



H.R. 2048—Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring (USA FREEDOM) Act of 2015 (Sensenbrenner, R-WI)

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FLOOR SCHEDULE: [H.R. 2048](#) IS EXPECTED TO BE CONSIDERED ON MAY 13, 2015, UNDER [CLOSED RULE](#). THE RULE ALSO PROVIDES A CLOSED RULE FOR H.R. 36, PAIN-CAPABLE UNBORN CHILD PROTECTION ACT, AND FOR ONE HOUR OF GENERAL DEBATE ON H.R. 1735, THE NATIONAL DEFENSE AUTHORIZATION ACT (NDAA) FOR FISCAL YEAR 2016. THE RULE FURTHER PROVIDES FOR SUSPENSION AUTHORITY FOR THURSDAY, MAY 14 AND FRIDAY, MAY 15.

TOPLINE SUMMARY: [H.R. 2048](#) would reauthorize and reform [Section 215 of the USA PATRIOT Act](#) ([Section 501 of the Foreign Intelligence Surveillance Act \(FISA\)](#)) along with other provisions of law to prohibit bulk collection of records and to provide the authority to utilize certain surveillance methods. Additionally, it would allow the Foreign Intelligence Surveillance Court to appoint amicus curiae to argue for civil liberties before the court in certain cases.

CONSERVATIVE CONCERNS: Some conservatives may be concerned that the bill would specifically codify the ability of the government to collect very large amounts of data. While the bill aims to prohibit bulk data collection by requiring certain requests to have a “specific selection term,” some argue that the definition of a “specific selection term” could be interpreted broadly. A federal court recently ruled that the federal government’s bulk data collection activities were conducted without statutory authority.

Some conservatives may be concerned that the bill would expand the government’s ability to conduct warrantless surveillance by providing emergency authority to compel the production of business records and call detail records without a court order as well as the emergency authority to conduct surveillance without a court order when a target is believed to have entered the U.S.

COST: The Congressional Budget Office (CBO) estimates that [H.R. 2048](#) would cost \$15 million over the 2016-2020 period, assuming appropriation of the necessary amounts.

CBO does not provide estimates for classified programs, so this estimate only covers the unclassified aspects of the bill.

The bill would impose both private and intergovernmental mandates, but those mandates would fall below the thresholds established by the Unfunded Mandates Reform Act (UMRA).

Some conservatives may be concerned that the bill does not include language that was included in previous versions of the USA FREEDOM Act that would have required minimization procedures to destroy records not connected to terrorism investigations that are collected by the government under authorities provided by FISA.

Some conservatives may be concerned that the bill does not include language that would prohibit the government from conducting warrantless searches of communications of U.S. persons under authorities originally designed to target non-U.S. persons abroad, language prohibiting the government from requiring software developers to allow surveillance of users of their products, or language that would require a warrant to access electronic data including emails stored on a third party server for longer than 180 days.

Some conservatives contend that the bill attempts to strike a reasonable balance between providing the government broad authority to combat international terrorism and protect the civil liberties of U.S. citizens.

- **Expand** the Size and Scope of the Federal Government?: The bill would expand the government’s ability to utilize certain activities to support terrorism investigations and would also prohibit certain activities the government is currently engaged in.
- **Encroach** into State or Local Authority?: No
- **Delegate** Any Legislative Authority to the Executive Branch?: No
- **Contain** Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No, according to the committee report.

DETAILED SUMMARY AND ANALYSIS:

The House Report (H. Rept. 114-109) accompanying H.R. 2048 can be found [here](#). A fact sheet on H.R. 2048 from the House Judiciary Committee can be found [here](#). A similar bill (H.R. 3361) was introduced in the 113th Congress and passed the House by a [303 – 121](#) vote. The RSC’s legislative bulletin for H.R. 3361 can be found [here](#) and a document from the House Judiciary Committee comparing H.R. 2048 and 3361 can be found [here](#).

FISA and PATRIOT Act Section 215 Background

The Foreign Intelligence Surveillance Act of 1978 (FISA) established the Foreign Intelligence Surveillance Court (FISC) to review the government’s applications to collect data and conduct surveillance for foreign intelligence. The FISC is made up of 11 U.S. District Court judges appointed by the Chief Justice of the United States.

Title V of FISA allows the government to obtain a FISC order requiring a person or entity to produce or turn over business records.

Section 215 of the USA PATRIOT Act amended Section 501 of FISA to expand the scope of business records that the government could compel the production of during a FISA investigation to “any tangible things.”

The USA PATRIOT Act Improvement and Reauthorization Act of 2005 required one of the three highest ranking FBI officials to approve an application under Section 215 for certain business records—such as library records, firearms sales records, tax return records, educational records, and medical records.

Section 215 was most recently reauthorized in 2011 by the [PATRIOT Sunsets Extension Act of 2011](#). Section 215 is set to expire on June 1, 2015. A CRS report on the authorities set to expire can be found [here](#).

Bulk Data Collection Background

In 2013, the Edward Snowden leaks revealed the existence of a National Security Agency (NSA) program that included the ongoing, daily collection of bulk telephony metadata from U.S. telecommunications carriers. This bulk data included the telephone numbers involved in a call, telephone calling card numbers, the time and duration of calls, the location where calls entered the telephone system (trunk identifiers) and other information. The program required carriers to produce call detail records on all telephone calls made through their systems where one or both ends of the call were located within the U.S. The metadata does not include the contents of the telephone calls. The FISC approved collection activity beginning in 2006 and renewed the approval every 90 days.

Telephone companies create similar records as a normal part of their business in order to bill customers for calls. [FCC regulations](#) require telecommunications companies to retain toll billing records for at least eighteen months.

According to [ACLU v. Clapper](#):

The government explains that it uses the bulk metadata collected pursuant to these orders by making “queries” using metadata “identifiers” (also referred to as “selectors”), or particular phone numbers that it believes, based on “reasonable articulable suspicion,” to be associated with a foreign terrorist organization. The identifier is used as a “seed” to search across the government’s database; the search results yield phone numbers, and the metadata associated with them that have been in contact with the seed. That step is referred to as the first “hop.” The NSA can then also search for the numbers, and associated metadata, that have been in contact with the numbers resulting from the first search – conducting a second “hop.”

On May 7, 2015, the [U.S. Court of Appeals for the Second Circuit](#) held that the government’s “bulk metadata program is not authorized by Section 215.” The court did not issue a preliminary injunction to stop the bulk metadata collection program, citing the fact that Section 215 is scheduled to expire in several weeks and the potential national security interests.

A report from the Privacy and Civil Liberties Oversight Board on Section 215 can be found [here](#).

Bill Summary

Call Detail Records Reforms

The bill would end the government’s bulk telephone data collection under Section 215. Instead the bill would allow the government to seek a FISC order that would require a telecommunications company to produce specific call detail records related to a selection term (phone number or other metadata identifier) on an ongoing, daily basis for up to 180 days.

The government could then require the production of a second “hop” or the call detail records related to selectors identified in the first result. Therefore, the government could obtain information about the contacts of a contact of the original suspect.

The bill would require the government to demonstrate a reasonable, articulable suspicion that the selection term (phone number or other metadata identifier) is associated with a foreign power engaged in international terrorism in order for the court order to be granted.

Call detail records are defined as “session identifying information (including originating or terminating telephone number, International Mobile Subscriber Identity number, or International Mobile Station Equipment Identity number), a telephone calling card number, or the time or duration of a call.” The records produced would not include the contents of the communication, the name, address, or financial information of a subscriber or customer or cell site location or GPS information.

The bill requires the government to destroy call detail records that it determines are not foreign intelligence information.

Emergency Authority for Requiring Production of Tangible Things

The bill would establish a new emergency authority that would allow the attorney general to require a person or entity to produce tangible things (including business records and call detail records) without a FISC order if the attorney general reasonably determines that an emergency situation requires the production of the information before a court order could be obtained. The attorney general must also determine that there is a factual basis for the issuance 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 seven days after the after the emergency authority has been employed

If the application is not approved, none of the information produced can be used unless the attorney general determines a threat of death or serious bodily harm to any person.

Prohibition on Bulk Data Collection

The bill would end bulk data collection by requiring 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.

Judicial Review of Minimization Procedures

The bill would allow FISC to evaluate the adequacy of minimization procedures under Section 501. Under current law, the court is only empowered to determine whether the government has minimization procedures in place.

Liability protection for Third Parties

The bill would 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.

Compensation for Assistance

The bill would 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.

Inspector General Reports

The bill would 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. In addition, the legislation would require the Inspector General of the Intelligence Community to assess the importance of information acquired under FISA, the manner in which that information was collected and used, and the minimization procedures used and whether they adequately protected the constitutional rights of United States persons.

Pen Register and Trap and Trace Device Reform

The bill would prohibit bulk data collection under the FISA section 402 [pen register and trap and trace device authority](#) by requiring a “specific selection term” to be used as the basis for the use of a pen register and trap and trace device.

A pen register is “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” and does not include the contents of the communication.

A trap and trace device is “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 likely to identify the source of a wire or electronic communication” and does not include the contents of the communication.

Targeting Persons Outside The United States Limits on the Use of Unlawfully Obtained Information

The bill would limit the use of information obtained about a United States person under the government’s FISA section 702 [overseas targeting authority](#) when the FISC determines that the information was collected unlawfully.

However, the information can be used with attorney general’s 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 government may be permitted the use of information obtained before the correction under minimization procedures established by the court.

Foreign Intelligence Surveillance Court Amicus Curiae

The bill would allow the FISC to appoint an individual to serve as amicus curiae (friend of the court) to provide legal arguments to advance the protection of individual privacy and civil liberties before the court.

The presiding judges will designate at least 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 and would be eligible to review classified information.

Declassification of FISC Decisions

The bill would require the Director of National Intelligence (DNI), in consultation with the attorney general, to review each decision by the FISC 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 bill would require as much information to be made publically available as practicable. The DNI may waive the declassification requirement, in which case the attorney general shall provide a public summary of the decision.

National Security Letter Prohibition on Bulk Collection

The bill would prohibit bulk data collection using [national security letter](#) (NSL) authorities under the Electronic Communications Privacy Act, the Right to Financial Privacy Act, and the Fair Credit Reporting Act by requiring a “specific selection term” to be used as the basis for the use of a NSL request.

Disclosure of National Security Letters

The bill would permit the government to impose a nondisclosure order on the recipient of an NSL if a senior FBI official certifies that danger to the national security, interference with an investigation, interference with diplomatic security, or danger to the life or safety of a person may result from public disclosure of the order.

The bill would allow the recipient of an NSL nondisclosure order to challenge the nondisclosure order by notifying the government or by filing a petition for judicial review. The government would then have 30 days to seek a court order of compliance with the nondisclosure order.

Reporting Requirements

The bill would require several reports, including:

- A summary of all compliance reports related to the use of FISA section 501
- The number of applications for call detail records under the new authority provided by the bill, including the number of orders granted, modified, and denied
- The number of standard FISA section 501 applications, including the number of orders granted, modified, and denied
- The number of Section 501 applications based on a specific selection term that does not specifically identify an individual, account or personal device, including the number of orders granted, modified, and denied, and for those applications that were granted or modifies if the FISC adopted additional particularized minimization procedures
- The number of FISC amici curiae appointments made under the bill
- An estimate of the number of targets and unique identifiers collected for FISA pen register, business records, and call detail records
- The number of 702 orders, as well as the number of search terms concerning known U.S. persons used to retrieve unminimized contents of wire or electronic communications acquired, and the number of queries concerning known U.S. persons of unminimized noncontents information acquired
- The number of national security letters issued, as well as the number of requests for information in those letters, and a good faith estimate of the number of requests concerning U.S. persons and non-U.S. persons

Public Reporting by Companies subject to FISA Orders

The bill would allow companies subject to FISA orders or national security letters to publicly report on the number of orders or NSLs they receive and the approximate number of customers affected.

Emergencies Involving Non-United States Persons

The bill would allow the government to target for foreign intelligence information a non-United States person that was previously believed to be located outside the U.S., but is now reasonably believed to be in the U.S. for up to a 72-hour period. To exercise this authority, the head of an element of the intelligence community must reasonably determine that the lapse in the targeting of the suspect poses a threat of death or serious bodily harm to any person.

The intent of this new authority is to allow surveillance of potential national security threats now believed to be inside the U.S. while the attorney general seeks authority from the FISC.

Investigations for Weapons of Mass Destruction

The bill would expand the definition of “agent of a foreign power” to allow non-U.S. persons that engage in the proliferation of weapons of mass destruction to be targeted under FISA.

Reauthorizations and Sunsets

The bill would reauthorize until December 15, 2019:

- Section 215 of the PATRIOT ACT relating to business records, as amended by the bill
- Section 206 of the PATRIOT Act relating to roving wiretap authority
- Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 relating to the definition of a lone wolf

Maritime Navigation Safety and Nuclear Terrorism Conventions Implementation

The bill would establish new federal crimes relating to acts of violence committed on or against ships or maritime fixed platforms and criminal acts involving the use of nuclear materials required by international agreements including the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the International Convention for the Suppression of Acts of Nuclear Terrorism and the amendment to the Convention on the Physical Protection of Nuclear Material. Similar legislation was passed in the 113th Congress by a [390 – 3](#) vote.

OUTSIDE GROUPS:

In Support:

[Center for Democracy & Technology](#)
[Center for National Security Studies](#)
[Competitive Enterprise Institute](#)
[Computer & Communications Industry Association](#)
[Facebook](#)
[GenOpp](#)
[Google](#)
[Microsoft](#)
[Mozilla](#)
[Niskanen Center](#)
[R Street](#)
[YAHOO!](#)

Additional letters of support provided by the House Judiciary Committee can be found [here](#).

Neutral:

[American Civil Liberties Union \(ACLU\)](#)

Opposition:

[Electronic Frontier Foundation \(EFF\)](#)

COMMITTEE ACTION: H.R. 2048 was introduced on April 28, 2015, and referred to the House Judiciary, Committee, the House Financial Services Committee, and the House Permanent Select Committee on Intelligence. On April 30, 2015, the House Judiciary Committee [marked up and reported](#) the bill by a 25 – 2 vote. The committee report can be found [here](#).

ADMINISTRATION POSITION: According to the [statement of administration policy](#), “the Administration strongly supports House passage of H.R. 2048, the USA FREEDOM Act.”

CONSTITUTIONAL AUTHORITY: “Congress has the power to enact this legislation pursuant to the following: Article 1, Section 8, clause 3 and Article 1, Section 8, clause 18.”

NOTE: *RSC Legislative Bulletins are for informational purposes only and should not be taken as statements of support or opposition from the Republican Study Committee.*

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