



December 5, 2019

## **Oppose the Protecting Against International Terrorism Act, S. 2939**

On behalf of our activist community, I urge you to contact your senators and ask them to oppose the Protecting Against International Terrorism Act, S. 2939. Introduced by Senators Richard Burr (R-N.C.) and Mark Warner (D-Va.), this bill would reauthorize Section 215 of the USA PATRIOT Act and the “roving wiretap” and “lone wolf” provisions under the Foreign Intelligence Surveillance Act (FISA) that are each currently set to expire on March 15, 2020. The bill would renew these surveillance authorities through December 15, 2027 while largely ignoring the constitutional issues raised by how they have been used.

Section 215 is the portion of the PATRIOT Act that has been used to justify the mass collection of cell phone metadata, including records on millions of Americans, as revealed by Edward Snowden in 2013. Although the NSA claims to have ceased this particular form of mass surveillance, their continuous difficulty staying within legal and constitutional due process protections highlights the need for further oversight of our government’s use of surveillance authorities domestically, not a reauthorization that ignores many deeply-needed reforms.

For example, Section 215 also authorizes the collection of business records, which explicitly includes “tangible things” such as financial transaction records and even medical and gun purchase records. Even after the limited transparency reforms passed since the NSA’s mass surveillance abuses were revealed, we know far less about how the business records collection under Section 215 has been conducted - what kinds or how many records are being produced. Section 215, if it is to be reauthorized, also needs a stronger prohibition on using First Amendment-protected activities as the basis of a surveillance order.

Additionally, the Foreign Intelligence Surveillance Court (FISC) should be required to more frequently summon an *amicus*, as provided under the USA Freedom Act, to represent the privacy and due process concerns of American citizens when considering surveillance requests. The *amicus* requirement has been seldom used, yet has already contributed to revealing major FBI abuses of Americans’ privacy via data collection under other portions of FISA.<sup>1</sup> The FISC also need to be compelled to move faster on declassifying relevant portions of their prior major

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<sup>1</sup> Office of the Director of National Intelligence, “Release of Documents Related to the 2018 FISA Section 702 Certifications,” Oct. 8, 2019. <https://icontherecord.tumblr.com/post/188217887058/release-of-documents-related-to-the-2018-fisa>

opinions on how surveillance authorities such as Section 215 are being interpreted. The lack of transparency on how the FISC actually interprets the government's surveillance authorities often leaves Congress in the dark when conducting crucial oversight on how their constituents are affected by intelligence activities.

These are only some of the many concerns that civil liberties and due process advocates have about how military surveillance authorities aimed at foreign adversaries end up impacting the rights of innocent Americans at home.

The main reform that S. 2939 does offer is the repeal of the call detail records (CDR) program, which was passed in June 2015 as part of the USA FREEDOM Act. Intended as a restriction on the unconstitutional mass collection of Americans' telephony metadata that was revealed by whistleblowers such as Edward Snowden, the CDR program itself had been found to have resulted in massive overproduction of data on innocent Americans.

According to the latest annual report published by the Office of the Director of National Intelligence,<sup>2</sup> the NSA collected 151.2 million call detail records in 2016, 534.4 million in 2017, and 434.2 million in 2018. The report notes that the NSA estimated the number of queries related to possible terrorism targets at 42 in 2016, 40 in 2017, and 11 in 2018. In other words, 11 collection orders in 2018 yielded 434.2 million records. The NSA began deleting these CDRs in 2018 because there were "irregularities" that "resulted in the production to NSA of some CDRs that NSA was not authorized to receive."

The collection of phone records continued after these records were deleted. Documents released in June 2019 in response to a Freedom of Information Act (FOIA) request by the American Civil Liberties Union revealed that this continued collection, too, had violated the due process rights of thousands of innocent Americans.<sup>3</sup> The NSA has since confirmed that the CDR program has ceased operation, and NSA representative Susan Morgan has recently testified that even the infrastructure to run the program has been dismantled.<sup>4</sup>

Earlier this year, the Wall Street Journal reported that the National Security Agency was recommending that the White House not seek reauthorization of the CDR program at all.<sup>5</sup> Considering the NSA has already ended it, the proposed repeal of the CDR program is low-hanging fruit and can't be considered a significant reform. Rather, it is simply necessary housekeeping to codify what the NSA has already done administratively.

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<sup>2</sup> Office of the Director of National Intelligence, "Statistical Transparency Report Regarding the Use of National Security Authorities, Calendar Year 2018," May 1, 2019, <https://www.dni.gov/index.php/newsroom/reports-publications/item/1987-statistical-transparency-report-regarding-national-security-authorities-calendar-year-2018>

<sup>3</sup> National Security Agency, "Report to the Intelligence Oversight Board on NSA Activities, First Quarter, 2018," posted by ACLU at: <https://www.aclu.org/legal-document/nsa-foia-documents-quarterly-reports-intelligence-oversight-board-nsa-activities>

<sup>4</sup> U.S. House Committee on the Judiciary Hearing, "Oversight of the Foreign Intelligence Surveillance Act," Sept. 18, 2019. <https://judiciary.house.gov/legislation/hearings/oversight-foreign-intelligence-surveillance-act>

<sup>5</sup> Dustin Volz and Warren P. Strobel, "NSA Recommends Dropping Phone-Surveillance Program," The Wall Street Journal, April 24, 2019 <https://www.wsj.com/articles/nsa-recommends-dropping-phone-surveillance-program-11556138247>

To merely end the already non-functioning CDR program and reauthorize the rest of Section 215 and related expiring authorities without significant further reforms would be to make a mockery of Congressional oversight and of the Fourth Amendment. For these reasons, I urge you to contact your senators and ask them to oppose the Protecting Against International Terrorism Act, S. 2939.

Sincerely,

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

Adam Brandon  
President, FreedomWorks