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Recent FISA Surveillance Votes Demonstrate Strong Demand for Reform

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There is a substantial likelihood that a “clean” reauthorization for any significant amount of time, or one with only cosmetic changes, would fail.

Parts of the USA PATRIOT Act, including the notoriously abused “Section 215,” are scheduled to sunset on March 15, 2020. Last week the House Judiciary Committee delayed its consideration of a reauthorization bill, the USA FREEDOM Reauthorization Act, which would have reauthorized these problematic authorities until the end of 2023.

The legislation may have fallen apart amid threats by the House Permanent Select Committee on Intelligence (HPSCI) to undermine or kill the bill if the House Judiciary Committee — which is the committee of primary jurisdiction over the Foreign Intelligence Surveillance Act (FISA) — adopted any substantive pro-privacy amendments expected to be offered by Representative Lofgren and others on committee.

HPSCI’s influence over the House Judiciary Committee is both unreasonable and unacceptable, and only serves the interest of a fringe minority of anti-reform members — in both parties.

Recent votes indicate support for far more substantial privacy reforms of FISA surveillance than HPSCI is permitting the Judiciary Committee, and the rest of Congress, to consider.

They also indicate that without substantial reform, a Section 215 reauthorization could fail in the House and succumb to a filibuster in the Senate.

The 2015 Reauthorization of Section 215 — and the attendant lapse in Section 215 authorities:

- The USA FREEDOM Act of 2015 reauthorized Section 215 and two other expiring FISA authorities.
- A key part of the compromise was banning the NSA’s illegal collection of all telephone records (metadata) of all customers of major U.S. telephone providers while also creating a new, narrower, telephone records program that the NSA shut down over a year ago due to [repeated unlawful](#) collection on an unknown number of innocent people in the United States.
- In 2018, while still in operation, that “Call Detail Records” program vacuumed up **434,238,543** phone records — in pursuit of **11** targets. That’s **39,476,231** records collected per target, per year.
- 88 members of the House opposed the USA FREEDOM Act because it was too weak, with 60 members saying that explicitly in a [bipartisan letter](#) authored by Representatives Justin Amash and John Lewis.



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By final passage, the bulk of civil liberties groups either opposed USA FREEDOM Act and/or endorsed full sunset as a better alternative

- Several times, bipartisan surveillance reformers in the Senate [prevented](#) Majority Leader McConnell from passing short-term reauthorizations and other amendments to further weaken the USA FREEDOM Act.
- **These Section 215 authorities lapsed in 2015 for over a day, and contrary to assertions by leadership at the time, the sun continued to rise. *Fear of a potential lapse should not cause reformers to unduly compromise in the current reauthorization debate.***

The 2018 Reauthorization of Section 702 — which nearly failed in the Senate:

- Section 702 is considered to be a far more valuable surveillance authority than Section 215. In addition to the incredible breadth of information collected, Section 215's telephone records programs are best known for producing [negligible intelligence value](#).
- The Judiciary Committee produced an extremely compromised bill during the Section 702 debate, the USA Liberty Act of 2017, which earned virtually [no support](#) from the civil liberties community and was [opposed](#) by many because, like today, it failed to meaningfully address known, major privacy issues with the law. HPSCI effectively [killed it anyway](#).
- Undermining Judiciary's primary jurisdiction, leadership advanced a HPSCI bill by replacing the text of S.139, the Rapid DNA Act, but reformers secured a surprise amendment to replace that with the USA RIGHTS Act, a [broadly supported](#) and truly bold surveillance reform bill.
- Then-Minority Leader Pelosi and then-Ranking Member Schiff joined their Republican counterparts to fiercely [whip against the bill](#), even using up the proponents of the privacy bill's [floor time](#).
- [183 members](#) voted for the USA RIGHTS Act — including over two thirds of the Democratic Caucus voting against their leadership, 14 of the 17 Democratic members of the House Judiciary Committee *then*, and 14 of the 16 Democrats who *now* serve on the House Judiciary Committee (of those who voted on the USA RIGHTS Act amendment). Of the few votes against, all but one came from members who also serve on HPSCI.
- **In the Senate, the bill overcame an aggressive bipartisan filibuster by only a [single vote](#).**



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Developments since 2018 have only strengthened the case for FISA reform.

Since 2018, the public has learned that the USA FREEDOM Act caused the unlawful surveillance of an unknown number of innocent people, under a program that needed to be shut down, which cost \$100,000,000 but produced only two pieces of information that the FBI didn't already possess over a 4 year period;

-and-

the Department of Justice's Inspector General report came out, revealing disturbing abuses of FISA surveillance authorities regarding the investigation of Carter Page as part of Crossfire Hurricane;

-and-

the Office of the Director of National Intelligence released several documents revealing massive abuse of the extremely invasive Section 702 authority, ranging from using it to [spy on relatives](#) to absurdly arguing *on appeal to the FISA Court of Review* that a statutory requirement that the FBI count how often it searches for people in the United States did not actually require them to be able to [differentiate those searches from any others](#) — meaning if they counted everything, it would satisfy the statute.

Implications for the Current Reauthorization Fight:

- **If the USA FREEDOM Reauthorization Act passes, the next time Congress considers Section 215 will be the end of 2023 — over a decade since the public learned the NSA was collecting all phone records of all customers of major U.S. telephone providers. It will have been over two decades since the PATRIOT Act was passed into law, surviving controversy that Section 215 could be used to warrantlessly acquire [library records](#).**
- **HPSCI has threatened to undermine or kill any bill the House Judiciary Committee passes if it is improved during markup. The Judiciary Committee canceled the 2/26 markup of the USA FREEDOM Reauthorization Act because of the “threat” that a majority of the committee *might* support modest, pro-privacy amendments, such as requiring records sought be “material” to an investigation, that defendants actually receive notice when Section 215-derived information is used in court, and that Section 215 not be used in investigations that are “substantially” based upon First Amendment-protected activity.**
- **The cancelation of a high-profile markup due to the “threat” that a subject matter expert on the committee would offer amendments that might be supported by a majority of the committee of primary jurisdiction is cause for alarm. It is suggestive of agency capture of its oversight committees.**



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- Committee staff, meanwhile, have publicly blamed Representative Lofgren, who is likely the most expert member on these issues on the committee, for ‘blowing up’ a deal that had been released only two days prior to the markup.
- Credible rumors are [swirling](#) that some have even suggested including a straight reauthorization of Section 215 in the upcoming coronavirus emergency spending bill, similar to the 90-day reauthorization just passed as part of last November’s Continuing Resolution. This has already precipitated [sharp, bipartisan backlash](#).
- A small number of fringe, pro-surveillance members are using HPSCI to politically bully the House Judiciary Committee away from even allowing its members to consider amendments that most of its members likely support.
- Recent FISA votes mean that surveillance reformers have cause to feel confident in the strength of their position, and they should continue to demand privacy protections.
- All those who care about regular order and Congress’s authority to oversee the executive branch should be concerned about the ongoing bicameral procedural machinations to undermine surveillance reform efforts.