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POLITICS

Surveillance and Privacy Debate Reaches Pivotal Moment in Congress

By CHARLIE SAVAGE JAN. 10, 2018

WASHINGTON — A yearslong debate over National Security Agency surveillance and protections for Americans' privacy rights will reach a climactic moment on Thursday as the House of Representatives takes up legislation to extend a program of warrantless spying on internet and phone networks that traces back to the Sept. 11 attacks.

There is little doubt that Congress will extend an expiring statute, known as Section 702 of the FISA Amendments Act, that permits the government to collect without a warrant from American firms, like Google and AT&T, the emails and other communications of foreigners abroad — even when they are talking to Americans.

But it is far from clear whether Congress will impose significant new safeguards for Americans' privacy. A bipartisan coalition of civil-liberties-minded lawmakers are trying to impose such changes, while the Trump administration, the intelligence community and House Republican leadership oppose them.

Thursday's vote is seen as the crucial test because more would-be reformers are in the House than in the Senate, which will take up the legislation later. If majority support for imposing new privacy protections on the program does not exist in the House, the Senate is unlikely to add them in.

"The chances are better in the House," acknowledged Senator Rand Paul, Republican of Kentucky, at a news conference on Wednesday of House and Senate lawmakers who support surveillance overhaul efforts. "The privacy movement is stronger in the House than the Senate. Maybe we can learn from you guys."

The N.S.A. began collecting Americans' international phone calls and emails without a warrant in October 2001 as part of the Bush administration's post-Sept. 11 Stellarwind program. In 2008, after the program had come to light, Congress legalized a form of it by enacting Section 702 of the FISA law. That law enabled the program to expand to Silicon Valley firms, not just telecoms, and to all foreign intelligence purposes, not just counterterrorism.

In late 2012, Congress extended the law for five years without changes. But the pending expiration of Section 702 is forcing lawmakers to address its substance for the first time since the 2013 leaks about N.S.A. programs by Edward J. Snowden set off a major debate about 21st-century surveillance technology and privacy rights.

On Thursday, the House will vote on an Intelligence Committee bill that would extend the 702 program for six years with only minor changes. But House leaders are permitting lawmakers first to vote on a single proposed amendment that would make major changes.

Chief among them, the amendment would ban the practice whereby officials at the N.S.A., the F.B.I. and other security agencies, without a warrant, search for and read private messages of Americans that the government incidentally swept up under the 702 program. Instead, except in emergencies, officials would need to obtain a court order to query the repository for an American's information.

The amendment is chiefly sponsored by Representative Justin Amash, Republican of Michigan, and Representative Zoe Lofgren, Democrat of California. It would substitute in the text of another bill, dubbed the USA Rights Act, which would extend Section 702 by only four years.

The bipartisan coalition backing overhaul efforts — which includes some of the most conservative and most liberal members of the House — say that change is necessary to uphold the meaning and substance of Fourth Amendment privacy rights in light of 21st-century communications technology and surveillance powers.

But the F.B.I. and the intelligence community have balked at that proposal, saying it would impede their efforts to protect the country to require warrants to query information the government already possesses. There are also lawmakers of both parties — backed by House leadership — who oppose the amendment.

Aides to Representative Devin Nunes, the California Republican who chairs the House Intelligence Committee, distributed a one-page sheet this week denouncing the amendment as imposing "unnecessarily severe requirements" that would endanger Americans.

Complicating matters, the base bill backed by Mr. Nunes contains a gesture toward a court-order requirement, too. It would apply only under narrow circumstances: if F.B.I. agents have already opened a criminal investigation into the American whose information they are searching for, and if the agents have no national-security rationale.

Representative Adam Schiff of California, the ranking Democrat on the Intelligence Committee, said the warrant requirement in the base bill would be sufficient to "prevent the database from being used as a general tool to gather evidence and introduce it in court in cases that have nothing to do with terrorism."

But the base bill would still permit routine queries for Americans' information without warrants. Its warrant requirement would not apply to national-security-related queries by a range of agencies, including the C.I.A., the N.S.A. and the F.B.I. Nor would it apply to F.B.I. queries when agents are merely pursuing tips about an American but do not yet have enough evidence of wrongdoing to open a criminal investigation.

In short, the base bill would give greater privacy protections to criminal suspects than to people the F.B.I. has no solid basis for thinking had committed any wrongdoing.

Senator Ron Wyden, an Oregon Democrat, dismissed the base bill's limited warrant provision on Wednesday as "fake reform" that was really just "business as usual."

Adding to the uncertainty, in 2014 and 2015, the House approved amendments to appropriations bills that would have required warrants to search the 702 repository for Americans' information, but they were rejected in negotiations with the Senate. When the idea came up again in 2016, shortly after the terrorist attack on a nightclub in Orlando, Fla., the House voted it down.

Another significant difference between the base bill and the amendment centers on the N.S.A.'s old practice of scanning Americans' international emails and other internet messages and collecting those that mention a foreign target — but are neither to nor from that target. The technique came to light amid the Snowden leaks and ended last year.

Such collection is technically complex, and the N.S.A. shut it down after repeatedly running into trouble adhering to limits imposed by the Foreign Intelligence Surveillance Court. But the agency wants to retain the flexibility to turn it back on. The base bill would permit it to do so after briefing the congressional intelligence committees. The amendment would ban the practice.

Nicholas Fandos contributed reporting.

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