



FBI Has the Authority to Obtain ECTRs Without Judicial Approval in Emergencies

What's going on: The Senate is currently debating the McCain-Burr-Cornyn Amendment ([Amendment No. 4787](#)), which, in part, would dramatically expand the FBI's National Security Letter (NSL) surveillance authorities and remove crucial judicial oversight. It would expand the statute to authorize the FBI to use NSLs to demand Americans' electronic communications transactional records (ECTRs), which can reveal highly personal information, including their browsing history; who they communicate with online via chat, email, text, and video; what online services they subscribe to and when they sign onto their accounts; their IP address(es), and much more.

How the FBI currently gets these records (under normal circumstances): There are a [plethora of existing authorities](#) under which the FBI can get court approval to obtain ECTRs. For investigations into terrorism and counterintelligence, they get orders from FISA Court judges under [Patriot Act Section 215](#). The standard the FBI must meet in order to obtain a 215 order from the FISA Court is identical to the standard that it must meet to issue an NSL: that the information sought is merely relevant to an authorized investigation.

Why the FBI says they need this expansion of authority: The FBI has been pushing for this proposal because they claim the process for applying for and receiving a court order takes a long time and requires many work-hours. The [McCain-Burr-Cornyn](#) amendment would do nothing more than enable the FBI to avoid making bureaucratic changes to make their process for drafting and submitting applications for court orders more efficient. Additionally, and troublingly, it would enable the FBI to avoid any meaningful oversight of its demands for ECTRs — oversight that is necessary to protect against a [pattern](#) of [repeated abuses](#) of NSLs.

When there is an emergency and time is of the essence, the FBI can use its emergency authorities to obtain the records immediately, and seek court approval after-the-fact:

This expansion of surveillance authority is entirely unnecessary. [Section 102](#) of the USA FREEDOM Act (Public Law No. 114-23) creates an emergency exception to the judicial approval requirement in Section 215 of the Patriot Act which allows the FBI to obtain the records they seek immediately if there is an emergency. The Act provides that if "the Attorney General reasonably determines that an emergency situation requires the production of tangible things before an order authorizing such production can with due diligence be obtained," then the FBI's demand for records can be issued immediately. The FBI must simply apply for a court order within seven days of issuing the emergency demand.

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