthorize the provision of the USAPATRIOT Act that provides the legal authority for the National Security Agency to collect Americans' phone records in bulk through 2020. That part of the law, Section 215, is set to expire June 1 unless Congress acts.

That deadline is key to the debate among supporters of an overhaul. Some privacy groups have put their weight behind the USA Freedom Act, while others are urging Congress to let Section 215 expire in the hopes of gaining a more comprehensive overhaul package down the line.

"Passing USA Freedom now, using the upcoming expiration of Section 215 as leverage, is our last, best chance for meaningful surveillance reform in the foreseeable future," said Kevin Bankston, the policy director at New America's Open Technology Institute.

Other supporters also appealed to a sense of urgency.

"We are running out of time, and the people are running out of patience," said Amie Stepanovich, the U.S. policy manager at Access, which cautiously supports the bill.

Most privacy advocates in favor of the bill agree it is a more significant compromise than some earlier versions.

It would require the government to request records from service providers using specific selection terms rather than collect them on its own, a change supporters said would effectively end domestic bulk collection programs under Section 215. It also includes limits on bulk collection under some other authorities and some transparency requirements.

But the law would give the government some emergency powers that would allow it to act for up to a week before getting court approval, and it would reauthorize the updated version of Section 215 without some other spying powers.

Some groups say that isn't good enough.

"This bill purports to ban certain acts under narrow authorities, but it doesn't ban those behaviors outright. Nor does it increase meaningful oversight of the NSA," said David Segal, executive director of Demand Progress, who wants Section 215 to expire.

The American Civil Liberties Union also supports expiration.

"In our view, Congress should simply let Section 215 sunset," said the group's deputy legal director, Jameel Jaffer.

Civil-liberties groups were split on the USA Freedom Act last year as well, and the various drafts of the law caused further fracturing -- even among some congressional co-sponsors. The issue seems to come down to a debate over principles versus pragmatism and what is actually attainable in the current political climate.

Nearly all privacy groups that favor the bill consider it an incremental step -- a fix for some of the most troubling bulk collection, not a complete solution to government mass surveillance. And most privacy advocates who oppose the bill emphasize that they share the same end goals, if not the same game plan, as supporters.

"We appreciate the efforts of the legislators who've crafted this reform bill, and we respect the advocacy groups that are supporting it," Jaffer said.

But the divide on specific rhetoric is jarring.

"At this point, a vote against USA Freedom is a vote against surveillance reform, period, even if it's motivated by a desire for stronger reforms," said Open Technology Institute's Bankston.

A blog post from Demand Progress makes nearly the opposite assertion: "A vote for a bill that does not end mass surveillance is a vote in support of mass surveillance."

However, supporters of the bill argue that letting Section 215 expire would actually leave American citizens with fewer protections than under the USA Freedom Act.

"There are other legal authorities that could allow the government to continue bulk collection even if 215 sunsets, which are limited by the USA Freedom Act," said Harley Geiger, advocacy director and senior counsel at the Center for Democracy and Technology, which supports the bill.

Without those limits, ending 215 might result in a sort of "shell game," where the government replaces one authority with another, according to Julian Sanchez, a senior fellow at the Cato Institute.

There's also a provision built into the USAPATRIOT Act that would allow for 215 to continue to be used for ongoing investigations even after it sunsets, as reported by *The New York Times* last year. Such a provision might be used to continue the bulk phone records program because some government enterprise-level investigations, such as those into major terror groups, can go on for a decade or more, according to Geiger and Sanchez.

"The truth is that neither the USA Freedom Act nor the expiry of Section 215 would end the government's mass-surveillance programs," said the ACLU's Jaffer. But actually forcing a sunset on 215 would send "an important message" against spying programs, he argued.

Some critics also worry the bill might actually give the government expanded spying powers, even if it moves direct control of Americans' bulk phone records out of government hands, because of the breadth of data that service providers might be forced to turn over in response to a request.

"In a way, it's kind of like Prism," the program revealed by Snowden where major tech companies turned over the content of online communications to the NSA, said longtime independent surveillance researcher Marcy Wheeler. "It pushes things to providers: Everyone gets immunity, but it doesn't add to the privacy."

Passing the bill, she argues, might also make it harder to get movement on more comprehensive changes because tech companies, which have been a major political force on this issue, will be able to already point to changes they helped win.

"Companies are provided monetary incentive to spy and share that information with the government, and blanket liability once they do, under USA Freedom -- even if that breaks that law," said Sascha Meinrath, the director of X-lab, an independent tech policy institute previously associated with New America. "Once companies receive that, they'll have almost no reason to weigh in on meaningful surveillance reform."

Google and Yahoo already have come out in favor of the latest version of USA Freedom.

But there's also a potential tactical reason to have some groups come out against the bill, said at least one privacy advocate who requested anonymity to avoid angering allies: Having some push for a more extreme position may give supporters leverage to argue against legislative attempts to water it down in committees.