



# NSA Can't Purge Call Records, Regardless of Congress' Next Move

**Evidence preservation orders require the spy agency to hold records.**

[Steven Nelson](#)

May 27, 2015

The National Security Agency's bulk collection of American call records is winding down, according to news [reports](#), but its reservoir of telephone metadata dating back at least five years cannot legally be purged – regardless of the outcome of a surveillance reform standoff in Congress.

That's because the Electronic Frontier Foundation, an advocacy group with ongoing lawsuits against NSA record-collection programs, has evidence preservation orders preventing the agency from wiping its drives.

Unless the orders are lifted, the NSA cannot lawfully destroy stored call records, even if Congress passes the USA Freedom Act, which would end automatic bulk collection under Section 215 of the Patriot Act, or allows Section 215 to expire as scheduled June 1.

It's unclear what court-ordered policies would govern stored call records if congressional action or inaction curtails surveillance powers.

The Foreign Intelligence Surveillance Court currently [requires](#) records that otherwise would have been deleted after five years be "preserved and/or stored in a format that precludes any access or use by NSA intelligence analysts for any purpose" except for compliance with preservation orders -- though that's little comfort to some privacy advocates.

## **A Purge Deferred**

EFF's legal battle against NSA surveillance programs began years before whistleblower Edward Snowden exposed the government's secret and expansive interpretation of Section 215 and other laws in June 2013, and the group sees temporary preservation of records as necessary to prove to judges and the American public that unconstitutional spying happened.

The advocacy group, leaning on reports from an earlier whistleblower, Mark Klein, about interception of communications at a California AT&T facility, launched the still-running *Jewel v. NSA* in 2008, building on companion case *Shubert v. Bush*, filed in 2006.

A federal judge in February ruled against EFF in Jewel, finding the group cannot prove Fourth Amendment claims against phone and Internet surveillance without revealing classified information. But the group isn't abandoning the case and maintains a preservation of evidence order requiring the government to retain records, according to EFF staff attorney Mark Rumold.

A younger NSA lawsuit brought by EFF, First Unitarian Church v. NSA, was filed on behalf of a [diverse coalition of groups](#) specifically challenging phone record collection in the wake of Snowden's disclosures. EFF attorneys won in March 2014 a preservation of evidence [order](#) from U.S. District Judge Jeffrey White that says the government may not destroy records relevant to the case.

Department of Justice lawyers notified the Foreign Intelligence Surveillance Court of the order, [writing](#), "The Government has determined that, absent further relief from the District Court, it is necessary in light of the attached Order to preserve [bulk phone record] metadata beyond five years," the standard length of storage.

The government received permission in February to submit a sealed response to White's order in the First Unitarian Church case, but the judge has not reversed or revised his decision, Rumold says. A Department of Justice attorney working on the case did not respond to a request for comment.

"The government is indeed under an ongoing preservation order in First Unitarian to preserve call records collected under Section 215," Rumold says. "The judge never amended his order, so – even if the government filed something under seal – the public order should govern."

The order informs the government: "Preservation includes taking steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible."

Preservation of evidence orders in the Jewel case have a more tumultuous history. Government attorneys did not inform surveillance court judges of older orders last year during one-sided proceedings, despite prompting by EFF, causing the court to issue an erroneous ruling.

Judge Reggie Walton, at the time chief judge of the surveillance court, [forced government attorneys to apologize](#), and White freshened the preservation orders. White, however, reversed himself in Jewel regarding records collected under Section 702 of the Foreign Intelligence Surveillance Act, which is used to take Internet records. The government said its systems were too complex to alter.

But in partially rescinding his order to carve out Section 702 collection, White reiterated, according to a courtroom [transcript](#), the court otherwise "maintains its ruling with regard to the preservation of all data relevant to plaintiffs' pending claims."

It's unclear how well the government is complying with the orders. The Department of Justice's designated spokesperson on national security issues could not be reached for comment. The NSA did not respond to a request for comment.

### **'Doesn't Make Sense'**

EFF ultimately seeks destruction of the NSA-held records, but the preservation of evidence orders nonetheless are controversial among other attorneys who argue the record collection violates constitutional rights.

"Holding up the slow destruction of millions of Americans' private information when that is the very relief sought just doesn't make sense," Ken Cuccinelli, who represents Sen. Rand Paul, R-Ky., and FreedomWorks in a long-stalled lawsuit, [told U.S. News](#) last year.

Paul, currently running for president, is working to force expiration of Section 215 on June 1 by opposing the Freedom Act, which would narrow collection under that authority. Paul [said Monday](#) he wants stored records "purged."

Some civil libertarians warn that blocking the Freedom Act may allow the government to transfer the phone program to other legal authorities that otherwise would be narrowed by the bill.

Legal activist Larry Klayman, who in December 2013 won a stayed preliminary injunction from District Judge Richard Leon, who found the phone record collection likely violates the Fourth Amendment, also opposes the orders. "It's a highly dangerous situation to leave those documents in the hands of the NSA," he said last year.

American Civil Liberties Union staff attorney Alex Abdo, who successfully argued before the U.S. Court of Appeals for the 2nd Circuit that Section 215 does not authorize bulk phone record collection, is less scornful.

"We want the NSA's call-records program ended and the NSA's database purged, which is why we brought the lawsuit," Abdo says. "If the NSA is going to keep some of the records in connection with litigation, we assume that this would be only temporary and would not permit the NSA to use the records for any other reason."

The 2nd Circuit panel ruling in the ACLU's favor did not reach constitutional claims. Two other appeals courts heard arguments late last year and are likely to announce decisions soon in cases brought by Klayman and Idaho nurse Anna Smith, whose legal team is aided by EFF.

It's possible there will be future contradictory court rulings regarding preservation or destruction of records. It's also possible White or higher judges will at some future time lift his orders. Many advocates believe the Supreme Court will settle the underlying legal debate – if legislation does not [moot](#) cases.

On Capitol Hill, senators appear deadlocked on passage of the USA Freedom Act, which [failed](#) to win consideration by three votes Saturday. It's possible – and perhaps likely – the House-passed, White House-supported legislation will find a few more votes as more hawkish members scramble to prevent Section 215 from expiring altogether in five days.

Cato Institute policy analyst Patrick Eddington, formerly a Capitol Hill staffer, says the Freedom Act “does not apply to records still sitting on U.S. government servers.” The only notable bill that would require a purge of records, he says, is the longshot [Surveillance State Repeal Act](#).