



NACDL urges support of the Lee-Leahy, Wyden-Daines and Paul amendments to the USA FREEDOM Reauthorization Act of 2020

Since the passage of the USA Freedom Act in 2015, several incidents have made it clear that the previous reforms were wholly insufficient to protect from programmatic abuses. Specifically:

- The NSA halted the call detail records program due to recurrent acquisition of records unlawfully and the program’s negligible intelligence value;¹
- Government reports indicate the use of “specific selector terms” did not effectively limit bulky collection under Section 215;²
- In December, the Department of Justice Inspector General’s report “Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation” detailed many procedural violations and other shortcomings in the FBI’s investigation, highlighting the importance of notice to the accused in criminal cases and the need for the accused to have access to the underlying FISA applications and orders; and
- A second, interim audit from March of this year further found that 25 FISA applications contained “apparent errors or inadequately supported facts” in every case file examined. The same report 4 additional cases where the associated Woods Files, which are intended to help ensure the accuracy of FISA applications, could not be found at all.³

Despite the repeated evidence of significant issues with the implementation of these intelligence authorities, the House introduced and passed a reauthorization bill without a committee mark up or any debate. Although the House bill did make some significant changes, it did not go nearly

¹ Ellen Nakishima, *Repeated Mistakes in Phone Record Collection Led NSA to Shutter Controversial Program*, WASHINGTON POST, (June 26, 2019 at 5:30 A.M), https://www.washingtonpost.com/world/national-security/repeated-mistakes-in-phone-record-collection-led-nsa-to-shutter-controversial-program/2019/06/25/f256ba6c-93ca-11e9-b570-6416efdc0803_story.html.

² Charlie Savage, *N.S.A. Triples Collection of Data From U.S. Phone Companies*, N.Y. TIMES, (May 4 2018), <https://www.nytimes.com/2018/05/04/us/politics/nsa-surveillance-2017-annual-report.html>.

³ Office of the Inspector General, MANAGEMENT ADVISORY MEMORANDUM FOR THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION REGARDING THE EXECUTION OF WOODS PROCEDURES FOR APPLICATIONS FILED WITH THE FOREIGN INTELLIGENCE SURVEILLANCE COURT RELATING TO U.S. PERSONS (March 2020), <https://oig.justice.gov/reports/2020/a20047.pdf>.



far enough to address the serious constitutional concerns that have come to light over the past four and half years.

NACDL was gratified that the Senate did not push the bill through without any opportunity for debate or amendment. As the bill comes back to the Senate for consideration, NACDL urges you to vote for three amendments that seek to address some of the deficiencies in the House bill, which would create a more privacy protective reauthorization. While these limited amendments are no substitution for a meaningful reform bill, they add critical protections.

- Senators Lee and Leahy’s amendment strengthens the role of “amici curiae,” who are independent, expert advisors to the Foreign Intelligence Surveillance Court (FISC), by increasing their access to information and power to raise issues with the FISC. It would also encourage their appointment for surveillance applications that involve political or religious leaders and organizations, as well as the domestic news media. Finally, it would require the Department of Justice and Federal Bureau of Investigation to provide all material evidence, including exculpatory evidence, to the FISC.
- Senators Daines and Wyden’s amendment prohibits the use of Section 215 for warrantless surveillance of the internet search and browsing history of people in the United States. This amendment would thus make clear that internet browsing and search history cannot be collected under Section 215, which is appropriate given that it does not require the government to meet a probable cause standard.
- Senator Paul’s amendment prohibits the use of FISA, as well as surveillance conducted under claimed Article II power, against people in the United States or in proceedings against them. In addition, it makes clear that if the government wants to surveil a United States person, they may only do so pursuant to a warrant in a traditional Article III court.

NACDL urges you to vote for the Lee-Leahy, Daines-Wyden and Paul amendments to the USA FREEDOM Reauthorization Act and to oppose any amendments that would seek to undermine these key privacy protections. If you have any questions please contact Jumana Musa at jmusa@nacdl.org.