

NEW YORK

U.S. Surveillance Powers Lapse After Senate Deal Is Blocked

By Chas Danner

June 1, 2015

As of 12:01 this morning, some provisions of the 9/11-era Patriot Act, including the NSA's controversial collection of bulk phone data, have now been stopped following an unprecedented Sunday in the U.S. Senate, during which legislators made a last-ditch effort to prevent the lapse with new legislation, only to be stymied by Senator Rand Paul. Delayed but not deterred, the Senate now seems certain to approve some version of the new bill as late as Tuesday, which means, barring further complications, it could be signed into law by the end of the week, [according](#) to the Associated Press. In the meantime, three parts of the Patriot Act have now been nullified.

In a rare Sunday evening session, 77 senators finally voted to advance the USA Freedom Act, a piece of House-approved legislation that would have extended, and at least partly reformed, the Patriot Act prior to its 12:01 a.m. "sunset." The reforms would have included a reining in of the bulk phone data program, and President Obama was ready and waiting to sign the bill later in the night. Senator Rand Paul, however, had something else in mind. Taking advantage of procedural rules with a theatrical flair that is becoming commonplace for the senator, Paul went against almost all of his GOP colleagues and blocked advancement of the new bill, guaranteeing that no vote could be held prior to the deadline.

The three parts of the Patriot Act that have now lapsed include section 215, the bulk phone data collection program that was exposed by NSA whistle-blower Edward Snowden, as well as a provision that let the government obtain roving wiretap warrants to track terror suspects' devices (which [according](#) to CNN gets used about 100 times a year). The third provision, which intelligence officials maintain they have never used but still need, allows national security tools to be used to target "lone wolves," i.e., suspects who don't seem to be affiliated with any known terrorist organization. The latter two provisions would be continued in the USA Freedom Act, while section 215 would not. However, it's important to note that, while the government can no longer use these measures for any new cases during the lapse, they are still [grandfathered](#) into being able to use them for ongoing investigations.

Over the weekend, both White House and intelligence community officials offered some dire warnings for what might happen if the new bill wasn't approved in time. Speaking on CBS's *Face the Nation* Sunday morning, CIA director John Brennan even [made it sound](#) as if terrorists were closely following the debate in Congress, waiting to see what upcoming weakness in our surveillance net they could take advantage of to harm us. Vox's Timothy B. Lee [rejects](#) this line of thinking as hyperbole, noting that it's not as if the government can't still target the same suspects during the lapse — they just have to fill out more paperwork to do so. He adds:

Reasonable people can disagree about whether this extra paperwork creates be an unnecessary burden or whether it brings much-needed judicial oversight to government spying. But either way, it's not an emergency.

In addition, as National Journal's Dustin Volz [points out](#), a recent Justice Department [report](#) determined that the FBI couldn't find any major case developments resulting from the bulk phone data program, so it may have been pointless anyway. He also adds that the intelligence community of course has other tools beyond the Patriot Act as well:

These authorities may be dead for now, but the intelligence community has a plethora of spying weapons and workarounds still accessible, including national security letters and the controversial Reagan-era Executive Order 12333. Like Section 702 of the Foreign Intelligence Surveillance Act, 12333 is intended to for overseas surveillance, although an unknown amount of U.S. data is "incidentally" tracked, particularly for citizens living abroad or those that communicate with foreigners.

Looking at the contentious dynamics of this debate within the GOP, Senate majority leader Mitch McConnell, who had until Sunday vigorously opposed advancement of the USA Freedom Act on the grounds its reforms were too extreme, eventually retreated as the deadline neared, and seemed to have convinced the majority of his Republican caucus to follow suit. Meanwhile, Rand Paul, who has made civil liberties and surveillance reform one of the key focuses of his presidential campaign, wasn't about to miss such a high-profile opportunity to prove his bona fides on the matter. In a [Time op-ed](#) published Saturday, the senator declared his intention to single-handedly stop the NSA's spying, which he sees as unconstitutional, insisting, "We should not be debating modifying an illegal program. We should simply end this illegal program." On Sunday, Paul then skipped a pre-session meeting of the Senate's Republican caucus, and later launched into his blocking move, which entailed making an objection to force a delay for the legislation. [According](#) to Politico, his GOP colleagues are none too pleased, and many blew off Paul's antics as irresponsible campaign grandstanding. Said John McCain on Sunday, "[T]his is, to some degree, a fundraising exercise. [Senator Paul] obviously has a higher priority for his fundraising and political ambitions than for the security of the nation."

Paul acknowledged such criticism during his lengthy floor speech Sunday night, wondering aloud if some of his critics "secretly want there to be an attack on the United States so they can blame it on me." Adopting some campaign rhetoric, he also spent a considerable amount of time blaming the surveillance program's excesses on President Obama. And to help provide a more campaign-style backdrop for his effort, Senator Paul also brought a coterie of supporters wearing "Stand with Rand" T-shirts to cheer him on from the Senate's spectator gallery. Then on social

media, he urged his followers to post [selfies](#) of themselves watching his floor speech. On Twitter, following the theatrics, Paul declared victory and [asked for donations](#).

The full consequences of Rand Paul's actions within the GOP remain to be seen, but as Tim Mak and Olivia Nuzzi [point out](#) over at the Daily Beast, his move does have a few likely benefits:

It puts him in the spotlight fighting a battle in which he has remained consistent throughout his political career. And perhaps more important than that, the burst of attention comes both after a period of doubt among some of Paul's more staunchly libertarian supporters and, conveniently, while he is promoting his latest book.

They also highlight how Rand's grandstanding on this issue might help shore up support among those who have backed the previous presidential campaigns of his father, Congressman Ron Paul. Several risks remain, though, in that any future national security crisis could be used to damage Paul as too weak on the nation's enemies, while another consequence, [according](#) to BuzzFeed's John Stanton, could be a souring of Paul's relationship with Senator McConnell, who thus far has been a key supporter of Paul's presidential campaign and given the junior senator a lot of latitude to use the Senate as a public platform. And then there is criticism from other libertarians, who argue, as the Cato Institute's Julian Sanchez [does](#), that civil liberties are in fact worse off without the USA Freedom Act in place, regardless of its flaws:

[I]t would be profoundly misguided to think that permanent expiration of this one authority would be better, from a civil liberties perspective, than even a highly imperfect reform that extends the authority in a heavily modified form. A temporary sunset may be a strategically useful means to the end of stronger reforms. But as a permanent end in itself, the expiration of 215 would provide the illusion of triumph even while leaving much of the machinery of surveillance intact.

Nonetheless, *Reason's* Nick Gillespie, another libertarian, [applauds](#) Paul's efforts and sees the current debate as an essential sea change in how the country perceives its security:

Taken together, I think that Paul's popular actions against the Patriot Act, government questioning of its effectiveness, and meaningful legal challenges it all point in the same direction: We are as a country finally coming out of the fog generated in the immediate aftermath of the 9/11 attacks. The Global War on Terror is being reevaluated at every level, from tactics to strategy to relevance. This is a good thing and augurs well for significant changes in the near future.

The Senate will debate the USA Freedom Act again starting today and may or may not try to add amendments to the bill at that time. Then the Senate will likely vote on Tuesday, and if any changes have been made, the House will have to weigh in on those changes as well. Either way, it seems more than likely that Obama will have something to sign by the end of the week, so for at least some of the now-lapsed Patriot Act, the sunset won't linger.