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United States House of Representatives

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Committee on the Judiciary
United States House of Representatives

The Honorable James Sensenbrenner
Member
United States House of Representatives

May 14, 2014

We the undersigned support ending the bulk collection of all types of data under all legal authorities, while preserving the requirement of prior court approval for surveillance under the Foreign Intelligence Surveillance Act (FISA). We recognize the substantial step in this direction the House Judiciary Committee and House Permanent Select Committee on Intelligence took in unanimously passing the USA FREEDOM Act (H.R. 3361). The bill includes several components critical to meaningful reform, such as a definition of “specific selection term,” the declassification of significant Foreign Intelligence Surveillance Court (FISC) decisions, and authorization for private parties to issue public reports of surveillance orders they receive. We respectfully urge you to oppose efforts to weaken these or other provisions in this historic bill.

While the bill makes significant progress in ending bulk collection, we strongly believe that several technical corrections and clarifications to the bill are required if Congress is to help ensure that the bill language is not misinterpreted and its stated goal of ending bulk collection is met. Accordingly, we respectfully urge the House Rules Committee to make the following clarifications and technical corrections to H.R. 3361, as reported,¹ before the bill goes to the House Floor:

- 1) **Clarify no content collection under Section 215 of the PATRIOT Act:** The bill creates a new authority for the collection of “call detail records” under Sec. 215 and states that call detail records do not include communications content.² However, the bill is currently silent on whether other “tangible things” under Sec. 215 can include communications content. This

¹ USA FREEDOM Act, as reported, 113th Cong, May 7, 2014 (available at http://judiciary.house.gov/_cache/files/ec687f8f-3b69-43b2-b5f6-bcf234457e7d/fisa-anos-003-xml.pdf).

² Sections 101 and 107 of H.R. 3361, as reported.

could lead to an interpretation that Sec. 215 authorizes the collection of communications content, which would be a significant expansion of the use of Sec. 215.

RECOMMENDATION: Clarify that Sec. 215 cannot be used to collect the content of communications from a provider of an electronic communications service or remote computing service, as those terms are defined by 18 U.S.C. 2510.

- 2) **Clarify no general prospective use of Section 215:** The bill states that the government may apply for an order to produce call detail records that are created after the government submits its application to the FISC.³ However, the bill is currently silent on whether Sec. 215 authorizes prospective collection of other tangible things. This could lead to an interpretation that Sec. 215 authorizes prospective collection generally, which would contravene the intent of the statute.⁴

RECOMMENDATION: Clarify that Sec. 215 cannot be used to collect records created after the order authorizing collection is entered, except with regard to call detail records.

- 3) **Clerical correction re: Division of orders for reporting:** The bill allows private parties to issue periodic public reports on surveillance demands.⁵ These reports can include the number of accounts affected or customer selectors targeted under each title of FISA. However, a clerical error prevents private parties from reporting the number of orders received under each title of FISA, instead permitting only a report of the number of content and non-content orders received.

RECOMMENDATION: Amend each subsection authorizing reports of the number of accounts affected or selectors targeted by title of FISA to additionally refer to the number of orders received.

- 4) **Clerical correction re: Disclosure of no receipt of orders:** If a private party does not receive any national security order, then the party would not violate confidentiality to report such. However, a clerical error in the bill refers to the ranges in which private parties may report the number of orders as 0-999, 0-249, and 0-499.⁶ This could be mistakenly read to require

³ Section 101(a)(3) of H.R. 3361, as reported.

⁴ Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court, Jan. 23, 2014, pgs. 81-87 (available at <http://www.pcllob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf>).

⁵ Amendment to the amendment in the nature of a substitute to H.R. 3361 offered by Ms. DelBene, Mr. Goodlatte, and Mr. Sensenbrenner, May 7, 2014 (available at http://judiciary.house.gov/_cache/files/199c1100-6c33-4031-bf13-8c2b4e95affe/05.07.14-amdt-2-delbene-passed-vv.pdf).

⁶ *Id.*

private parties that do not receive a national security order to report only that they receive less than 999, 249, or 499 orders.

RECOMMENDATION: Amend the numerical ranges for private party reporting of orders received to 1-999, 1-249, and 1-499. Alternatively, clarify that if the number of orders received is zero, the private party may report the estimate as zero. In the alternative, or in addition, insert a rule of construction making clear that the private party reporting section shall not to be construed as prohibiting disclosures other than those authorized by the section. This rule of construction appeared the USA FREEDOM Act, as introduced.⁷

- 5) **Clerical correction re: Statement of facts:** The new prospective call detail records authority of Sec. 215 uses the word “facts” an extra time, thus requiring the government’s applications for call detail records to include a “statement of facts showing that there are facts giving rise to a reasonable, articulable suspicion.”⁸ This could be mistakenly read to require the government to merely state that facts exist, rather than actually showing reasonable, articulable suspicion in the application for an order for the production of call detail records.

RECOMMENDATION: In the bill’s proposed version of 50 U.S.C. 1861(b)(2)(C)(ii), replace the phrase “are facts giving rise to” with the word “is.”⁹ To further clarify that the government must make a factual showing, in the proposed section 1861(c)(1), change the phrase “the application meets the requirements of subsections (a) and (b)” to the “application meets the requirements of, and makes the factual showings required by, subsections (a) and (b).”

In addition to the above clarifications and corrections, in order to prevent future abuses of surveillance authority, we also respectfully request that Congress take this opportunity to make further substantive improvements to the USA FREEDOM Act prior to its final passage. These substantive improvements should include, but are not limited to:

- 1) **Reform Section 702 of FISA:** The USA FREEDOM Act should reasonably limit the collection, retention, and use of communications obtained pursuant to Section 702 of FISA. Notably, Section 702 should be amended to require prior court approval when U.S. person identifiers are used to search or analyze communications data collected under

⁷ USA FREEDOM Act, as introduced, 113th Cong, Oct. 29, 2013, at Sec. 601(e) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr3361ih/pdf/BILLS-113hr3361ih.pdf>).

⁸ Sec. 101(a)(3) of H.R. 3361, as reported.

⁹ *Id.*

Section 702 – a change included in the USA FREEDOM Act, as introduced.¹⁰

- 2) **Provide for greater transparency by private parties and government:** The USA FREEDOM Act should allow for robust reporting by private parties and maintain strong government transparency reporting requirements. Private parties should be permitted to report, within as narrow a numerical range as possible, the number of surveillance orders received and accounts affected under each FISA authority, rather than under separate FISA titles. Further, government reporting should separately estimate the number of U.S. and non-U.S. persons subject to surveillance under each FISA authority. The USA FREEDOM Act, as introduced in the House and Senate, included these reforms.¹¹

- 3) **Create a Special Advocate for the FISC.** The USA FREEDOM Act should create an Office of the Special Advocate within the FISC. While the participation of amicus curiae authorized by the bill as amended in Committee will be valuable, the presence of an official tasked specifically with promoting privacy and civil liberties would help effectively prevent overbroad surveillance in the future and better ensure that all necessary disclosure of important FISC opinions occurs. The USA FREEDOM Act, as introduced, provided for such a Special Advocate.¹²

Thank you for your consideration of the above recommendations. We look forward to continuing to work with Congress and the Administration to advance legislation and policies that preserve the integrity of the Internet and the free exercise of individual liberty and human rights.

Sincerely,

¹⁰ USA FREEDOM Act, as introduced, at Sec. 301.

¹¹ USA FREEDOM Act, as introduced, at Sec. 601-3.

¹² USA FREEDOM Act, as introduced, at Sec. 401.

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