

The USA FREEDOM Act (H.R. 3361), as passed by the U.S. House¹

Summary & Analysis

Jun. 3, 2014

I. OVERVIEW OF MAJOR REFORMS IN H.R. 3361

- 1) Limits on bulk collection: Aims to end nationwide bulk collection of data in Section 215 of the PATRIOT Act, the pen/trap statute, and NSLs by requiring the government to limit its surveillance demands to records based on a “specific selection term.” [Sections 103, 201, and 501] “Specific selection term” essentially means a discrete term the government uses to limit the scope of information sought. [Sec. 107]
 - Current law does not require a “selection term” to be used as the basis of production under these authorities. Instead, current law requires relevance to an investigation to protect against international terrorism or clandestine intelligence activity.²
 - Reform still needed: The bill’s definition of “specific selection term” is open-ended and ambiguous, making it unclear how much of a limitation on the scope of the surveillance is required. The definition should be modified to clearly prohibit large-scale collection of non-public data about individuals with no connection to terrorism.

- 2) New call detail record authority: Bill creates a new authority in Sec. 215 for “call detail records.” [Sec. 101] “Call detail records” are landline and mobile phone metadata, including session identifying information and duration, but not conversation content or cell site location information. [Sec. 107] This authority enables the government to require companies to provide call detail records on a daily basis, prospectively, and to provide records “two hops” from the target. To obtain this order, the government must use a “specific selection term” as the basis for production and provide the FISC with a statement of facts showing 1) relevance to an investigation to protect against international terrorism and 2) reasonable, articulable suspicion that the specific selection term is associated with a foreign power or agent of a foreign power.
 - Currently, Sec. 215 does not explicitly authorize prospective records collection or records requests to extend “two hops” from the target. However, the government has

¹ H.R.3361 passed the U.S. House on May 22, 2014. Bill available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr3361eh/pdf/BILLS-113hr3361eh.pdf>. Page and line citations refer to this version.

² See, e.g., 50 U.S.C. 1861(a)(1).

used Sec. 215 in this manner for several years in connection with its telephony metadata program, leading some to conclude that this use was inconsistent with the statute.

- Reform still needed: Clarify that Sec. 215, beyond the call detail record authority, does not authorize prospective records collection or collection of records “two hops” from a target. Also, clarify that the government’s application for call detail records must demonstrate reasonable, articulable suspicion.

- 3) Private Party Reporting: Creates new permissions for private parties to publicly report surveillance orders received under FISA and NSLs. [Sec. 604] Reports are on a semiannual basis, but with a six-month delay. The government can impose a two-year delay in reporting on new services. Private parties have three options for reporting, with varying level of detail: 1) Report number of orders received and accounts affected in ranges of 1,000. This option permits reporting numbers of NSLs, content/non-content FISA orders, and orders received by title of FISA, except title VII. 2) Report number of orders received and customer selectors targeted in ranges of 250. This option does not permit subdivision. 3) Report number of orders received and customer selectors targeted in ranges of 500. This option permits reporting the numbers NSLs and content and non-content FISA orders.
- Current law imposes nondisclosures requirements on the recipients of FISA orders and NSLs.³ However, as part of a litigation settlement, the Dept. of Justice allows private parties to report in a fashion similar to that which the bill would authorize.⁴ The primary differences between the bill and the settlement is that one option in the bill permits reporting the number of orders by title of FISA used (except title VII), whereas the settlement only permits reporting the numbers of FISA orders for content and non-content.
 - Reform still needed: The bill should be modified to permit reporting on title VII of FISA, which includes Sec. 702 – the legal basis for NSA surveillance programs with broad implications for both U.S. and non-U.S. persons. In addition, reporting on “selectors targeted” should be replaced with reporting on accounts affected; the number of selectors targeted is not an accurate representation of the number of accounts affected since one selector, or an order based on one selector, can encompass multiple accounts.
- 4) FISA Court Reforms: The bill would create a panel of amicus curiae which the FISC may call upon for expert analysis. [Sec. 401] The bill would also require declassification of FISC opinions, decisions, and orders that include a significant construction or interpretation of law. If declassification is not possible due to national security concerns, the government

³ See, e.g., 50 U.S.C. 1861(d).

⁴ Harley Geiger, *One Small Step for Transparency*, Center for Democracy & Technology, Jan. 27, 2014, <https://cdt.org/blog/one-small-step-for-transparency>.

must release an unclassified summary of the opinion, decision, or order. [Sec. 402] Decisions that interpret “specific selection term” are “included” as significant.

- Current law does not allow for amicus curiae, nor does current law require public disclosure of FISC opinions. Current law does require the Attorney General to submit to the House & Senate Intelligence & Judiciary Committees, on a semiannual basis, copies of FISC decisions that include a significant construction or interpretation of law.⁵
- Reform still needed: Make clear that new interpretations or applications of “specific selection term” are automatically significant. Earlier iterations of the bill provided for a Special Advocate to represent privacy and civil liberties interests full-time at the FISC, rather than amici which would be periodically relied on at the FISC’s discretion, but these provisions were stripped from the bill prior to final passage in the House. The Special Advocate provisions should be returned to the bill to provide adversarial process when the FISC considers questions involving broad application of civil liberties and privacy rights.

II. SECTION BY SECTION OF H.R. 3361

TITLE I: FISA BUSINESS RECORDS REFORMS

- Primarily amends Section 215 of PATRIOT (50 U.S.C. 1861). [Pg. 3, lines 13-14]
 - Sec. 215 enables the government to force private parties to disclose any “tangible thing,” including business records such as Internet and telephony metadata, for national security purposes. To obtain the records under Sec. 215, the FBI applies for an order from the Foreign Intelligence Surveillance Court (FISC). The government has interpreted Sec. 215 – as it exists under current law – to authorize collection of private records, including telephony metadata, about virtually all Americans in bulk.⁶

Section 101: New authority for call detail records.

- Applicability – The new authority for call detail records applies only to applications for the production, on a daily basis, of call detail records “created before, on, or *after* the date of application.” [Pg. 4, lines 9-12]
 - The bill is silent on whether the rest of Sec. 215 can also be used for prospective records collection (i.e., records created after the date of application).⁷

⁵ 50 U.S.C. 1871(a).

⁶ Harley Geiger, *Issue brief: Bulk collection of records under Section 215 of the PATRIOT Act*, Feb. 10, 2014, <https://cdt.org/blog/issue-brief-bulk-collection-of-records-under-section-215-of-the-patriot-act>.

⁷ Although the government used Section 215 to obtain telephone records on a prospective basis, the Privacy and Civil Liberties Oversight Board’s Jan. 2013 report on the collection of telephony metadata concluded that 215 was

- Standard – The bill requires government applications for Sec. 215 orders – including orders under the new call detail authority – to use a “specific selection term” as the basis for production. [See Section 103, below] The government must also provide the FISC with a statement of facts showing that 1) there are reasonable grounds to believe that the call detail records are “relevant” to an authorized investigation to protect against international terrorism; and 2) “there are facts giving rise to a reasonable, articulable suspicion that such specific selection term is associated with a foreign power or agent of a foreign power.” [Pgs. 4-5, lines 12-2]
 - Bill does not change the statutory language regarding the “relevance” and investigation requirements – both of which the FISC has interpreted very broadly.⁸
 - Bill wording is unclear as to whether the statement of facts must demonstrate reasonable, articulable suspicion – or whether the application can merely state that there are facts.
 - Other requirements in the current statute for government’s application for a Sec. 215 order – such as enumeration of minimization procedures – remain in place.
- Duration – Order for daily production of call records shall last up to 180 days. This order may be renewed if the government submits another application and the FISC approves it. [Pg. 5, lines 13-19]
 - No time limit currently in statute.
- Two hops – Order shall authorize the government to get call detail records with a direct connection to the specific selection term. The government can use those call detail records as the basis for production of a second set of call detail records. [Pgs. 5-6, lines 23-7]
- Technical assistance – Order shall require records to be produced in a form that is “useful” to the government. Order shall also direct recipient to furnish the government with “all information, facilities, or technical assistance necessary to accomplish the production,” protect secrecy, and produce minimum interference with the service. [Pg. 6, lines 8-20]
- Purge – Order shall require government to purge call detail records that are not “foreign intelligence information.” The call detail records must also be purged according to the minimization procedures currently required under Section 215. [Pgs. 6-7, lines 23-6]

not intended to authorize prospective collection. Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, Jan. 23, 2014, Pgs. 81-86,

<http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf>.

Hereinafter “PCLOB report.”

⁸ PCLOB report, pgs. 58-61.

- The definition of “foreign intelligence information” in current law is broad, and includes information that relates to the conduct of the foreign affairs of the United States.⁹

Section 102: New emergency authority.

- Bill authorizes the Attorney General (AG) to require the production of tangible things (not just call detail records) under Sec. 215 if the AG reasonably determines that an emergency requires such production before an order can be obtained, and that there is a factual basis for approving a Sec. 215 order. The minimization procedures required under Sec. 215 must still be used during emergency production. The AG must inform the FISC of the emergency production, and the AG must submit a Sec. 215 application no later than 7 days after the emergency production begins. If the FISC denies the application, then the information produced under the emergency authority may not be used in any proceeding, and the information may not be disclosed unless it indicates a threat of death or serious bodily harm. [*Pgs. 7-9, lines 11-20*]

Section 103: Prohibition on bulk collection of tangible things.

- Application & order for tangible things under Sec. 215 must include “a specific selection term to be used as the basis for the production of tangible things sought.” [*Pgs. 10-11, lines 20-15*] [*See Sec. 107, below, for the definition of “specific selection term.”*]
- This would mark the first time the “selection term” concept is explicitly built into statute. The NSA currently uses “selection terms” to query information collected in bulk under Sec. 215.¹⁰

Section 104: Judicial review of minimization procedures.

- Judicial Review – Before issuing a Sec. 215 order, FISC reviews whether minimization procedures meet the statutory definition of minimization procedures. [*Pg. 11, lines 16-23*]
- In current law, FISC just notes that there are minimization procedures and does not review whether they meet the statutory standard.¹¹
- Bill does not alter statutory standard for minimization procedures.

Section 105: Liability protection.

⁹ 50 U.S.C. 1801(e).

¹⁰ PCLOB report, pgs. 26-31.

¹¹ 50 U.S.C. 1861(c)(1).

- No cause of action for any person who produces tangible things pursuant to an order, or provides technical assistance, under this section. Production not deemed to constitute waiver of any privilege. [Pgs. 12, lines 2-17]
 - Current law protects persons who produce tangible things in good faith from liability to other persons. Production is not deemed to constitute waiver of any privilege.¹²

Section 106: Compensation.

- The government must compensate persons for expenses they incur in providing technical assistance. [Pgs. 12-13, lines 22-8]
 - Current law does not include a compensation provision.

Section 107: Definitions.

- Call detail records includes originating and terminating phone (including mobile) numbers, and call duration. Definition excludes communications content, subscriber identifiers or financial information, and cell site location data. [Pgs. 13-14, lines 16-6]
- Specific selection term is “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.” [Pg. 14, lines 7-14]
 - This definition is open-ended, and it is unclear what might qualify as a specific selection term. It is therefore unclear how the prohibition on bulk collection will be applied, and whether the requirement of “specific selection term” would effectively limit large-scale collection of data about individuals with no connection to terrorism.¹³
 - Note: Earlier iterations of the bill included a clearer and more limited definition: “A term used to uniquely describes a person, entity, or account.” This definition was weakened prior to final passage in the House.

Section 108: Inspector General reports on business records.

- Inspector General (IG) audit – The Dept. of Justice IG must perform a comprehensive audit of improper or illegal use of Sec. 215 authority from 2012-2014. The audit must also examine of the minimization procedures, used in relation to Sec. 215 orders from 2012-2014, to determine whether they adequately protect the “constitutional rights of U.S. persons.” The IG of the intelligence community must assess the importance of information acquired under Sec. 215 to intelligence activities. The report must be

¹² 50 U.S.C. 1861(e).

¹³ Harley Geiger, *Why We Can't Support the New USA Freedom Act*, Center for Democracy & Technology, May 27, 2014, <https://cdt.org/blog/why-we-cant-support-the-new-usa-freedom-act>.

submitted to the House & Senate Intelligence & Judiciary Committees. [Pgs. 14-17, lines 21-7]

- The USA PATRIOT Improvement and Reauthorization Act of 2005 required an IG report containing these elements from 2002-2006.¹⁴

Section 110: Rule of construction.

- Clarifies that nothing in the bill shall be construed to authorize, under Sec. 215, the production of contents of an electronic communication from an electronic communication service provider. [Pgs. 19-20, lines 22-4]

TITLE II: FISA PEN/TRAP REFORM

- Primarily amends FISA pen register / trap & trace statute (50 U.S.C. 1842). [Pg. 20, lines 10-11]

Section 201: Prohibition on bulk collection under FISA pen/trap.

- Application for pen/trap must include a “specific selection term” to be used as the basis for selecting the phone line to which the pen/trap is to be applied. [Pg. 20, lines 18-21]
 - Bill references new definition of “specific selection term” in Sec. 215.

Section 202: Privacy procedures for FISA pen/trap.

- Establishes new privacy procedures for the pen/trap statute, requiring the AG to ensure “appropriate policies” are in place to safeguard non-public information concerning U.S. persons, and to protect the collection, retention, and use of information concerning U.S. persons. Pen/trap devices installed pursuant to the existing emergency authority¹⁵ must follow these privacy procedures. [Pg. 21, lines 4-23]
 - Pen/trap statute currently has no privacy or minimization procedures.
 - Note: Earlier iterations of the bill established minimization procedures that were virtually identical to those currently in Sec. 215. In the earlier iteration of the bill, Government applications for pen/trap were required to include a statement of minimization procedures, the FISC was able to review whether the minimization procedures meet the statutory standard, and the FISC was able to review compliance with minimization procedures involving U.S. persons. These procedures were stripped out of the bill prior to final passage in the House.

¹⁴ Public Law 109-177; 120 Stat. 200, available at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ177/html/PLAW-109publ177.htm>.

¹⁵ 50 U.S.C. 1843.

TITLE III: FISA ACQUISITIONS TARGETING PERSONS OUTSIDE THE U.S.

- Primarily amends FISA Section 702 (50 U.S.C. 1881a). [*Pg. 22, line 6*]

Section 301: Minimization procedures.

- Bill would add new requirement to existing Sec. 702 minimization procedures that would minimize acquisition and prohibit retention and dissemination of any communications for which the sender and all intended recipients are determined to be located in the U.S., consistent with the need for the U.S. to obtain, produce, and disseminate foreign intelligence information. [*Pg. 22, lines 17-25*]
 - This provision – which is aimed at wholly domestic communications – prohibits retention, whereas current law does not. Current law requires minimization of acquisition and retention, and prohibition of dissemination of U.S. persons in an identifiable form – consistent with the need for the U.S. to obtain, produce, and disseminate foreign intelligence information.¹⁶
- Bill prohibits use of any discrete communication from a U.S. person that is not to, from, or about a target, except to protect against immediate threat to human life. [*Pgs. 23, lines 1-8*]
 - Under the minimization procedures in current law, communications from U.S. persons can be retained and disseminated if, among other things, the communication includes evidence of a crime that has been, is being, or about to be committed.¹⁷
 - Collection of communications “about” a target is not explicitly authorized by Sec. 702 of FISA. This provision would mark the first time that such collection is referenced in statute.

Section 302: Limits on unlawfully obtained info.

- Under current law, the FISC can require the government to correct deficiencies in 702 certifications or procedures.¹⁸ For 702 applications or procedures that the FISC determines are deficient, the bill would forbid using information concerning any U.S. person as evidence before any authority – unless the AG determines that the information indicates a threat of death or serious bodily harm. [*Pgs. 23-24, lines 15-14*] The bill creates an exception to this prohibition if the government corrects the deficiency and abides by the corrected minimization procedures. [*Pg. 24, lines, 15-22*]

¹⁶ 50 U.S.C. 1881a(e)(1).

¹⁷ 50 U.S.C. 1821(4)(C).

¹⁸ 50 U.S.C. 1881a(i)(3).

TITLE IV: FISC REFORMS

Section 401: Appointment of amicus curiae.

- Each FISC shall appoint an individual to serve as amicus curiae to assist the court in novel or significant interpretations of law (unless the court finds that such an appointment is not appropriate), or any other instance. The presiding judges of FISC must designate no less than 5 eligible amicus curiae. [*Pg. 25-26, lines 7-8*]

Section 402: Declassification of decisions/orders/opinions.

- The Director of National Intelligence (DNI) shall conduct a declassification review of each FISC decision/order/opinion with a significant construction of law, and make it publicly available to greatest extent practicable, redacted as necessary. [*Pgs. 27-28, lines 20-13*]
- A construction or interpretation of “specific selection term” is included as significant. [*Pg. 28, lines 3-4*]
- DNI can waive the requirement to declassify if necessary to protect national security or sources and methods. If the DNI waives the requirement to declassify, the AG must issue an unclassified statement that summarizes the significant construction of law in the FISC decision. [*Pgs. 28-29, lines 19-13*]

TITLE V: NATIONAL SECURITY LETTER REFORM

Section 501 Prohibition on bulk collection for NSLs.

- Requires NSLs to include a specific selection term to be used as the basis for production of records. [*Pgs. 30-32, lines 4-18*]
 - Bill references new definition of “specific selection term” in Sec. 215.

TITLE VI: FISA TRANSPARENCY AND REPORTING REQUIREMENTS

Section 601: Reporting on orders for business records.

- Requires AG’s annual report to the Judiciary & Intelligence Committees on Sec. 215 to include the following new items: 1) Total number of applications for the orders requiring

the daily production of call detail records, 2) Total number of orders granted, modified, or denied for the daily production of call detail records. [Pg. 33, lines 1-14]

- Current statute already requires reporting on applications/orders for tangible things, with specific numbers for certain categories of information (i.e., library circulation records, firearm sales, etc.) – but not call detail records.¹⁹

Section 602: Business records compliance reports.

- Requires AG’s annual report to Judiciary & Intelligence Committees on Sec. 215 to include a summary of all compliance reviews conducted on the production of tangible things under Sec. 215. [Pg. 33, lines 23-25]
 - Note: Earlier iterations of the bill required the AG’s semiannual report to Judiciary & Intelligence Committees on FISA authorities (i.e., electronic surveillance, pen/trap, etc.) to include any compliance reviews conducted on FISA authorities. These provisions were stripped out of the bill before final passage in the House.

Section 603: Annual report on orders entered.

- Requires U.S. Courts Administrator to annually submit to Judiciary & Intelligence Committees, and make publicly available, 1) the number of orders entered under FISA authorities, 2) the number modified, 3) the number denied, 4) the number of appointments for amicus curiae. [Pg. 34, lines 8-26]
- Requires the DNI to make an annual public report that identifies the total number of orders issued, and the total number of targets affected, for each of the following: 1) titles I and III, and sections 703 and 704 of FISA, 2) Sec. 702 of FISA, 3) title IV of FISA, 4) tangible things under Sec. 215 of the PATRIOT Act, 5) call detail records under Sec. 215 of the PATRIOT Act, and 6) national security letters. [Pg. 35, lines 1-24]
 - Current law requires the AG to make semiannual reports to the Judiciary & Intelligence Committees that include aggregate numbers for these authorities, though not Sec. 702 of FISA or the new call detail records authority.²⁰

Section 604: Public reporting by persons subject to FISA orders.

- Bill provides three options for “a person” to publicly report information on surveillance orders or directives the person is ordered to comply with. Key differences between these three options are a) the size of the bands, b) whether reporting may reference accounts affected or selectors targeted, and c) the degree to which reporting can subdivide these

¹⁹ 50 U.S.C. 1862(b).

²⁰ 50 U.S.C. 1871(a).

numbers by type of data requested and separate legal authorities employed. [Pgs. 37-39, lines 6-22]

Option 1:

Legal Authority	What May Be Reported	Numerical Range
National Security Letters	Number of Orders and Accounts Affected	1000
Total FISA Orders (content)	Number of Orders	1000
Total FISA Orders (non-content)	Number of Orders	1000
Title I Orders (content)	Number of Accounts Affected	1000
Title IV Orders (non-content)	Number of Accounts Affected	1000
Title V Orders (non-content)	Number of Accounts Affected	1000
Title V Orders (call detail records)	Number of Accounts Affected	1000

Note: Non-content orders under title I, as well as both content and non-content orders under title VII, are excluded from this option. Earlier iterations of the bill allowed reporting on these authorities, but those provisions were stripped from the bill before final passage in the House.

Option 2:

Legal Authority	What May Be Reported	Numerical Range
Total national security processes (all FISA orders and NSLs)	Number of Orders and Customer Selectors Targeted	250

Option 3:

Legal Authority	What May Be Reported	Numerical Range
National Security Letters	Number of Orders and Accounts Affected	500
Total FISA Orders (content)	Number of Orders and Customer Selectors Targeted	500
Total FISA Orders (non-content)	Number of Orders and Customer Selectors Targeted	500

- Reports are semiannual. The first and third options – but not the second option – include the following additional requirements: 1) a half-year delay in reporting, so that the

report's numbers are no less than six months old, and 2) a 2-year delay in reporting for platforms, products, or services for which the person did not previously receive an order or NSL. [Pg. 40, lines 3-15]

- Key differences with Administration's settlement agreement²¹ with companies:
 - Administration's settlement agreement offered two options, not three.
 - The Administration option 1 is identical to USA FREEDOM option 3, except for the numerical range – 1000 and 500, respectively.
 - The Administration option 2 is identical to USA FREEDOM option 2.
 - USA FREEDOM option 1 allows greater detail than either Administration options with respect to legal authority and accounts affected. That is, USA FREEDOM option 1 allows for reporting of numbers by (some, not all) specific titles of FISA, whereas the Administration option 1 permits only reporting of content and non-content orders.
- The government and any person may jointly agree to the publication of information in forms other than that which this section allows. [Pg. 40, lines 17-21]

Section 605: Annual report of FISC decisions.

- Requires FISC and FISCR to submit, within 45 days, decisions/orders/opinions, or denial or modification of such, with a significant construction or interpretation of law to Judiciary & Intelligence Committees, along with associated memoranda and background documents. [Pg. 41, lines 11-22]

Section 605: Submission of FISA reports.

- Includes House Judiciary Committee in several reporting requirements. [Pgs. 41-43, lines 24-23]
 - Some areas of current law require reports to go to the House & Senate Intelligence Committees and the Senate Judiciary Committee, but not House Judiciary Committee.

TITLE VII: SUNSETS

Section 701: Sunsets.

- Moves sunset for several authorities – including Sec. 215 and “lone wolf” – from 2015 to 2017. Aligns it with sunset for Sec. 702 of FISA. [Pg. 44, lines 3-12]

²¹ Letter from Deputy Attorney General James Cole, Dept. of Justice, Jan. 27, 2014, available at <http://www.justice.gov/iso/opa/resources/366201412716018407143.pdf>.

END

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