Oppose Senator Burr’s “FISA Improvements Act of 2015”

After the US Senate narrowly voted down the USA FREEDOM Act of 2015 (H.R. 2048), Senator Burr floated a draft legislation he described as a “compromise” to address overbroad government surveillance of Americans.¹ Senator Burr’s draft bill, titled the FISA Improvements Act of 2015, would not end NSA bulk collection, would impose a data retention requirement on private companies, does not address the problem of secret law, and expands government surveillance without a court order. The Center for Democracy & Technology urges opposition to this bill. Among other things, the FISA Improvements of 2015 –

- **Does not end bulk collection.** The draft bill makes no change to the FISA pen/trap statute or national security letters. The government used the FISA pen/trap statute (50 USC 1842), which covers both phone and Internet records, for bulk collection of email metadata until 2011.² The draft bill does nothing to prevent the government from restarting a nationwide bulk collection program under this authority. By contrast, the USA FREEDOM Act of 2015 would prohibit nationwide bulk collection under Sec. 215 of the PATRIOT Act, the FISA pen/trap statute, and national security letters.³

- **Expands surveillance without a court order.** Sec. 205 of the draft bill grants new authority to the FBI to obtain electronic communication transactional records (ECTRs) using national security letters (18 USC 2709). The draft bill would allow the FBI to obtain ECTRs from service providers by merely certifying relevance to an investigation - no court order required. This expansion of surveillance power is unnecessary because the FBI can already obtain ECTRs using Sec. 215 of the PATRIOT Act or the FISA pen/trap statute (50 USC 1842), though these require a court order predicated on a very low standard: relevance to an investigation.⁴

- **Does not address secret law.** The draft bill does nothing to shed light on secret FISA Court opinions with significant implications for Americans’ civil liberties. Secret law is incompatible with an open and democratic society, but the draft bill does not address this problem. By contrast, Sec. 402 of the USA FREEDOM Act of 2015 requires the Attorney General to declassify (to the greatest extent practicable) or release unclassified summaries of FISA Court opinions with a significant or novel interpretation of law.

- **Makes surveillance power permanent.** Sec. 102 of the draft bill repeals the sunset provisions for the Sec. 215, roving wiretap, and lone wolf authorities of the PATRIOT Act. The sunset provisions are safeguards to ensure Congressional review of controversial laws, and repealing the sunset provisions removes a crucial incentive for Congress to update and align the laws with

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³ Sections 103, 201, and 501 of the USA FREEDOM Act of 2015 (H.R. 2048), respectively.

⁴ 50 USC 1861(b)(2), 1842(c)(2).
Congressional intent and the will of voters. By contrast, Sec. 705 of the USA FREEDOM Act of 2015 would sunset these PATRIOT Act provisions in four years.

- **Empowers the government to mandate data retention.** Sec. 101 of the draft bill requires all electronic communication service providers to notify the Attorney General if they retain call detail records for less than three years. The Attorney General can obtain a secret court order to compel service providers to retain call detail records for "at least" three years. This provision would require new government interference with the lawful business practices of US companies, forcing them to become arms of the intelligence community. Yet a data retention mandate is unnecessary for security – in a letter of support for the USA FREEDOM Act, the Attorney General the Director of National Intelligence stated that carriers’ existing practices for retaining metadata were sufficient for preserving essential security capabilities.⁵

- **Codifies NSA’s current telephony bulk collection program for at least two years.** Sec. 101 of the draft bill would require a two-year delay before the NSA’s ongoing bulk collection of phone records can be limited. The draft bill would require intelligence officials to submit extremely detailed assessments of the expected impact of the transition from bulk collection to the system proposed in the bill. If the assessments uncover a potential problem, real or manufactured, this could be used as an excuse to continue the bulk collection program without reform. This delay and assessment requirement would be costly and unnecessary – in a letter to Senate Leadership, the Director of the NSA made clear that the query system that the USA FREEDOM Act of 2015 would establish could be fully operational within 180 days.⁶

Senator Burr’s draft bill is not a compromise – it is a nonstarter that makes government surveillance power and secrecy even more broad. Senator Burr’s draft bill would undo nearly all the House of Representatives’ work to end bulk collection and strengthen transparency by passing the USA FREEDOM Act of 2015 and does not adequately respond to Americans, who overwhelmingly favor restrictions on the government’s surveillance power.⁷

The Center for Democracy & Technology strongly opposes Senator Burr’s draft FISA Improvements Act of 2015. We urge the Senate to reject it and pass the USA FREEDOM Act – or sunset Sec. 215 of the PATRIOT Act.

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