



May 7, 2019

## **Support the Ending Mass Collection of Americans' Phone Records Act, H.R. 1942 and S. 936**

On behalf of our activist community, I urge you to contact your representative and senators and urge them to cosponsor the Ending Mass Collection of Americans' Phone Records Act, H.R. 1942 and S. 936. Introduced by Reps. Justin Amash (R-Mich.) and Zoe Lofgren (D-Calif.) and Sens. Ron Wyden (D-Ore.) and Rand Paul (R-Ky.), the Ending Mass Collection of Americans' Phone Records Act would end the National Security Agency's controversial call detail records program.

Before the American War for Independence, colonists were alarmed at the use of writs of assistance, or general warrants, by the British to search homes, without any regard for privacy. In 1761, James Otis defended Boston merchants, who were challenging the writs. Otis attacked these general warrants as "the worst instrument of arbitrary power."

A young man by the name of John Adams, who would go on to become a leading founding father and our second president, credited Otis's passionate speech with sparking the revolutionary sentiment. In a letter nearly 60 years later, Adams wrote, "Then and there the Child Independence was born."

The sentiment against general warrants was so strong that the Congress adopted and the states ratified what became the Fourth Amendment, which states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The federal government has little regard for the constraints placed on it by the Constitution and the Bill of Rights. The document that is meant to limit the federal government and protect individual liberty is often ignored. Although there are, sadly, countless examples of this, a recent one is the bulk collection of phone metadata under today's version of a general warrant.

In June 2013, disclosures revealed that the National Security Agency (NSA) was collecting phone metadata of virtually every American, without a specific warrant, under Section 215 of the USA PATRIOT Act. This statute, at the time, did not authorize a vast apparatus for the mass collection of cell phone metadata.

The federal government, however, defended this bulk, programmatic surveillance by relying on the Supreme Court's decision in *Smith v. Maryland* (1979). That case further cemented the third-party doctrine, which rests on the theory that an individual has no reasonable expectation of privacy for records held by a third-party, such as a telephone company. Effectively, this means that a warrant is not required to access records held by a third party. Justice Neil Gorsuch ripped apart the third-party doctrine in his dissent in *Carpenter v. United States* (2018), which should be required reading for those seeking to learn more about this area of law.

In 2015, Congress passed the USA FREEDOM Act and modified Section 215 to allow the FBI and NSA to collect phone records. Although this framework may not be as extensive as the previous regime, it is still expansive.

According to the *Statistical Transparency Report Regarding the Use of National Security Authorities* published by the Office of the Director of National Intelligence, the NSA collected 151.2 million call detail records (CDRs) in 2016, 534.4 million in 2017, and 434.2 million in 2018. The report notes that the NSA estimated the number of possible terrorism targets at 42 in 2016, 40 in 2017, and 11 in 2018. In other words, 11 targets in 2018 yielded 434.2 million records.

The NSA began deleting these CDRs in 2018 because, as the report notes, 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.

Recently, the NSA reportedly shut down the program and recommended that the White House not seek the renewal of the statute authorizing the CDR program because, as the Wall Street Journal explained, "the logistical and legal burdens of keeping it outweigh its intelligence benefits." Keeping the haystack to find the needle was too much of a burden, as it were. Still, the White House may seek reauthorization, despite the NSA's recommendation to the contrary.

Congress should take the initiative and codify the end of the NSA's CDR program. For these reasons, I urge you to contact your representative and senators and urge them to cosponsor the Ending Mass Collection of Americans' Phone Records Act, H.R. 1942 and S. 936.

Sincerely,

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

Adam Brandon  
President, FreedomWorks