

March 18, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Doug Collins
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler and Ranking Member Collins:

The undersigned organizations, which are dedicated to preserving privacy, civil liberties, and advancing transparency and accountability, write to request that you hold hearings and make public information critical to permit an informed debate over the reauthorization of Section 215 and other provisions of the Patriot Act, which are set to expire December 15, 2019.

In 2015, Congress passed the USA Freedom Act in direct response to revelations that the NSA had abused provisions of the law to justify dragnet surveillance programs that siphoned up the information of virtually every American. The stated goal of the bill was to end bulk and large-scale, indiscriminate collection under the Patriot Act, require transparency to prevent future surveillance abuses premised on dubious legal interpretations, and reform the Foreign Intelligence Surveillance Court (FISC).

At the time of passage, many of our organizations and members of Congress raised concerns that the reforms in the USA Freedom Act did not go far enough or would not achieve the bills' stated goals. Critical protections that were in the original version of the USA Freedom Act - sponsored by over 150 members including the Chairman of this committee - were omitted in the final version of the bill.¹ As Chairman Nadler acknowledged when the final version of the bill was being considered, "...not every reform I would have hoped to enact is included in [the USA Freedom Act]."²

¹ H.R. 3361, USA FREEDOM Act, 113th Congress (2013-2014).

² Congressman Nadler Statement on USA Freedom Act (May 13, 2015), <https://nadler.house.gov/press-release/congressman-nadler-statement-usa-freedom-act>.

Unfortunately, disclosures made since passage of the USA Freedom Act suggest that the bill has not fully succeeded in limiting large-scale surveillance under the Patriot Act or achieving all of its other objectives. News reports indicate that the NSA may have already halted the call detail record program created by the bill following years-long compliance violations that resulted in the unlawful collection of records.³ Congress should end this program. However, Congress must also consider what additional measures are needed to protect individuals' rights from abuses under the Patriot Act and other surveillance authorities. These important issues should not be debated in the dark. Thus, we urge you to use all the tools at your disposal to obtain and make public information regarding the following issues:

1. Discrimination

Historically, government surveillance has often wrongly targeted individuals on the basis of race, religion, or political views. For example, a recently leaked FBI intelligence assessment suggests that the agency is targeting black activists as “extremists” and media disclosures revealed that the government used FISA to spy on prominent Muslim Americans who were never charged with committing a crime.⁴ However, there is little information that has been made publicly available regarding what, if any, procedures exist to prevent discrimination under Patriot Act authorities.

We urge members to request and make public information regarding whether characteristics such as race, religion, national origin, gender, and sexual orientation can be used to make targeting and surveillance decisions under the Patriot Act; what existing non-discrimination policies are currently in effect; and whether audits have been performed to measure potential discriminatory impact of Patriot Act surveillance programs.

2. First Amendment Protections

Section 215 and other Patriot Act authorities prohibit surveillance based “solely” on First Amendment-protected activities. Yet opinions that have been partially released by the FISC suggest that these safeguards have been interpreted narrowly. Thus, we urge members to request and make public information regarding how this restriction has been interpreted; how many surveillance applications under the Patriot Act rely wholly or in part on First Amendment protected activities; and how often Section 215 and other Patriot Act authorities have resulted in the collection of information of individuals engaged in news gathering or other First Amendment protected activities.

³ Savage, Charlie. *Disputed N.S.A. Program is Shut Down, Aide Says*, NY Times (March 4, 2019), <https://nadler.house.gov/press-release/congressman-nadler-statement-usa-freedom-act>.

⁴ See FBI Intelligence Assessment, *Black Identity Extremists Likely Motivated to Target Law Enforcement Officers*, (Aug. 3, 2017), <https://www.documentcloud.org/documents/4067711-BIE-Redacted.html>; Charlie Savage and Matt Apuzzo, *U.S. Spied on 5 American Muslims, Report Says*, NY Times (July 9, 2014), <https://www.nytimes.com/2014/07/10/us/politics/nsa-snowden-records-glenn-greenwald-first-look.html>.

3. Bulk and Large-Scale Collection

Statistics released by the NSA suggest that the USA Freedom Act has not achieved its goal of preventing bulk and large-scale collection under the Patriot Act. For instance, in 2017, using the pen register and trap and trace authority, the government collected information of over 56,000 unique persons, accounts, and devices, despite the fact it had only 27 surveillance targets.⁵ Similarly, in 2017 alone, the government received 534 million records of Americans' phone calls based on only 40 surveillance targets. This constituted more than three times the number of call detail records (CDRs) collected in 2016 alone, which were based on 42 targets.⁶ Because the NSA has failed to disclose the number of "unique identifiers" impacted – i.e. unique accounts, persons, or devices – as required under the USA Freedom Act, it is difficult to know how many individuals are likely impacted by such collection. Though news reports indicate that the NSA may have halted this collection following years-long compliance violations, the agency has not confirmed such reports and would likely argue that it retains the authority to restart such collection under the existing statute.

We urge the Committee press the NSA to disclose whether it has ended the call detail record program and, if so, to release declassified documents related to this decision. The NSA should also clarify whether it intends to restart the program or has replicated the program under a different authority. In addition, we urge the committee to press the NSA to fully release statistics about the call detail record program, as required under the USA Freedom Act and to explain why the CDR collection more than tripled year-to-year. Moreover, to ascertain why the government continues to collect a staggering amount of information, we also urge you to declassify information regarding the types of specific selection terms the government relies on for surveillance collection under the Patriot Act.

4. Notice and Criminal Use

Unlike Section 702 of FISA, Section 215 does not have a statutory provision requiring notice to criminal defendants in cases where information obtained or derived from the authority is used in a criminal case. In court filings, the government has denied that it has any statutory or constitutional obligation to provide such notice. We urge the committee to request information regarding whether the government has ever provided notice to criminal defendants in cases where information obtained or derived from Section 215 or other Patriot Act authorities was used, and what the DOJ's procedures are regarding notice in such contexts. In addition, we urge the committee to obtain information about how information collected under the Section 215 CDR program is shared and used by federal agencies, including whether the FBI or DHS receive the CDRs and whether either or both routinely queries Section 215 information for criminal or foreign intelligence purposes. The committee should also press for the declassification of the

⁵ Office of the Director of National Intelligence, *Statistical Transparency Report Regarding the Use of National Security Authorities, Calendar Year 2017*, 28 (April 2018), <https://www.dni.gov/files/documents/icotr/2018-ASTR--CY2017----FINAL-for-Release-5.4.18.pdf>.

⁶ *Id.* at 35.

minimization procedures that govern the retention, use, and dissemination of Section 215 information.

5. Efficacy of Section 215 CDR Collection under the Patriot Act

Shortly after bulk collection of CDRs was disclosed in 2013, the government made numerous and misleading claims about the efficacy of Section 215 in stopping terrorist attacks. It took months for members of Congress to gain access to the classified information on which these claims were based in order to de-bunk them. The Privacy and Civil Liberties Oversight Board ultimately concluded that Section 215 surveillance had not contributed uniquely to the stopping of even a single terrorist attack, and that it had not “made any significant contribution to counterterrorism efforts to date.”⁷

The USA Freedom Act replaced the former bulk telephone records program with a narrower authority to collect CDRs, but there has been no indication that the new program has been effective. In fact, after uncovering “technical irregularities” in collection of CDRs, the NSA decided in the spring of 2018 to delete all the CDRs it had collected under the new program since it began in 2015⁸ and has reportedly halted the CDR program altogether. We urge the Committee to press the intelligence community to explain how, if at all, the CDR program has been effective, and to publicly disclose the particular incidents, if any, in which CDR collection under Section 215 surveillance played a unique role in thwarting a terrorist attack where more targeted surveillance techniques would not have provided the information necessary to thwart such an attack. We also urge you to critically review the classified information supporting any such claims.

6. Disclosure of FISA Court Opinions

The USA Freedom Act directed the government to make all “significant” or “novel” Foreign Intelligence Surveillance Court opinions publicly available to the greatest extent practicable.⁹ This includes opinions written before the passage of USA Freedom. Nonetheless, only a handful of opinions from the court – released following passage of the bill – have been published. The government should clarify how it determines which opinions are significant or novel enough to be published, and it should disclose how many opinions remain completely secret. In addition, the government should disclose Office of Legal Counsel opinions relevant to the government’s interpreting of Section 215 or the USA Freedom Act provisions.

⁷ Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215*, 155 (January 23, 2014), https://www.pclomb.gov/library/215-Report_on_the_Telephone_Records_Program.pdf.

⁸ NSA Press Release, *NSA Reports Data Deletion* (June 28, 2018), <https://www.nsa.gov/news-features/press-room/Article/1618691/nsa-reports-data-deletion/>.

⁹ H.R. 3361, USA Freedom Act of 2015, Section 402.

7. Interpretation of the Supreme Court's *Carpenter* Decision

In cases challenging surveillance under the Patriot Act, the government has argued that individuals do not have a Fourth Amendment protected interest in information held by third parties. In last term's *Carpenter*¹⁰ decision, however, the Supreme Court held that individuals have a Fourth Amendment interest in historical cell site location data held by third parties. Though the facts in *Carpenter* dealt specifically with location information, the Court's reasoning in that case applies equally to other types of sensitive digital data that could be collected under the Patriot Act. Thus, we urge you to request and make public information regarding how the government is applying *Carpenter*; to what extent it has impacted surveillance under the Patriot Act; and what types of records the government believes it can lawfully collect under Section 215 in light of the *Carpenter* decision.

8. Section 702

The original version of the USA Freedom Act included reforms to Section 702 of FISA, including a provision that required the government to obtain a warrant when querying the Section 702 database to obtain information about Americans. Unfortunately, these reforms were not included in the final version of the bill.

To assess the impact of Section 702 on Americans' rights, it is essential that Congress obtain information regarding how many Americans have their information collected under Section 702 and how often the FBI searches the Section 702 database looking for information about Americans. There is no reasonable justification for why this information has not already been made public. In 2017, the NSA reneged on a commitment to provide an assessment of the number of individuals in the US who have their information collected under Section 702. The NSA and CIA both report the number of US person searches, yet the FBI continues to claim it cannot provide data that would shed light on this question.

The information above is critical to determine how surveillance authorities are being used and the impact they have on individuals' rights. We urge you to use every tool at your disposal to obtain and make public such information.

If you have questions, please contact Neema Singh Guliani, Senior Legislative Counsel at the ACLU, at nguliani@aclu.org.

Sincerely,

Access Now
ADC American-Arab Anti-Discrimination Committee
American Civil Liberties Union

¹⁰ *Carpenter v. United States*, 138 S.Ct. 2206 (2018).

American Library Association
Americans for Prosperity
Arab American Institute
Brennan Center for Justice at NYU School of Law
Center for Democracy & Technology
Color Of Change
Consumer Action
Council on American-Islamic Relations (CAIR)
CREDO
Defending Rights & Dissent
Demand Progress
Electronic Frontier Foundation (EFF)
Electronic Privacy Information Center (EPIC)
Fight for the Future
Free Press Action
FreedomWorks
Government Accountability Project
Government Information Watch
Human Rights Watch
Immigrant Legal Resource Center
Indivisible
Liberty Coalition
Million Hoodies Movement for Justice
Muslim Justice League
Muslim Public Affairs Council
NAACP
National Association of Criminal Defense Lawyers
National Coalition Against Censorship
National Immigration Law Center
New America's Open Technology Institute
Open the Government
PEN America
Project on Government Oversight
Restore The Fourth, Inc.
TechFreedom
Transparency International

cc: Members of the U.S. House Permanent Select Committee on Intelligence, Committee on Oversight and Reform, and Committee on the Judiciary