



May 11, 2020

**Key Vote YES on Lee-Leahy/Paul/Daines-Wyden Amendments And
NO on McConnell Amendments to the USA FREEDOM
Reauthorization Act, H.R. 6172**

On behalf of FreedomWorks' activist community, I urge you to contact your Senators and ask them to vote YES on civil liberties reform amendments (Lee-Leahy/Paul/Daines-Wyden) to the USA Freedom Reauthorization Act, H.R. 6172, and to vote NO on amendments that would substantially weaken these reforms (McConnell). The underlying bill, H.R. 6172, would reauthorize portions of the Foreign Intelligence Surveillance Act (FISA) that have been expired since March 15th of this year.

As we noted when the House passed H.R. 6172, "This bill contains a lot of window dressing to conceal that it largely leaves untouched the legal authorities that have been abused to circumvent the Constitution and acquire the data of millions of innocent Americans without a warrant." You can read the longer story of our concerns about the underlying bill and the unfortunate process by which it was produced [HERE](#).

Even since the bombshell DOJ Inspector General (IG) report revealing the extent to which the FBI ignored the law as it renewed FISA surveillance against Trump campaign advisor Carter Page, more revelations have suggested these issues are systemic and endanger the basic due process rights of all Americans. The more recent [IG audit](#) of 29 random FISA applications by the FBI showed "an average of about 20 issues per application reviewed" and a lack of confidence "that the process is working as it was intended to help achieve the 'scrupulously accurate' standard for FISA applications."

In combination with what we already knew about the government's previous mass collection of data and communications of Americans thanks to various whistleblowers, it should be apparent that much stronger transparency and legal protections are necessary to ensure that intelligence agencies abide by the Fourth Amendment as they conduct their important work.

Thanks only to a heroic stand in March by a bi-partisan group of senators as Senate leadership attempted to ram the USA Freedom Reauthorization Act through without debate, we will now see a vote on three reform amendments designed to improve Americans' due process rights against warrantless government surveillance. These positive amendments are as follows:

1 -- Sponsored by Senators Mike Lee (R-Utah) and Patrick Leahy (D-Vt.): This amendment greatly expands the instances under which *amici curiae* may be appointed to present some semblance of an adversarial process in Foreign Intelligence Surveillance Court (FISC) proceedings. Obviously, it would defeat the point of a legitimate surveillance order to have the target be able to represent themselves in front of the FISC, but the Lee/Leahy amendment insists that amici with expertise in privacy and civil liberties be present to ensure a fair proceeding in their stead in a number of instances.

At their discretion, the FISC would be expected to appoint an amicus in FISA applications involving: new interpretations of law; First Amendment-protected activities; persons affiliated with political campaigns, religious organizations, or domestic new media; the use of new surveillance technologies; or other civil liberties concerns. This would greatly increase the likelihood that abuses of surveillance authorities, including both the NSA's mass surveillance of Americans revealed by Edward Snowden and the FBI's abuse of the same against President Trump's campaign, would be discovered and flagged before they got out of hand.

The government would also be explicitly required to disclose all possible exculpatory evidence that may undercut the need for a surveillance order to both the FISC and the amicus. The importance of such a requirement is highlighted by both the Carter Page incident during the Trump campaign, in which information about Page being an intelligence asset was withheld from the FISC. Recent revelations that the FBI also withheld exculpatory evidence in their investigation of General Flynn, as well, further calls that the disclosure of such information be explicitly demanded.

2 -- Sponsored by Senator Rand Paul (R-Ky.): This amendment would require that a warrant be acquired under a non-FISA court in order to conduct surveillance on any US person and would disallow the use of information collected on US persons under either FISA or Executive Order 12333 from being used against them in court. Because it challenges the very structure of the surveillance authorities the government claims, this is considered a more ambitious reform than the others. However, it would bring surveillance authorities far closer into line with the express intent of the 4th Amendment - that all Americans receive due process against undue searches and seizures and that defendants have access to all information available to the government in the event of a court proceeding.

The specific prohibition on the use of EO 12333 data against Americans is particularly noteworthy in light of Senator Burr's recent assertion on the Senate floor that the executive branch could use it to continue Section 215 surveillance unabated in the absence of legislative permission.

3 -- Sponsored by Senators Steve Daines (R-Mont.) and Ron Wyden (D-Ore.): This amendment would disallow the collection of internet search and browser history under Section 215 of the USA PATRIOT Act. This information could still be acquired, but via other legal authorities that require a demonstration of probable cause by the government. This is largely codifying what is supposed to be current practice, but the government's long history of reading the restrictions on their access to information extremely broadly justifies establishing a clear prohibition on acquiring such intrusive and revealing personal information. One need only check one's own browser history to see how many details about a person's life and that of their family can be inferred merely by acquiring that data.

FreedomWorks supports all three of the above amendments.

In addition, Senate Majority Leader Mitch McConnell (R-Ky.) has reserved the right for himself or a designee to introduce "side-by-side" amendments to each of the three reform amendments above. These amendments are substantially weakened versions of the reform proposal that are calculated to let supporters claim to support civil liberties reforms while accomplishing little to nothing by way of real reform.

1. **The McConnell side-by-side to Lee/Leahy:** This amendment would remove many of the instances where an amicus ought to be invoked, instead only expanding amicus involvement to cases involving a federal political campaign, or in which the criminal predicate for the FISA request is solely a violation of the Foreign Agent Registration Act (FARA). This effectively guts the civil liberties protections offered by the Lee/Leahy amendment. Perhaps even more perverse, it suggests that politicians and their campaigns ought to have special due process protections that for some reason shouldn't apply to ordinary citizens.
2. It is unknown at this time whether Leader McConnell will offer a side-by-side to the Paul amendment, or what that would look like.
3. **The McConnell side-by-side to Daines/Wyden:** This amendment would only prohibit collection of internet search and browser records "to the extent that such information constitutes contents of a communication" as defined by the Electronic Communications Privacy Act (ECPA). This would likely allow the government to claim that the collection of some internet records would indeed be allowed under Section 215, which operates

under a far lower standard of evidence requirement than probable cause. This amendment passing would thus actually worsen the underlying bill instead of improving it.

FreedomWorks thus opposes both of the McConnell side-by-side amendments.

In keeping with our [prior opposition](#) to H.R. 6172 in the House, FreedomWorks will oppose its passage in the Senate should the three legitimate reform amendments fail.

FreedomWorks may count any and all of these votes on amendments, cloture, and final passage for H.R. 6172 on our 2020 Congressional Scorecard and reserves the right to score any related or additional votes. The scorecard is used to determine eligibility for the FreedomFighter Award, which recognizes Members of the House and Senate who consistently vote to support economic freedom and individual liberty.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Brandon', with a stylized flourish at the end.

Adam Brandon
President, FreedomWorks