

## Oppose Amendments to Weaken & Delay USA FREEDOM Act

Yesterday (05/31/15) the USA FREEDOM Act (H.R. 2048) cleared an important Senate hurdle and is now headed for a vote on final passage. But first, amendments to the bill will be considered. Senate Majority Leader Mitch McConnell filed four problematic amendments to the USA FREEDOM Act<sup>1</sup> – without permitting any amendments to strengthen privacy or transparency – all of which may be voted on as soon as tomorrow (06/02/15) morning. These amendments only need 50 votes to pass.

The Center for Democracy & Technology (CDT) opposes Senator McConnell's amendments because each one would significantly weaken the USA FREEDOM Act. These amendments are unnecessary for national security, erode privacy and transparency, and fail to reflect the overwhelming consensus in favor of the House-passed bill. If the amendments are added to the USA FREEDOM Act, CDT will oppose the final bill.

- 1) **Amendment 1449 (ARM15C86)** – Substitute amendment containing a notice requirement for data retention and a certification requirement for transition to the new phone records program. *CDT recommends a NO vote.*

This amendment (Sec. 107) would require private service providers receiving an order for production of call detail records to notify the Attorney General if they intend to retain call detail records for less than 18 months. The service provider must notify the Attorney General six months in advance of retaining phone records for less than 18 months. This notice requirement is unnecessary for security - the Attorney General herself and the Director of National Intelligence stated that companies' current retention practices are sufficient for essential security needs.<sup>2</sup> The notification requirement is broad, applying to all "call detail records"<sup>3</sup> – including those that are not related to any investigation. The requirement that private companies report to law enforcement any change in data retention policies far in advance will likely become a significant factor in business decisions, potentially deterring innovation and upgrades that would benefit consumers.

This amendment (Sec. 110) would also require the Attorney General to certify to Congress – within five months of enactment of the USA FREEDOM Act – whether the prohibition of bulk collection under Sec. 215 will not harm national security, and will ensure protection of classified information and operations. The Attorney General must also certify whether querying phone records held by private companies will allow for the timely retrieval of foreign intelligence information. The USA FREEDOM Act (Sec. 109) already allows a six-month transition period, which the NSA Director said would meet technical and security needs to establish a system of querying records held by phone companies.<sup>4</sup> But the amendment's certification provision would require the Attorney General to make guarantees about the impact on security of a system before the transition is even complete. Such guarantees may be difficult to objectively assess – several Members of Congress continue to argue that the telephony bulk collection program is essential for security, despite multiple experts with access to classified intelligence concluding that the program is an ineffective tool for protecting national security.<sup>5</sup>

- 2) **Amendment 1450** – Second degree amendment to 1449. This amendment extends government authority to collect Americans' communications records in bulk by an extra six months. *CDT recommends a NO vote.*

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<sup>1</sup> See United States Senate, *Schedule for Monday, June 1, 2015*, Senate Democrats,

<http://democrats.senate.gov/2015/06/01/schedule-for-monday-june-1-2015/> (last accessed Jun. 1, 2015).

<sup>2</sup> Letter from Attorney General Lynch and Director of National Intelligence Clapper to Senators Lee and Leahy, May 11, 2015,

<http://www.scribd.com/doc/265113744/Letter-to-Senators-Leahy-and-Lee-Supporting-USA-Freedom-Act>.

<sup>3</sup> Sec. 107 of the USA FREEDOM Act of 2015, H.R. 2048, 114th Cong.

<sup>4</sup> Letter from NSA Director Rogers to Senators McConnell and Reid, May 20, 2015,

<http://apps.washingtonpost.com/g/documents/politics/letter-from-nsa-director-michael-s-rogers-to-senate-leaders/1557>.

<sup>5</sup> See Harley Geiger, *Senators' Questionable Claims about NSA Bulk Collection*, Lawfare, May 11, 2015, available at

<http://www.lawfareblog.com/2015/05/senators-questionable-claims-about-nsa-bulk-collection/>.

This amendment delays Sections 101-103 of the USA FREEDOM Act for an additional six months, codifying bulk collection under Sec. 215 for a full year. The amendment does not just delay the transition of the phone records program – the delay applies to the bill’s general prohibition on bulk collection under Sec. 215. This measure is unnecessary for security and needlessly impairs Americans’ privacy. NSA Director Rogers stated in a letter<sup>6</sup> that the 180-day transition period would meet technical and security needs, and Senator McConnell has provided no information to counter this claim or justify the need for a longer transition period.

3) **Amendment 1451** – Second Degree amendment to 1450. This amendment weakens the USA FREEDOM Act amicus provision. *CDT recommends a NO vote.*

This amendment would give the FISA Court extensive control over amicus curiae – outside experts providing input to the Court. The amendment would give the FISA Court power to appoint the amicus, designate the amicus’ duties, and designate the documents and materials the amicus may review. The FISA Court would not be required to issue any written finding when the Court declines to appoint an amicus in significant cases.

The amicus provision of the USA FREEDOM Act (Sec. 401) is already quite modest. Under the USA FREEDOM Act, the amicus can argue any matter before the FISA Court, not just in favor of privacy and civil liberties.<sup>7</sup> Under the USA FREEDOM Act, the Court has discretion to designate the cases in which the amicus participates, and controls the scope of the amicus’ duties.<sup>8</sup> However, the USA FREEDOM Act would require the FISA Court to issue a written finding when an amicus is not appointed in significant cases, providing incentive for the Court to hear outside perspectives when considering a matter of importance to Americans’ civil liberties. In addition, the USA FREEDOM Act requires the FISA Court to provide the amicus with all materials relevant to the duties of the amicus, helping to ensure the amicus can provide complete and informed assistance to the Court.

The secretive FISA Court typically hears only one perspective – that of the government. Weakening the USA FREEDOM Act’s amicus provision – particularly by removing the requirement of a written notice when the FISA Court declines to appoint an amicus in significant cases – is unnecessary for security and will lead to less balanced consideration in cases with profound implications for Americans’ privacy.

4) **Amendment 1452 (ARM15C92)** – Substitute amendment that contains all of the above changes and strikes disclosure of FISA Court opinions to the public. *CDT recommends a NO vote.*

In addition to the problems described above, this amendment eliminates a key element of the USA FREEDOM Act requiring the government to declassify – or release detailed unclassified summaries of – significant FISA Court opinions for the public. Instead, the amendment would only require disclosure of FISA Court opinions to the House and Senate Judiciary and Intelligence Committees.

The amendment would eliminate the USA FREEDOM Act provision that sheds light on secret FISA Court opinions with significant implications for Americans’ civil liberties. The amendment would prevent public disclosure of declassified opinions, impairing debate over how the FISA Court is construing the law. Members of Congress can already access FISA Court opinions. Secret law is incompatible with an open and democratic society, and the amendment would exacerbate 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 to the public.

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<sup>6</sup> Letter from NSA Director Rogers to Senators McConnell and Reid, May 20, 2015, <http://apps.washingtonpost.com/g/documents/politics/letter-from-nsa-director-michael-s-rogers-to-senate-leaders/1557>.

<sup>7</sup> The USA FREEDOM Act permits the amicus to provide to the FISA Court “legal arguments or information regarding any other area relevant to the issue presented to the court.” (Sec. 401)

<sup>8</sup> The USA FREEDOM Act permits the FISA Court to refuse amicus participation in any proceeding simply by declaring that such participation is “not appropriate.” (Sec. 401)