



Legislative Bulletin.....May 22, 2014

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H.R. 3361 – USA FREEDOM Act

H.R.3361 – USA FREEDOM Act (Sensenbrenner, R-WI)

Order of Business: [H.R. 3530](#) is scheduled to be considered on May 22, 2014, subject to a closed rule.

Summary: The bill amends the Foreign Intelligence Surveillance Act of 1978 ([50 U.S.C. 1801 et seq.](#)) (FISA). The legislation ends the bulk collection authority of the government to collect Americans’ records under Section 215 of the Patriot Act and other provisions of law. It amends current law to provide more civil liberties protections. Below is a summary of the different sections of the bill:

Title I: FISA Business Records Reforms

Section 101 - “Additional Requirements for Call Detail Records”: Section 101 amends section 501(b)(2) of FISA to create additional requirements in order for the government to obtain call detail records. In order to obtain call detail records the legislation requires that “(i) there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection term required under subparagraph (A) are relevant to such investigation; and (ii) there are facts giving rise to a reasonable, articulable suspicion that such specific selection term is associated with a foreign power or an agent of a foreign power.” The authorization for the production of records is valid for 180 days and all call detail records that the government determines are not foreign intelligence information must be destroyed. “Call detail record” is defined by the legislation as identifying information of telephone calls (both ends of the call), the time or duration of the call, a telephone calling card number, or the International Mobile Station Equipment Identity Number, or the International Mobile Subscriber number. The definition explicitly states that the definition of call detail record does not include the contents of any communication (defined by [18 U.S.C. 2510 \(8\)](#) as “any information concerning the substance, purport, or meaning of that communication.” The call detail records also do not include the cell site location information, the name, address, or financial information of a subscriber or customer. The amendments made by this section become effective 180 days after enactment of the Act.

Section 102 – “Emergency Authority”: This section amends section 501 of FISA ([50 U.S.C. 1861\(b\)\(2\)](#)) to allow the Attorney General to require the emergency production of tangible things without an order authorizing the production if the Attorney General reasonably determines that there is a factual basis for the potential approval of the order exists and a judge having jurisdiction of this type of order is informed that a decision to use the emergency authority has been made and the Attorney General, or designee, makes an application for authority no later than ten days after the after the emergency authority has been employed.¹ The Attorney General must require minimization procedures when the emergency authority is employed. If a judicial order approving the production of tangible things is employed, the emergency authority expires when at the earliest occurrence of the information be sought being obtained, the application for the order for production is denied, or the passage of seven days after the emergency authority is employed. Any judicial denials of production applications can be reviewed. If emergency authority is employed but the required application for production is denied by a judge, or any other case where the production of tangible things is terminated and no order issued approving the production, then none of the evidence or information derived from the production may be used in any proceeding before any court, or other government body. In addition, no information concerning any United States person should be used or disclosed, without the consent of the person, unless the Attorney General approves the disclosure of the information because it indications a threat to any other person.² The amendments made by this section become effective 180 days after enactment of this Act.

Section 103 – “Prohibition on Bulk Collection of Tangible Things”: This section amends section 501(b)(2) of FISA ([50 U.S.C. 1861](#)) to require a specific selection term to be used as the basis for the production of tangible things sought and prohibits any orders from being issued without the use of a specific selection term. The legislation defines “specific selection term” as “a discrete term, such as a term specifically identifying a person, entity, account, address, or device, used by the Government to limit the scope of the information or tangible things sought pursuant to the statute authorizing the provision of such information or tangible things to the Government.” The amendments of this section take effect 180 days after enactment of this Act.

Section 104 – “Judicial Review of Minimization Procedures for the Production of Tangible Things”: This section amends section 501(c)(1) of FISA ([50 U.S.C. 1861\(c\)\(1\)](#)) to allow the court to review the minimization procedures used when the produced authority is employed.

Section 105 – “Liability Protection”: This section amends section 501(e) of FISA ([U.S.C. 1861\(e\)](#)) to provide liability protection when a third party produces tangible things to the government or provides help to the government in producing the tangible things. In summary, it prevents any cause of action from being brought against any person who helps the government under FISA or the implementation of the USA FREEDOM Act.

¹ “Tangible things” are defined by [50 U.S.C. 1861 \(a\)\(1\)](#) as “books, records, papers, documents, or other items.

² The legislation refers to the definition of “United States person” as defined by [50 U.S.C. 1801](#). “United States person is defined as “a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

Section 106 – “Compensation for Assistance”: This section amends section 501 of FISA ([50 U.S.C. 1861](#)) to require the government to pay a person reasonable expenses for producing tangible things or providing technical help under the authority of FISA or the USA FREEDOM Act.

Section 108 – “Inspector General Reports on Business Records Orders”: This section amends Section 106A of the USA PATRIOT Improvement and Reauthorization Act of 2005 ([Public Law 109-177](#)) to require the Inspector General of the Department of Justice to perform a comprehensive audit of the investigative authority provided under Title V of FISA for calendar years 2012-2014. It also requires the Inspector General of the Department of Justice to include within the audit, an examination of minimization procedures used in relation to orders under section 501 of FISA for the 2012-2014 time period and whether the constitutional rights of United States persons was adequately protected. In addition, the legislation requires the Inspector General of the Intelligence Community to access the importance of information acquired under FISA, the manner in which that information was collected and used, the minimization procedures used and whether they adequately protected the constitutional rights of United States persons, and any minimization procedures proposed by the intelligence community that were modified or denied by a FISA court.³

Title II: FISA Pen Register and Trap and Trace Device Reform

Section 201 – “Prohibition on Bulk Collection”: This section amends section 402(c) of FISA ([50 U.S.C. 1842\(c\)](#)) to require that a specific selection term be used as the basis for selecting the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied.⁴ The definition of “specific selection term” defined in section 103 of the bill applies to this section as well.

³ The bill refers to the definition of “**intelligence community**” as defined in 50 U.S.C. 3003. [50 U.S.C. 3003](#) defines “intelligence community as including “the following: (A) The Office of the Director of National Intelligence. (B) The Central Intelligence Agency. (C) The National Security Agency. (D) The Defense Intelligence Agency. (E) The National Geospatial-Intelligence Agency. (F) The National Reconnaissance Office. (G) Other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs. (H) The intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy. (I) The Bureau of Intelligence and Research of the Department of State. (J) The Office of Intelligence and Analysis of the Department of the Treasury. (K) The Office of Intelligence and Analysis of the Department of Homeland Security. (L) Such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

⁴ “**Pen register**” and “**trap and trace**” are referenced in 50 U.S.C. 1841 (FISA). That section defers to 18 U.S.C. 3127 for the definitions of “pen register” and “trap and trace”. “**Pen register**” is defined as “a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business. “**Trap and trace device**” is defined as “a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably

Section 202 – “Privacy Procedures”: This section amends [50 U.S.C. 1842](#) to require that the Attorney General insure that there are procedures and policies in place to safeguard non-publicly available information concerning United States persons that is collected through the use of pen register or trap and trace device. The procedures are required to include protections on the use, retention, and collection of information concerning United States persons as much as possible given the need to protect national security.

Title III: FISA Acquisitions Targeting Persons Outside the United States Reforms

Section 301 – “Minimization Procedures”: This section amends section 702(e)(1) of FISA ([50 U.S.C. 1881a\(e\)\(1\)](#)) to require the government to minimize the acquisition of information when all parties involved (sender and intended recipients) are located in the United States consistent with the need to obtain, produce, and disseminate foreign intelligence information. It also prohibits the use of discrete communications when they are to or from an identifiable United States person and are also not to, from, or about the target of an acquisition, except to protect against the immediate threat of human life.

Section 302 – “Limits on Use of Unlawfully Obtained Information”: This section amends section 702(i)(3) of FISA ([50 U.S.C. 1881a\(i\)\(3\)](#)) to limit the use of information obtained about a United States person when the court has determined that the information was collected following a deficiency of procedures. It also limits the use of information about any United States person when that was based on the procedure that was subsequently deemed deficient. However, the information can be used with Attorney General approval if the information indicates a serious threat of death or serious bodily harm to any person. In addition, if the government corrects any deficiency identified by order of the court the court may permit the use of information obtained before the correction under minimization procedures established by the court.

Title IV: Foreign Intelligence Surveillance Court Reforms

Section 401 – “Appointment of Amicus Curiae”: This section amends 103 of FISA ([50 U.S.C. 1803](#)) to allow the court, at its discretion, to appoint an individual to serve as amicus curiae to assist the court when there is an issue of novel or significant interpretation of the law unless the court issues a written finding that the appointment of amicus curiae is not appropriate. It also allows the court to appoint amicus curiae in any case it deems appropriate. The presiding judges will jointly designate five individuals to be eligible to serve as amicus curiae. These individuals must have expertise in telecommunications, civil liberties and privacy, intelligence collection, or any other expertise that could assist the courts. The individuals also have to have appropriate security clearances.

Section 401 – “Declassification of Decisions, Orders, and Opinions”: Title VI of FISA ([U.S.C. 1871](#)) is amended to require the Director of National Intelligence, in consultation with the Attorney General, to review each decision by the Foreign Intelligence Surveillance Court of

likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication”

Review or Foreign Intelligence Surveillance Court for potential declassification when it includes a significant interpretation or construction of any provision of this Act, including an interpretation of “specific selection term.” The section requires as much information to be made publically available as practicable. The Director of National Intelligence is allowed to redact provisions of the decisions in order to comply with this section. The Director of National Intelligence may waive the requirement to make decisions public if, in consultation with the Attorney General, it is determined that a waiver is necessary to protect the national security of the United States or properly classified intelligence sources or methods and a public statement is release that summarizes the significant interpretation or construction under this Act.

Title V: National Security Letter Reform

Section 501 – “Prohibition on Bulk Collection”: This section amends [18 U.S.C. 2709\(b\)](#) to require the use of a specific selection term when requesting the counterintelligence access to telephone records. In addition, specific selection terms are required when requesting access to financial records for certain intelligence and protective purposes. When national security letter authority is used for access to consumer records and consumer reports this section requires that specific selection terms are used.⁵

Title VI: FISA Transparency and Reporting Requirements

Section 601 – “Additional Reporting on Orders Requiring Production of Business Records”: This section amends section 502(b) of FISA ([50 U.S.C. 1861\(b\)](#)) to require additional reporting on the total number of applications for orders approving requests for the production of tangible things; the total number of such orders denied, modified, or granted; the total number of applications made for orders approving requests for the production of call detail records and the total number of those requests that were denied, granted or modified.

Section 602 – “Business Records Compliance Reports to Congress”: This section amends section 502(b) of FISA ([50 U.S.C. 1862\(b\)](#)) to require a summary report to be delivered to Congress of all the compliance reviews conducted by the government on the production of tangible things.

Section 603 – “Annual Reports by the Government on Orders Entered”: This section amends title VI of FISA ([50 U.S.C. 1871 et seq.](#)) to require an annual report by the Director of the Administrative Office of the United States Courts on the number of orders entered under various sections of FISA, the number of orders modified under various sections FISA, the number of orders denied under various sections of FISA, and the number of appointments of individuals appointed as amicus curiae and their names. This report is to be submitted to the Committee on the Judiciary and the Committee on Intelligence of the House of Representatives and subject to a declassification review by the Director of National Intelligence and the Attorney General be available publically on an internet website. In addition, the Director of National

⁵ The legislation defines “**specific selection term**” as “a discrete term, such as a term specifically identifying a person, entity, account, address, or device, used by the Government to limit the scope of the information or tangible things sought pursuant to the statute authorizing the provision of such information or tangible things to the Government.”

Intelligence is required to make publically available an annual report that identifies the number of orders issued pursuant to various sections FISA and the number of targets affected by such orders.

Section 604 – “Public Reporting by Persons Subject to Orders”: This section allows a person to publically report, semiannual, the number of FISA or national security letters the person was required to comply with.

Section 605 – “Reporting Requirements for Decisions of the Foreign Intelligence Surveillance Court”: This section amends section 601(c)(1) of FISA ([50 U.S.C. 1871\(c\)](#)) to require the Attorney General to provide the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate and the Committees on the Judiciary of the House and the Senate with a report within 45 days after the Foreign Intelligence Surveillance Court of the Foreign Intelligence Surveillance Court of Review issues an opinion, order, or decision under this Act that includes a significant construction or interpretation of any provisions of the Act or results in an change in application of the Act and a copy of each application and pleadings, or memoranda of law associated with the decision.

Section 606 – “Submission of Reports under FISA”: This section amends section 108(a)(1) of FISA ([50 U.S.C. 1808\(a\)\(1\)](#)) to add the House Committee on the Judiciary to the list of committees currently receiving reports on electronic surveillance, physical searches, pen register and trap and trace devices, an reports on access to certain business records and other tangible items. The full list would include the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

Title VII: Sunsets

Section 701 – “Sunsets”: This section extends section 102(b)(1) of the USA PATRIOT Improvement and Reauthorization Act of 2005 ([50 U.S.C. 1805](#)) through December 31, 2017. It also extends section 6001(b)(1) ([50 U.S.C. 1801](#)) of the Intelligence Reform and Terrorism Prevention Act of 2004 through December 31, 2017.

Additional Information: In June 2013, a former CIA employee released classified information regarding NSA data collection conducted under the Foreign Surveillance Act (FISA). This information was published *The Guardian* newspaper. The reporting of this government program led to some concerns by Members of Congress and their constituents about whether their civil liberties and privacy was being adequately protected under the FISA program. This bill is an attempt by the Committee on the Judiciary to balance the security needs of the nation with the need to protect Americans’ civil liberties. A Section-by-Section summary of the bill can be found on the Committee on Rules website [here](#). An op-ed written by the Chairman of the Judiciary Committee, Representative Goodlatte, can be viewed [here](#).

Committee Action: H.R. 3530 was introduced on October 29, 2013, and referred to the House Committee on the Judiciary, the Committee on Financial Services, and the Committee on Intelligence. On May 15, 2014, the Committee on Financial discharged the bill. On May 7,

2014, the Committee on the Judiciary reported the bill, as amended, by a vote of [32-0](#). The Committee on Intelligence also reported the bill, as amended, on May 8, 2014, by [voice vote](#). On May 20, 2014, the [Committee on Rules](#) adopted a substitute amendment by Rep. Sensenbrenner.

Conservative Concerns: Some conservatives have expressed concerns about the amount of data that can be collected under the bill. In addition, some conservatives have expressed concern about the constitutional implications of the searches.

Outside Group Statements:

- [American Civil Liberties Union](#)
- [FreedomWorks](#)
- [Electronic Frontier Foundation](#)
- [Access](#)
- [Open Technology Institute](#)
- [Center for Democracy and Technology](#)

Administration Position: On May 21, 2014, the Executive Office of the President issued a [Statement of Administration Policy](#) stating: “The Administration strongly supports House passage of H.R. 3361, the USA FREEDOM Act.”

Cost to Taxpayers: The Congressional Budget Office conducted an official cost estimate for a previous version of the bill. According to a preliminary cost estimate the current version of the bill the cost estimates are the same as the previous cost estimate. It is estimated that it will cost approximately \$15 million over the 2015-2019 period.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No.

Constitutional Authority: According to the sponsor, Congress has the power to enact this legislation pursuant to the following: Article I, section 8, clause 3 and Article I, section 8, clause 18.” Congressman Sensenbrenner’s statement in the Congressional Record can be viewed [here](#).

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