Hearing: Reauthorizing the USA FREEDOM ACT of 2015

To: Members, U.S. Senate Committee on the Judiciary
From: The Electronic Frontier Foundation
Date: November 6, 2019
RE: Reauthorizing the USA FREEDOM ACT of 2015

Background

Section 215 of the USA PATRIOT Act allows the government to obtain a secret order from the Foreign Intelligence Surveillance Court (FISC) requiring third parties like telephone and Internet companies to hand over any records or other “tangible thing” deemed “relevant” to an international terrorism, counterespionage, or foreign intelligence investigation. In 2013, the Snowden revelations demonstrated that the government had relied on Section 215 for years to conduct mass surveillance of billions of Americans' domestic telephone call detail records (showing who called whom and when).

After a federal appeals court ruled that the government’s interpretation of Section 215 to conduct its dragnet phone records surveillance was “unprecedented and unwarranted,” the 2015 USA FREEDOM Act amended Section 215 to limit government access to these records. In addition to the use of Section 215 to collect call detail records, the FBI relies on this authority for “traditional business record” orders, which, contrary to the name, may be used to collect any record that can be obtained with a grand jury subpoena.

Section 215 sunsets on December 15, 2019 (in addition to two other PATRIOT Act provisions). Allowing a sunset would mean a return to the status quo before the passage of the PATRIOT Act in 2001.

Although Congress placed important limits on Section 215 in 2015, recent official disclosures suggest that the will of Congress has been thwarted. Before considering reauthorization, Congress should examine the misuse of authority and institute new transparency measures. If the intelligence community cannot justify the utility of specific programs while ensuring they operate within the bounds of the law, these programs should end.

Questions for the Witnesses

1. The CDR Program Is Illegal and Ineffective, So It Should Be Ended

Prior to passage of USA FREEDOM in 2015, both the Privacy and Civil Liberties Oversight Board and the President’s Review Group on Intelligence and Communications Technologies concluded that the NSA’s mass telephone records program was neither essential nor effective in counterterrorism investigations. Recent reports indicate the NSA had shuttered its Call Detail Record (CDR) Program because it ran afoul of the law, violated Americans’ privacy en masse, and reportedly failed to produce useful intelligence.

   a. Why is the administration seeking reauthorization of a program that is neither essential nor effective in counterterrorism investigation?
   
   b. Why is the administration seeking reauthorization of a program it is not even using?
   
   c. Can the ODNI point to any uses of Section 215 since 2015 in which it made a concrete difference in the outcome of a counterterrorism investigation or directly contributed to the discovery of a previously unknown terrorist plot or disruption of a terrorist attack?

2. Transparency on “Traditional” Business Record (BR) Collection

In 2015, after a federal appeals court ruled that the government’s interpretation of Section 215 was “unprecedented and unwarranted,” Congress passed USA FREEDOM and included several transparency and reporting requirements. The public reports have provided some data about how Section 215 is used to collect information, but critical disclosures are still missing.

   a. How many records are collected pursuant to the traditional business record orders?
b. What types of records are collected under the business records authority of Section 215 and do those records include the content of communications protected by the Fourth Amendment?

c. Why was there such a jump in the number of unique identifiers between FY2017 and FY2018 (87,000 to 215,000) in records collected pursuant to “traditional” business record orders despite a drop in the number of orders (77 to 56)?

d. How many queries has the FBI conducted of 215 data using US Person identifiers?

e. How many unreleased FISC opinions interpreting Section 215 after USA FREEDOM reforms have yet to be released in declassified form?

f. Has the Department of Justice notified all criminal defendants who are being prosecuted based on evidence derived from use of Section 215? If not, why not? Can the Department commit to such notification?

3. FISC Opinions

The USA Freedom Act directed the government to make all “significant” or “novel” FISC opinions publicly available to the greatest extent practicable. It is clear from the text and from statements from Members during floor debate that this was to include opinions written before the passage of USA Freedom. Nonetheless, only a handful of FISC opinions – issued following passage of the bill – have been published.

a. How does the ODNI or the DOJ determine which opinions are significant or novel enough to be published?

b. How many opinions that fit this definition still remain completely secret?

c. How many Office of Legal Counsel opinions relevant to the government’s interpreting of Section 215 or the USA Freedom Act provisions have not been released?

4. The Impact of Carpenter v. United States on NSA programs

In 2018, the Supreme Court handed down a landmark opinion in Carpenter v. United States, ruling 5-4 that the Fourth Amendment protects location information taken from users of cell phones. In an opinion by Chief Justice Roberts, the court recognized that location information—collected by cell providers like Sprint, AT&T, and Verizon—creates a “detailed chronicle of a person’s physical presence compiled every day, every moment over years.” As a result, police must now get a warrant before obtaining this data.

a. Has the FISC or the OLC issued guidance applying the ruling in Carpenter v. United States, 138 S. Ct. 2206 (2018), to activities conducted pursuant to Section 215? If so, when will this guidance be declassified and released?

b. Does the intelligence community believe Carpenter limits the type of records it can collect using Section 215?

c. Would the intelligence community support an amendment to clarify that Section 215 cannot be used to obtain geolocation information that implicates individuals’ reasonable expectation of privacy, following the Carpenter decision?

d. Would the intelligence community support an amendment to clarify that Section 215 cannot be used to collect other personal information such as medical or tax records, and other information in which individuals ordinarily have a reasonable expectation of privacy?

5. Technical Irregularities

The NSA announced in 2018 that it received large numbers of CDRs it should not have, and that these “technical irregularities” began in 2015. In response, the NSA deleted every single record it had collected since 2015. The agency claims it solved the problem going forward, but has failed to provide evidence of any change. Instead, in March 2019, the New York Times published a major story reporting that the NSA stopped using this authority entirely.

a. What exactly were the “technical irregularities”?

b. Has the NSA actually stopped the CDR program this time?

Want more information? Please contact India McKinney at india@eff.org.