



USA FREEDOM and Rand Paul

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In June 2013, Sen. Rand Paul (R-Ky.) introduced the [Fourth Amendment Restoration Act](#), a bill declaring that "the Fourth Amendment to the Constitution shall not be construed to allow any U.S. government agency to search the phone records of Americans without a warrant based on probable cause." The legislation was aimed specifically at stopping the National Security Agency (NSA) and other federal agencies from interpreting the Foreign Intelligence Surveillance Act and the USA PATRIOT Act in ways that allows them to clandestinely collect and winnow through Americans' telephone and other electronic records. I entirely support the bill, but the sad truth is that it has garnered not a single cosponsor and it has gone nowhere.

What *has* gone somewhere, though this week it was stopped in its tracks, is the [USA FREEDOM Act](#). This bill aims to limit the NSA's bulk collection of Americans' phone data under Section 215 of the PATRIOT Act. Specifically, it restricts the FBI to seeking the records related to specific individuals, phone numbers, and email accounts based on a "reasonable, articulable suspicion" that they are associated with a foreign power or its agent engaged in international terrorism or activities in preparation for such terrorism. The FBI would also no longer be able to engage in electronic dragnets by demanding to see the records of every customer of a telecommunications service provider or everyone who lives in a particular zip code or city.

Other provisions dealt with [National Security Letters](#) which are administrative subpoenas that the FBI uses without judicial oversight to directly order companies to turn over the banking, telephone, and Internet usage records of their customers and then gag the companies from telling anyone that they did so. In order to forestall agencies from reinterpreting NSLs to permit dragnet surveillance, the bill set the same standard on NSLs as it did on searches under Section 215, that is, limiting them to specific individuals, accounts, phone numbers, and so forth.

The USA FREEDOM Act would also increase the transparency of the Foreign Intelligence Surveillance Court by allowing it to appoint a privacy advocate in certain cases, seek technical information about the operation of surveillance programs, and require the disclosure of significant decisions relating to Americans' privacy rights.

Earlier this week, the bill needed the votes of 60 senators in order for debate on the bill to proceed. It garnered only 58, and so it did not make it to the floor. One of the 42 voting against was Sen. Paul.

"I think NSA reforms are necessary and I will continue to fight against bulk data collection," Paul explained in an emailed statement. "Last night, I stood on principle by opposing a bill that

included a provision reauthorizing elements of the Patriot Act that violate the Bill of Rights. I have always been steadfast against the Patriot Act and I will continue to do all I can to prevent its extension."

Paul specifically objected that the act would extend three provisions of the PATRIOT Act beyond their June 1, 2015, sunset dates to 2017. These include bulk collection of records under Section 215, secret "lone wolf" surveillance of non-U.S. persons not affiliated with any terrorist organization, and roving wiretaps that allow one authorization to cover multiple devices—say, a suspect's cell phone, computer, and tablet.

Cato Institute policy analyst [Julian Sanchez](#) tells me that while the lone wolf surveillance provision is "somewhat concerning," it has never been used. With regard to roving wiretaps, further restrictions such as a requirement for a probable cause warrant should be implemented, but the idea that law enforcement should be able to legally track the communications of a terrorism suspect across multiple devices is reasonable. Sanchez makes the further point that the USA FREEDOM Act would actually amend Section 215 to limit bulk collection, so extending it to 2017 would be much less problematic.

Most civil libertarians agree with Sen. Paul that the bill is far from perfect. Nevertheless, they wanted the debate to proceed. "I respect that Sen. Paul has been trying to reform the NSA for a long time, but it is disappointing that he voted against moving forward on the bill," says ACLU legislative counsel [Neema Singh Guliani](#). "It is a huge step back, a huge lost opportunity."

Similarly, Electronic Frontier Foundation legislative analyst [Mark Jaycox](#) praises Paul as "a very good advocate on privacy" but adds that "it was disappointing that he voted against debating the bill." Jaycox argues that if Paul thought the bill was too weak and needed strengthening, he could have offered amendments during the debate. If those amendments had failed, the senator could have voted against it at that time. Both Guliani and Jaycox believe the USA FREEDOM Act is a good first step in a long process of ending domestic surveillance abuses.

EFF "I have not heard a single person plausibly argue that we will get more robust and more far-reaching reform now that this bill has failed," says Sanchez. "I am with him [Paul] in spirit, but I don't see how this works strategically."

On the other hand, Sanchez' Cato colleague [Patrick Eddington](#) suggests that the June 1, 2015, sunset date on the three PATRIOT Act provisions will make congressional debate on NSA surveillance reform an urgent matter this coming spring. As that date approaches, NSA enablers such as future Senate majority leader Mitch McConnell may be frantic to save some Section 215 surveillance capabilities.

Eddington believes that there is a strong enough bipartisan libertarian/progressive coalition in the House of Representatives to allow the sunset provisions of the Patriot Act to die in June, if no agreement on substantial surveillance reforms is reached. Since the USA FREEDOM Act failed, Eddington thinks that pressure for surveillance reforms will build as more and more information comes to light about just how egregiously the NSA and other agencies are violating Americans' Fourth Amendment rights.

Maybe so. But *The New York Times* is reporting that an artful interpretation of Section 215 could well make it [essentially permanent](#) without further congressional authorization. If so, Paul's stand will have accomplished nothing.

Eddington suggests that another avenue for surveillance reform may open up later this year. Back in June, the House of Representatives passed an amendment to the Department of Defense appropriation bill that would [prohibit the NSA](#) from spending any money on warrantless FISA Section 702 searches and on efforts to install backdoors in encryption standards. The NSA has interpreted FISA Section 702 to allow a [backdoor search loophole](#) that sweeps up Americans' emails, instant messages, Facebook messages, and Web browsing history.

On December 11, the continuing budget resolution that funds federal operations for fiscal 2015 will run out. As Congress hastily tries to get home for Christmas, there is a chance that it will pass a giant omnibus appropriations bill that must be approved all at once. If so, the June DOD amendment would make it through and thus stop NSA Section 702 searches and agency efforts to undermine encryption standards.

Both Jaycox and Guliani also have some hope that the federal courts will come to the rescue. A [number of lawsuits](#) are challenging the constitutionality of various surveillance programs. All too often courts give deference to the decisions made by the political branches, especially when it comes to alleged matters of national security. Nevertheless, there is some possibility that litigation might overturn some aspects of the national security surveillance state.

"Paul made a call that he clearly thought was in the best interests of the country," concludes Eddington. "I think it is more than likely that time will prove him right." I hope so. But there may come a time when Paul rues the day he allowed the perfect to get in the way of the merely better.