

February 26, 2020

Dear Members of the House Committee on the Judiciary,

The undersigned organizations write to strongly encourage significant amendments to H.R. ____, the “USA FREEDOM Reauthorization Act of 2020.”

When the USA Freedom Act was passed in 2015, Chairman Nadler acknowledged that “not every reform I would have hoped to enact is included in [the USA Freedom Act].”¹ Disclosures made since passage of the USA Freedom Act suggest that the bill has not succeeded in fully limiting large-scale surveillance under the Patriot Act or achieving its other stated objectives. In the time since the bill passed:

- The U.S. Supreme Court issued its opinion in *Carpenter v. U.S.*,² finding that the collection of historical cell site location information requires a warrant, and establishing a test that implicates other types of digital records and location history;
- The NSA halted the call detail records program due to recurrent acquisition of records unlawfully and the program’s negligible intelligence values;³
- Government reports indicate the use of “specific selector terms” did not effectively limit bulky collection under Section 215;⁴
- Newly disclosed decisions from Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Court of Review (FISCR) paint a dire picture of the ways in which the FBI interprets intelligence-collection statutes and how the FBI failed to comply with reporting requirements in its Section 702 intelligence collection, emphasizing the need for increased reporting and transparency into FBI intelligence investigations;⁵ and
- In December, the Department of Justice Inspector General’s report “[Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation](#)” detailed many procedural violations and other shortcomings in the FBI’s investigations, highlighting the importance of notice to the accused in criminal cases and the need for the accused to have access to the underlying FISA applications and orders.

These developments have made the need for significant reforms to the USA FREEDOM Act clear. H.R. ____ has several positive provisions: it ends Section 215’s call detail record authority; expands the role of the Foreign Intelligence Surveillance Court amici; makes clear that the USA FREEDOM Act required the government to declassify novel and significant opinions issued prior to 2015; and strengthens FBI reporting requirements. However, these reforms do not go far enough to address the various problems with these authorities that have been revealed. We therefore call on the House Judiciary Committee to

¹ Congressman Nadler Statement on USA Freedom Act (May 13, 2015), <https://nadler.house.gov/press-release/congressman-nadler-statement-usa-freedom-act>.

² *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018).

³ Ellen Nakishima, *Repeated Mistakes in Phone Record Collection Led NSA to Shutter Controversial Program*, WASHINGTON POST, (June 26, 2019 at 5:30 A.M.), https://www.washingtonpost.com/world/national-security/repeated-mistakes-in-phone-record-collection-led-nsa-to-shutter-controversial-program/2019/06/25/f256ba6c-93ca-11e9-b570-6416efdc0803_story.html.

⁴ Charlie Savage, *N.S.A. Triples Collection of Data From U.S. Phone Companies*, N.Y. TIMES, (May 4 2018), <https://www.nytimes.com/2018/05/04/us/politics/nsa-surveillance-2017-annual-report.html>.

⁵ Elizabeth Goitein, *The FISA Court’s 702 Opinions, Part I: A History of Non-Compliance Repeats Itself*, JUST SECURITY, (October 15, 2019), <https://www.justsecurity.org/66595/the-fisa-courts-702-opinions-part-i-a-history-of-non-compliance-repeats-itself/>.

support amendments that strengthen the USA FREEDOM Reauthorization Act, specifically including amendments that may be offered by Representatives Jayapal and Lofgren today that would:

- Fix the bill’s notice requirement by clarifying what information is “derived from” FISA surveillance;
- Require the Department of Justice to disclose how it interprets “derived from;”
- Prohibit retention of information after three years if it has not been determined to contain foreign intelligence;
- Prohibit the use of Section 215 to collect geolocation, web browsing, and internet search history information;
- Prohibit surveillance based “substantially” on First Amendment-protected activity;
- Add to the bill’s provisions strengthening the FISC amici by ensuring that they have full access to information, and will have permission to raise any issue with the FISA court;
- Require that the records sought be “material” to an investigation; and
- Require a count of the government’s total intake of records pursuant to Section 215.

We would also support other amendments that may be offered, including those that further protect the rights of the accused in criminal cases, those that advance transparency and accountability, and those that address the other well-documented problems with FISA. It is critical that the House Judiciary Committee, which is the committee of primary jurisdiction over FISA, advance reforms that reflect the priorities of its members and protect their constituents from unwarranted invasions of their privacy and other constitutional rights. We therefore urge all members of the House Judiciary Committee to support the above amendments. If you have any questions please contact Jumana Musa at jmusa@nacdl.org or 202-465-7658.

Sincerely,

American Arab Anti-Discrimination Committee
American Civil Liberties Union
Arab American Institute
Brennan Center for Justice
Council on American-Islamic Relations
Constitutional Alliance
Defending Rights and Dissent
Demand Progress
Due Process Institute
Freedom House
FreedomWorks
Free Press
Government Accountability Project
Government Information Watch
National Association of Criminal Defense Lawyers
National Security Counselors
Open Technology Institute
Open the Government
Project on Government Oversight
TechFreedom