

Patriot Act author prepares bill to put NSA bulk collection 'out of business'

Exclusive: Bipartisan bill pulls together existing efforts to dramatically reform the NSA in the wake of Snowden disclosures

Dan Roberts in Washington

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Jim Sensenbrenner told the Guardian: 'The disclosure that NSA employees were spying on their spouses ... was very chilling.' Photo: Chip Somodevilla/Getty Images

The conservative Republican who co-authored America's Patriot Act is preparing to unveil bipartisan legislation that would dramatically curtail the domestic surveillance powers it gives to intelligence agencies.

Congressman Jim Sensenbrenner, who worked with president George W Bush to give more power to US intelligence agencies after the September 11 terrorist attacks, said the intelligence community had misused those powers by collecting telephone records on all Americans, and claimed it was time "to put their metadata program out of business".

His imminent bill in the House of Representatives is expected to be matched by a similar proposal from Senate judiciary committee chair Patrick Leahy, a Democrat. It pulls together existing congressional efforts to reform the National Security Agency in the wake of disclosures by whistleblower Edward Snowden.

Sensenbrenner has called his bill the Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-Collection, and Online Monitoring Act – or USA Freedom Act, and a draft seen by the Guardian has four broad aims.

It seeks to limit the collection of phone records to known terrorist suspects; to end "secret laws" by making courts disclose surveillance policies; to create a special court advocate to represent privacy interests; and to allow companies to disclose how many requests for users' information they receive from the USA. The bill also tightens

up language governing overseas surveillance to remove a loophole which it has been abused to target internet and email activities of Americans.

Many lawmakers have agreed that some new legislation is required in the wake of the collapse in public trust that followed Snowden's disclosures, which revealed how the NSA was collecting bulk records of all US phone calls in order to sift out potential terrorist targets.

In July, a temporary measure to defund the NSA bulk collection programme was narrowly defeated in a 217 to 205 vote in the House, but Sensenbrenner said the appetite for greater privacy protections had only grown since.

"Opinions have hardened with the revelations over the summer, particularly the inspector general's report that there were thousands of violations of regulations, and the disclosure that NSA employees were spying on their spouses or significant others, which was very chilling," he told the Guardian in an interview.

Instead, the main opposition to Sensenbrenner and Leahy's twin-pronged effort is likely to come from the chair of the Senate intelligence committee, Dianne Feinstein, who is supportive of the NSA but who has proposed separate legislation focusing on greater transparency and checks rather than an outright ban on bulk collection.

Sensenbrenner and other reformers have been scathing of this rival legislative approach, calling it a "fig leaf" and questioning the independence of the intelligence committee. "I do not want to see Congress pass a fig leaf because that would allow the NSA to say 'Well, we've cleaned up our act' until the next scandal breaks," he said.

"[Party leaders] are going to have to review what kind of people they put on the intelligence committee. Oversight is as good as the desire of the chairman to do it."

Sensenbrenner also called for the prosecution of Obama's director of national intelligence, James Clapper, who admitted misleading the Senate intelligence committee about the extent of bulk collection of telephone records.

"Oversight only works when the agency that oversight is directed at tells the truth, and having Mr Clapper say he gave the least untruthful answer should, in my opinion, have resulted in a firing and a prosecution," said the congressman.

Clapper has apologised for the incident, but reformers expect a fierce backlash to their proposals to rein in his powers in future. "I anticipate a big fight, and Senator Feinstein has already basically declared war," said Sensenbrenner. "If they use a law like Senator Feinstein is proposing, it will just allow them to do business as usual with a little bit of a change in the optics."

His twin effort with Leahy to introduce legislation via the House and Senate judiciary committees is partly intended to circumvent such opposition among intelligence committee leaders.

But there is plenty of support among other intelligence committee members. Democratic senators Ron Wyden and Mark Udall, who were first to seize on Snowden's disclosures as a way to make public their longstanding concerns, recently teamed up with Republican Rand Paul and colleague Richard Blumenthal to propose similar reforms of the NSA in their own bill [1].

Sensenbrenner insisted the different reform efforts were likely to converge, rather than compete. "I wanted to get a bill passed, and the best way to get a bill passed is to have the chairman of the judiciary committee and the most senior US senator [Leahy] co-sponsoring it," he said. "We need to change the law, and we need to change the law quickly."

Publication of the House version of the USA Freedom bill, jointly sponsored by Democrat John Conyers, has

been held up by the government shutdown, which has furloughed a number of congressional legal staff, but is still expected within the next few days.

A spokesman for Leahy's office told the Guardian on Thursday that the senator was still on track to introduce his version of the legislation through the Senate judiciary committee once the shutdown effects had passed.

The main thrust of the bill would tighten section 215 of the Patriot Act to limit the collection of business records such as telephone metadata, to instances where the NSA was able to convince courts set up under the Foreign Intelligence Surveillance Act (Fisa) that the target was "an agent of a foreign power", was "subject of an investigation" or thought to be "in contact with an agent of a foreign power".

Sensenbrenner said this tighter definition was needed because previous language had been improperly interpreted by Fisa courts. "Having the three qualifications would make it very clear that they have to find out who a bad person is first, get the Fisa order, and then see who that bad person was contacting to get the information rather than find the needle in a very large haystack, which is what the metadata was," he said.

"We had thought that the 2006 amendment, by putting the word 'relevant' in, was narrowing what the NSA could collect. Instead, the NSA convinced the Fisa court that the relevance clause was an expansive rather than contractive standard, and that's what brought about the metadata collection, which amounts to trillions of phone calls."

This approach has been justified by intelligence agencies as the only way to get enough data to allow them to sift through it looking for connections, but Sensenbrenner claimed that NSA director general Keith Alexander only pointed to 13 possible suspicious individuals found through this method during his recent Senate testimony.

"The haystack approach missed the Boston marathon bombing, and that was after the Russians told us the Tsarnaev brothers were bad guys," added Sensenbrenner.

Another important aspect to the bill, in the draft seen by the Guardian, is a set of measures that would prevent the NSA using other legal powers to carry on collecting bulk data – even if the Patriot Act language is tightened.

"The concern that I have had is that if the shoe starts pinching on what the NSA is doing, they will simply try to use another mechanism to try to get the metadata and national security letters is the one that would rise to the top," said Sensenbrenner, who described ways to close this potential loophole.

"I have always had a lot of questions about administrative subpoenas such as national security letters, and the bill adds a sunset date for national security letters, which were originally authorised in 1986."

Staff members have been holding discussions behind the scenes about how to make sure the NSA can continue to get access to individual phone records when they do have specific concerns about terrorism activity.

"We will have to figure out some kind of way for the NSA to get records, whether through a Fisa court order or a grand jury subpoena," said Sensenbrenner.

This is likely to be opposed by the security services, who argued in recent congressional testimony that such a system would impose unacceptable delays in obtaining records.

Sources

1. <http://www.theguardian.com/world/2013/sep/25/nsa-reform-bill-surveillance-congress>

