

September 15, 2014

Dear Members of Congress,

We, the undersigned civil liberties advocates, organizations, and whistleblowers, are alarmed that Senator Leahy's recently introduced bill, the USA FREEDOM Act (S. 2685), legalizes currently illegal surveillance activities, grants immunity to corporations that collaborate to violate privacy rights, reauthorizes the PATRIOT Act for an additional 2.5 years, and fails to reform EO 12333 or Section 702, other authorities used to collect large amounts of information on Americans. For these reasons, we encourage both the House and the Senate to oppose this legislation in its current form.

Governmental security agencies' zeal for collecting Americans' personal information without regard for cost, efficacy, legality, or public support necessitates that Congress act to protect the rights of residents across the United States and around the globe. Our fundamental civil rights – the human rights we hold dear – are not adequately protected by either the Senate or House versions of the USA FREEDOM Act.

The reckless actions of top officials charged with ensuring national security – from lying to Congress to secretly weakening security standards to hacking the communications of our allies – has undermined global confidence that the United States can act as an ethical Internet steward. The 11th-hour gutting of the USA FREEDOM Act in the House of Representatives and the CIA's recent illegal spying on the U.S. Senate underscore just how powerful and out of control this surveillance regime has become. Time and again, these agencies have relied on aggressive manipulation of legal loopholes to thoroughly undermine safeguards and checks and balances.

As just one example of why clarity in law is now necessary, the collection of information on **all** domestic phone calls was justified under the “relevancy” standard in the PATRIOT Act. The NSA claimed that **all** domestic telephone metadata records were “relevant” to ongoing terrorism investigations and therefore legally collectible. This absurd interpretation – that everyone's calls were relevant and no probable cause was needed – was then rubber-stamped by a secret court in an ex parte hearing. Such secret law is repugnant to the Fourth Amendment and the plain meaning of the legal authorities on which the Intelligence Community has relied.

The USA FREEDOM Act (S. 2685) also contains ambiguities that are ripe for abuse:

- The bill does not define "direct connection" in the new Call Detail Record provision of Section 215. This may permit the government to access the data from Americans' smart phones through telecommunication providers, which the USA FREEDOM Act immunizes from customer lawsuits. This would be an expansion of the NSA's current authority.
- Loopholes in Section 215, such as the authority to collect phone records in other than daily production or to use a corporation, organization, or

government entity as a specific selection term, still permit bulk data collection, and the bill's transparency provisions do not include production under those loopholes in reporting requirements.¹

- The bill expands on the emergency provision approved by the Foreign Intelligence Surveillance Court (FISC) in February, creating new powers for the government to retain data and introduce it as evidence even if the courts reject the NSA's petition to collect it.

S. 2685 fails to substantially rein in surveillance, and stops short of establishing adequate oversight:

- The bill does not safeguard against warrantless ("back door") searches on the content of Americans' communications collected under Section 702.
- The bill does not require reporting on the FBI's warrantless searches of U.S. persons' content, even when there is no evidence of wrongdoing against those people. Similarly, it does not require reporting on the collection of things like credit card records or information about Western Union transfers, among many other kinds of information, which would allow the government to hide ongoing bulk collection of those items.
- The bill does not prevent the use of Executive Order 12333 to conduct bulk collection.²

S. 2685 fails to protect against future privacy invasions of innocent people. At a minimum, meaningful privacy safeguards should:

- Protect individuals from surveillance where they are not within two degrees of direct communication with an individual subject to authorized surveillance, and prohibit holding of information collected about innocent people. These protections should be expressed as affirmative rights of United States persons, not merely as a modification to a single law.
- Prohibit the use of metadata for connection chaining where it represents contact with companies or federal, state, or local governments. Because so many people rely on these entities, such as Google or municipal governments, contact chaining through them would collect substantial amounts of information on most Americans.³

¹ <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/30/might-get-fooled-again-the-senate-and-surveillance/>

² http://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html

³ <http://webpolicy.org/2013/12/09/metaphone-the-nsa-three-hop/>

- Prohibit the government from hacking into or otherwise interfering with companies and other non-governmental organizations, and the people whose information they hold, so long as they comply with warrants and court orders.
- Preserve the rights of Americans to pursue legal recourse against companies where they fail to exercise reasonable care in protecting individuals' information, including at the request of government actors not acting pursuant to a legal warrant or court order. The bill currently gives blanket immunity to companies responding to any government order, no matter how outrageous.
- Include efforts made by the U.S. House of Representatives, such as the Lofgren-Massie Amendment and the Grayson amendments focused on rehabilitating the National Institute of Standards and Technology Act.
- Improve oversight by creating reporting processes and protections for whistleblowers that disclose information to members of Congress.
- Require more than summaries of the secret interpretations of law made by government agencies and the FISC.
- Not reauthorize the USA PATRIOT Act.

Congress must narrowly and unambiguously define the Intelligence Community's surveillance authority. Sen. Leahy's USA FREEDOM Act fails this basic test, and is not the substantive reform originally envisioned and supported by the public.

Indeed, the USA FREEDOM Act has significant potential to degrade, rather than improve, the surveillance status quo. At best, even if faithfully implemented, the current bill will erect limited barriers to Section 215, only one of the various legal justifications for surveillance, create additional loopholes, and provide a statutory framework for some of the most problematic surveillance policies, all while reauthorizing the PATRIOT Act. Given the several broad legal authorities claimed as justifications for mass surveillance of United States persons and non-United States persons, it remains unclear if the Senate's USA FREEDOM Act would end any of the Intelligence Community's clandestine programs to surveil Americans.

For these reasons, we call on the House and the Senate to reject this version of the USA FREEDOM Act. As long as S. 2685 contains ambiguous language that can be abused by the Intelligence Community and lacks language that clearly protects innocent Americans, we believe that focusing on USA PATRIOT Act reauthorization next year, remedies in

the courts, aggressive confirmation hearings for personnel, and defunding of Intelligence Agencies are more constructive paths forward.

Sincerely,

Campaign for Liberty
CREDO Action
Emptywheel
Fight for the Future
Firedoglake
OffNow
Participatory Politics Foundation
Progressive Change Campaign Committee
Progressive Change Institute
Restore The Fourth
RootsAction.org
Tenth Amendment Center
The Rhode Island Coalition to Defend Human and Civil Rights
The Sunlight Foundation
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