# Protecting Civil Liberties Before Reauthorizing Controversial FISA Powers

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Congress has been debating H.R. 6172, the USA FREEDOM Reauthorization Act of 2020, which would reauthorize three Foreign Intelligence Surveillance Act (FISA) surveillance authorities that expired on March 15:

- **FISA's "business records" provision**, widely known as Section 215 of the USA PATRIOT Act, which gives the FBI the power to compel companies to give the government records about people who are not suspected of any wrongdoing, pursuant to an order from the Foreign Intelligence Surveillance Court (FISC or FISA Court), to obtain business records, documents, or any "tangible things," from third parties such as banks and phone companies — without a warrant. Instead, the government only has to show the records are "relevant to" an investigation, a much lower evidentiary standard. This authority explicitly covers "book sales records," "educational records," and "medical records," in addition to "any [other] tangible things," such as purchase and calling records. Republican Senate leadership has suggested that Section 215 is being or may be used to generate leads using "Internet data as a starting point" — which suggests Section 215 was being misused to conduct dragnet surveillance of internet activity Congress has not considered (like surveilling everyone who visits a given website or watches a video online).
- **FISA's "roving wiretaps" provision**, which allows the FISC to authorize surveillance without specifying the device that will be monitored (while authorizing surveillance of a particular target or group).
- **FISA's "lone wolf" provision**, which has "never even been used" but allows surveillance of immigrants even when the FBI cannot show probable cause that they are acting on behalf of a foreign power.

The FISA Court and FISA Court of Reviews operate in secret, and until 2015, government attorneys would seek approval of their surveillance applications without any other attorneys present to respond, no matter how novel or significant that application. After the Snowden disclosures showed that the FISC was rubber stamping implausible interpretations of surveillance statutes, Congress created an **amicus curiae ("friend of the court") role** in which independent civil liberties experts (amici) may respond in cases that present novel questions of law. Amici serve a critical oversight role in the secret FISA Court — but today, the amicus role is narrow and limited.

## Timeline

- Late January: Sens. Roy Wyden (D-OR) and Steve Daines (R-MT) and Reps. Zoe Lofgren (D-CA), Warren Davidson (R-OH), Pramila Jayapal (D-WA), and Matt Gaetz (R-FL) introduced **S. 3242/H.R. 5675, the Safeguarding Americans' Private Records Act**. 45 groups, including Color of Change, Demand Progress, Free Press Action, Indivisible, and Democracy for America, endorsed the bill.
- March 11: The House passed **H.R. 6172, the USA FREEDOM Reauthorization Act**, on a 278-136 vote.
- March 31: The Department of Justice Inspector General issued an interim memorandum to the FBI revealing systemic failures in the FISA process, finding that 29 of 29 sampled FISA applications to the FISC included numerous inaccurate and unsubstantiated claims. All failed to adhere to the government's own procedures to ensure accuracy in applications (so-called "Woods Procedures").
- May 14: The Senate passed H.R. 6172 on an 80-16 vote after adoption (77-19) of an **amendment offered by Sens. Mike Lee (R-UT) and Patrick Leahy (D-VT),** which increases amici access to information and ability to inform the court, including specific protections if the government targets religious groups or the press.. A **separate amendment offered by Sens. Wyden and Daines** to prohibit the use of Section 215 for warrantless access to internet browsing and search histories fell one vote short of adoption.
- May 28: The House voted 284-122 to go to conference with the Senate on H.R. 6172 following a veto threat from President Trump and an unsuccessful effort to get a House vote on the Wyden-Daines Amendment.

## Ongoing Section 215 Surveillance

While these authorities have sunsetted, outstanding questions remain as to what surveillance of individuals in the United States is continuing a) in the absence of this authority on the basis of secret claims of inherent executive power, b) through the misuse of other authorities, or c) through a carveout in the sunset for investigations into activities that predate the sunset. Former Senate Intelligence Committee Chair Richard Burr has claimed for instance, despite the expiration of these authorities, that the President "can do all of this, without Congress's permission, with no guardrails [...] that authority exists" under claimed inherent executive authority (broadly regulated by and referred to as Executive Order 12333). On July 21, Sens. Leahy and Lee sent a letter to Attorney General Bill Barr and Director of National Intelligence John Ratcliffe requesting critical information about what forms of surveillance are still operating in the absence of the expired authorities, along with the Administration's legal justification for any such surveillance.

House Intelligence Committee Chair Adam Schiff has further stated that a version of the Wyden-Daines amendment, which he changed before permitting the House to vote on it, would not prohibit the use of Section 215 for the warrantless surveillance of United States persons' internet browsing and search history, despite its plain language. Instead, he said it would only prohibit the government from using Section 215 orders "to seek to obtain" a U.S. person's information, which Senator Wyden explained meant it would not protect against "dragnet collection of online activity." In practice, this change appears to allow for the NSA or FBI to surveil individuals in the United States based on visiting a website or watching a video, after being caught in a dragnet. While this

use of Section 215 has never been considered by Congress, concerns exist that it is already occurring in secret and Sen. Wyden has sent a letter to the Director of National Intelligence seeking further clarification, as have Sens. Leahy and Lee and a bipartisan coalition of organizations. Without a clear answer to this question, it is impossible to determine whether Chair Schiff's proposed language would in practice protect United States persons from dragnet surveillance of online activity, or indeed whether Congress would be unknowingly reauthorizing such dragnet spying by extending these authorities. The only other thing the Schiff's changes to the Wyden-Daines amendment would do is ensure the government can use Section 215 to warrantlessly surveil the internet activity of immigrants, including Dreamers.

## Current Reauthorization Legislation

If the Senate also sends H.R. 6172 to conference, a negotiated version will return to both chambers' floors. The table below compares the civil liberties protections in H.R. 6172 as passed by the House in March, H.R. 6172 as amended by the Senate in May, and H.R. 5675.

| Civil liberties protections | H.R. 6172 (House) | H.R. 6172 (Senate) | S. 3242/H.R. 5675 |
|---|---|---|---|
| Does the bill reauthorize § 215 of the USA PATRIOT Act, allowing the government to search "business records" without a warrant? | **Yes**, with minimal reforms that primarily codify current practice and/or law. . | **Yes**, with more new privacy protections. | **Yes, but** would prohibit use of § 215 for warrantless surveillance of location data, internet browsing and search histories, and bulk collection of phone metadata. |
| Does the bill end the shuttered "Call Detail Records" program, which unlawfully collected cell phone data in bulk? | **Yes.** All three bills would end the "Call Detail Records" program, which the government ended last year after receiving a storm of criticism after unlawfully collecting cell phone metadata. In 2018, the program collected over 434 million phone records in pursuit of 11 targets. This program replaced the even larger, illegal bulk telephone metadata surveillance program revealed by Edward Snowden in 2013. Under all bills, Section 215 would still allow surveillance of call detail telephone records of people not suspected of any wrongdoing, just not programmatically. | | |
| Does the bill change § 215's vague "relevant to" standard, which the government has specifically abused? | **No.** | | **Yes,** by requiring the records be "relevant and material" to an investigation, and that they "pertain to" an agent of a foreign power. (§ 105) |

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| Does the bill prohibit the government from conducting mass or targeted records surveillance under claimed executive authority (namely Executive Order 12333)? | **No.** | | **Yes.** § 501 establishes FISA as the "exclusive means" for foreign intelligence surveillance of communications, location, and internet browsing and search records. |
| Does the bill end warrantless searches of cell phone location and GPS data under § 215? | **Yes,** with an emergency exception. | | **Yes.** |
| Does the bill require the government to get a warrant to access web browsing history, search history, and other online activity? (*This would have been required by the Wyden-Daines Amendment).* | **No.** | **No.** The **Wyden-Daines Amendment**, which would prohibit warrantless searches of online activity, **failed by one vote.** | **Yes.** (§ 501) This proposal was mirrored in the proposed Wyden-Daines Amendment. |
| Does the bill protect information that would otherwise require a warrant for law enforcement purposes? | **Only under § 215,** and only pursuant to an unclear standard. (§ 102) | **Only under § 215,** and only pursuant to an unclear standard. (§ 102) | **Yes.** (§ 104 and §501(e)) |
| Does the bill give AG Barr the sole responsibility to approve an investigation into Joe Biden, or excuse to deny an investigation into Donald Trump (any federal official or candidate)? | **Yes.** (§ 203) | | **No.** |

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| Does the bill require the FISA court to appoint an independent amicus for sensitive investigations, including investigations of elected officials, candidates for office, the press, or political or religious organizations? | **No.** § 302 adds amici protection only for "exceptional concerns about the protections of the rights of a United States person under the first amendment," as determined by the FISC**.** | **Yes, as required by the Lee-Leahy Amendment.** This provides much-needed oversight in response to federal surveillance of political movements and organizers, such as ongoing surveillance of Black Lives Matter activists. | **Yes,** and the bill would go further by allowing amici to provide oversight of and raise any issue with the FISC. (§ 301) |
| Does the bill require the FISA Court to appoint an amicus for surveillance applications that involve new programs, new technology, or novel use of existing technology? | **No.** | **Yes, as required by the Lee-Leahy Amendment.** | **Yes,** and the bill would go further by allowing amici to to raise any issue with the FISC. (§ 301) |
| Does the bill allow amici to appeal the FISA Court's decisions? | **Yes.** (§ 302) | **Yes.** (§ 302) | **Yes.** (§ 301) |
| Does the bill empower independent amici to access needed information about the surveillance requests to which they are responding? | **No, but** § 302 allows amici to request access to relevant materials and information. | **Yes**, **as required by the Lee-Leahy Amendment.** The bill requires that amici "shall have access" to the full record in matters they participate in. | **Yes.** (§ 301) Amici would have further access to all FISC opinions, transcripts, pleadings, and documents presented in the FISA Court and FISA Court of Review (FISCR). |

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| Does the bill reauthorize FISA's "roving wiretaps" provision? | **Yes.** | | **Yes, and** it requires an IG report on whether and to what extent roving wiretaps are used to surveil people other than known targets. (§ 121) |
| Does the bill require that § 215 only be used in counterterrorism and espionage cases? | **No.** | | **Yes.** (§ 110) |
| Does the bill prohibit "parallel construction," an FBI technique of building a parallel, additional evidentiary basis for an investigation that obscures a real evidentiary trail based on evidence? | **No.** | | **Yes.** (§ 203) |
| Does the bill require the government to notify people if § 215 information (information from business records searches) will be used against them in court? | **No.** The government can (and would) avoid the requirement by claiming that notice would harm national security. | | **Yes,** and would permit a motion to suppress. (§ 111) |
| Does the bill allow defendants and their attorneys to read FISA applications if evidence from FISA searches is used in criminal prosecutions? | **No** — and without this information, defendants can't challenge the surveillance that led to the charges. This is a priority for civil liberties groups. | | |

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| Does the bill require the government to publicly release significant FISA Court decisions, orders, and opinions? | **Yes.** § 301 would require complete declassification and publicly disclose FISA court decisions, orders, and opinions with a "significant construction or interpretation of any provision of law, including any novel or significant construction" *or* for any decisions, orders, and opinions resulting from a procedure in which an amicus curiae was appointed. | | **Yes.** § 305 would require declassifying all significant FISA opinions, decisions, or orders. |
| Does the bill require an investigation into whether the Government is using First Amendment- protected activities, race, ethnicity, national origin, or religion to support surveillance applications? | **Yes,** but under an entity without jurisdiction over foreign intelligence. (§ 403) | | **Yes,** and would extend jurisdiction over foreign intelligence to oversight bodies. (§ 112 and § 304) |
| Does the bill end "secret law" loopholes, under which the government secretly conducts surveillance outside the FISA process? | **No.** | | **Yes.** § 501 would make FISA the "exclusive means" for surveilling communications within the US. |
| Does the bill require the government to justify § 215 gag orders to the FISA Court? | **No.** | | **Yes.** § 106 requires the government show that disclosure of an order would cause harm. |

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| Does the bill create a sunset for National Security Letters? | **No.** | | **Yes**: 2023**.** (§ 401) |
| Does the bill limit indefinite, unjustified retention of people in the United States' records? | **5 years, but** with enormous loopholes. (§ 104) | | **3 years,** unless they include foreign intelligence information or evidence of a crime. (§ 107) |
| Does the bill permit the FISA Court to review compliance with statutorily mandated minimization procedures? | **No.** | | **Yes.** (§ 108) |
| Does the bill require full reporting on how much information is collected under § 215? | **No.** | | **Yes.** (§ 109) |
| Does the bill require § 215 efficacy reporting? | **No.** | | **Yes.** (§ 110) |
| Does the bill otherwise reform the FISA Court? | **No,** it only requires certain (nonpublic) documentation. | | **Yes.** § 302 diversifies the appointment of FISC judges, who are all currently appointed by the Chief Justice of SCOTUS, and § 303 orders a study on ensuring appointments are "diverse and representative." |