



June 1, 2015

**RE: Proposed Amendments to H.R. 2048, USA Freedom Act**

Dear Senator,

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On behalf of the American Civil Liberties Union, please find below the ACLU vote recommendations on proposed amendments 1450, 1451, 1449, and 1452 to H.R. 2048, the USA Freedom Act. A vote on these amendments is anticipated early this week.

To date, the ACLU has neither supported nor opposed H.R. 2048. However, in the event any of the amendments offered by Senator McConnell is adopted, the ACLU will oppose the entire bill absent other improvements.

**The ACLU recommends a NO vote on Senator McConnell's amendment 1450**

The amendment extends the transition period of H.R. 2048 to 12 months – despite assurances by the intelligence community that a 180-day transition period is sufficient, and despite the fact that the government has multiple other tools that can be used to collect records of terrorism suspects. Prolonging the transition period could be used by the government to continue illegal bulk collection programs even beyond the six months contemplated by H.R. 2048.

**The ACLU recommends a NO vote on Senator McConnell's amendment 1451.**

H.R. 2048 creates an amicus curiae to participate in significant proceedings before the Foreign Intelligence Surveillance Court (FISC). Amendment 1450 weakens this already modest provision by excluding language ensuring that the amicus curiae has access to relevant materials; appropriate clearances to access classified information; and specific duties that may include advancing privacy and civil liberties arguments. Thus, the resulting amicus curiae may lack the information necessary to meaningfully participate in FISC proceedings, and may be less likely to serve the important role of protecting privacy and civil liberties. In addition, the provision states that the court is authorized to appoint an amicus, but excludes prior language requiring appointment of an amicus in significant cases *unless* the court issues a finding that such appointment is not

appropriate. As a result, there is ambiguity over whether the court would have to report to Congress the number of times they appoint an amicus in a significant case and the number of times they deem such an appointment inappropriate.

### **The ACLU recommends a NO vote to Senator McConnell's amendment 1449**

Amendment 1449 wrongly imposes data notification requirements on phone companies and requires certifications by the Director of National Intelligence (DNI) prior to the bill's effective date. Specifically, the amendment:

- Requires the DNI to certify in writing that implementation of H.R. 2048 (a) will not harm national security; (b) will ensure the protection of classified information, intelligence sources, and methods related to the production of call detail records; and (c) will, following transition, allow the government to obtain foreign intelligence from phone companies in a timely manner. Given that the intelligence community has already stated that the bill will not impair intelligence capabilities, such a provision is unnecessary and designed to provide an opportunity for subsequent attacks on the bill prior to its effective date.
- Requires companies served with Foreign Intelligence Surveillance Act (FISA) court orders to provide notification to the Attorney General if they (a) retain call records for less than 18 months, and (b) intend to implement a policy permitting destruction of call records prior to 18 months, at least 180 days in advance. Such notification burdens companies and forces them to wait 180 days before implementing new data retention policies that better reflect business needs.

### **The ACLU recommends a NO vote on Senator McConnell's amendment 1452**

The amendment combines many elements contained in amendments 1449, 1450, and 1451. It eliminates key transparency provisions, weakens the amicus curiae, lengthens the bill's transition period, imposes burdensome notification requirements on companies, and provides the opportunity for subsequent attacks on the bill. Specifically, the amendment:

- Strikes provisions requiring the declassification or summary of significant FISC opinions, which are necessary to ensure that Congress and the public have sufficient information to determine whether H.R. 2048 is properly implemented;
- Weakens the amicus curiae by eliminating provisions ensuring that the amicus has access to relevant materials, appropriate clearances to access classified information, and specific duties that may include advancing privacy and civil liberties arguments; and striking language requiring the appointment of an amicus in significant cases unless the court deems such appointment inappropriate;
- Lengthens the transition period of the bill to 12 months, despite assertions of the intelligence community that 180 days is sufficient;
- Requires that the Director of National Intelligence certify in writing that implementation of the USA Freedom Act: (a) will not harm national security; (b) will ensure the protection of classified information, intelligence sources, and methods related to the production of call

detail records; and (c) will, following transition, allow the government to obtain foreign intelligence from phone companies in a timely manner. Similar to amendment 1449, such a change is designed to provide an opportunity for subsequent attacks on the bill.

- Requires companies served with a FISA orders to notify the government if they retain call records for less than 18 months, and provide 18 months' notice if they intend to make such a change in data retention policies. Similar to amendment 1449, such notification unnecessarily burdens companies and interferes with their ability to implement new data retention policies.

We urge Senators to vote against all of the amendments identified above. Please call Legislative Counsel Neema Guliani with any questions at (202) 675 2322.

Regards,



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