

December 10, 2019

The Honorable Lindsey Graham, Chairman
The Honorable Dianne Feinstein, Ranking Member
U.S. Senate Committee on the Judiciary
Dirksen Senate Office Building 224
Washington, DC 20510

Dear Chairman Graham and Ranking Member Feinstein:

We write to you regarding the hearing on the Foreign Intelligence Surveillance Act (FISA) to urge you *not* to renew Section 215 of the Patriot Act, to end “about” collection, and increase transparency at the Foreign Intelligence Surveillance Court (FISC).¹

The Electronic Privacy Information Center (“EPIC”) testified before the House Judiciary Committee during the 2012 FISA reauthorization hearings.² At the time, EPIC urged the Committee to adopt more robust public reporting requirements and to strengthen the authority of the FISA Court to review the government’s use of FISA authorities. In May 2012, almost a year before the disclosures of Edward Snowden, we correctly warned that the scope of government surveillance was likely far greater than was known to the public or even to the Congressional oversight committees. Events of the past few years make clear that Section 215 should not be renewed.

Section 215 Authority Must Not Be Renewed

Since Congress attempted to reform Section 215 with the USA FREEDOM Act, multiple compliance violations continue to plague the program. In June 2018, the NSA revealed that it collected unauthorized call detail records,³ but was unable to segregate the unauthorized records from those which were legitimately collected. The ODNI advised the NSA to purge all the records

¹ *Examining the Inspector General’s Report on Alleged Abuses of the Foreign Intelligence Surveillance Act*, S. Comm. on the Judiciary (Dec. 11, 2019), <https://www.judiciary.senate.gov/meetings/examining-the-inspector-generals-report-on-alleged-abuses-of-the-foreign-intelligence-surveillance-act>.

² See Testimony of EPIC President Marc Rotenberg, *The FISA Amendments Act of 2008*, Hearing before the H. Committee on the Judiciary (May 31, 2012), <https://epic.org/privacy/testimony/EPIC-FISA-Amd-Act-Testimony-HJC.pdf>.

³ Office of the Director of National Intelligence, *NSA Reports Data Deletion*, IC on the Records (June 28, 2018).

collected.⁴ Related litigation uncovered additional compliance concerns.⁵ As the NSA itself has stated:

Executive Order 12333, as amended, requires Intelligence Community elements to report to the IOB, in a manner consistent with Executive Order 13462, as amended, intelligence activities they have reason to believe may be unlawful or contrary to Executive Order or Presidential Directive. These reports are also provided to the Office of the Director of National Intelligence. In general, each NSA report contains similar categories of information, including an overview of recent oversight activities conducted by NSA's Office of the Inspector General and the Office of the General Counsel; signals intelligence activities affecting certain protected categories; and descriptions of specific incidents which may have been unlawful or contrary to applicable policies.⁶

The NSA acknowledges numerous compliance issues, though contends “The vast majority of compliance incidents involve unintentional technical or human error.”⁷ But this is hardly reassuring as the NSA also states, “some amount of [error] occur naturally in any large, complex system.”⁸ That is precisely the concern that civil liberties organizations have raised about the expansive collection of call detail records concerning Americans.

In addition to concerns about compliance, there is little evidence that the Section 215 program is effective. This was precisely the finding of the Senate Judiciary Committee and the Privacy and Civil Liberties Oversight Board (PCLOB) that led to enactment of the USA Freedom Act. As the PCLOB concluded “[g]iven the limited value [Section 215] has demonstrated to date . . . we find little reason to expect that it is likely to provide significant value, much less essential value, in safeguarding the nation in the future.”⁹

Former Director of National Intelligence Dan Coats recently confirmed that the NSA suspended the call detail records program after “balancing the program’s relative intelligence value, associated costs, and compliance and data integrity concerns caused by the unique complexities of using these company-generated business records for intelligence purposes.”¹⁰

The right outcome is clear: ***Section 215 authority should be allowed to sunset.***

⁴ *Id.*

⁵ *NSA FOIA Documents – Quarterly Reports to the Intelligence Oversight Board on NSA Activities*, Aclu.org, <https://www.aclu.org/legal-document/nsa-foia-documents-quarterly-reports-intelligence-oversight-board-nsa-activities>.

⁶ *NSA Reports to the President's Intelligence Oversight Board (IOB)*, <https://www.nsa.gov/news-features/declassified-documents/intelligence-oversight-board/>

⁷ *Id.*

⁸ *Id.*

⁹ 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* 155 (Jan. 23, 2014).

¹⁰ Letter from Dir. of Nat’l Intelligence Dan Coats to the Honorable Richard Burr, Chairman, Sen. Select. Comm. on Intelligence, et al. (Aug 4, 2019), <https://int.nyt.com/data/documenthelper/1640-odni-letter-to-congress-about/20bfc7d1223dba027e55/optimized/full.pdf#page=1>.

End “About” Collection Authority

On October 8, 2019, the Office of the Director of National Intelligence released alarming new information related to surveillance conducted under Section 702 of the Foreign Intelligence Surveillance Act (FISA), which poses a serious threat to the privacy of both U.S. and non-U.S. persons.¹¹ The documents reveal significant privacy violations, including the wrongful use of this powerful tool for personal purposes, queries that violated both the statute and the Fourth Amendment, and efforts by the Federal Bureau of Investigation (FBI) to evade laws designed to access how often this tool is turned against people in the United States.

The documents raise questions regarding the scope of the government’s “about” collection, which involves collection of communications that are not to or from a surveillance target. Under “about” collection, the government access to private communications is broader than other means of collection because it necessarily involves scanning the content of all messages over a particular network in order to find selected terms within the body of a communication.¹² In response to persistent compliance violations, the government ended certain types of “about” collection in 2017. However, these documents raise questions regarding whether the government is engaged in new “about” collection that Congress did not authorize. Based on the documents, it appears that the Foreign Intelligence Surveillance Court (FISC) rejected arguments made by the appointed amicus regarding whether certain surveillance practices could constitute “about” collection, which would trigger Congressional notification requirements prior to initiation. Given this divergence, it is crucial that Congress clearly define and prohibit any type of “about” collection.

Transparency is Necessary for Adequate Oversight

The abuses in the documents also underscore the need to further strengthen the role of court-appointed amicus, enhance transparency, and ensure prompt declassification of novel and significant FISC opinions. It should not have taken a full year to declassify the October 2018 opinion, which covers numerous significant issues.

As EPIC explained in our testimony in 2012, over classification thwarts effective government oversight. Declassification is an especially important priority with respect to legal opinions issued by the Foreign Intelligence Surveillance Court (FISC), often referred to as a “secret court.”¹³ Congress recognized in the USA FREEDOM Act that FISC opinions contain important interpretations of law relevant to the privacy of individuals and the oversight of government surveillance programs. The law now requires the Director of National Intelligence, in consultation with the Attorney General, to:

conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 601(e)) that includes a significant construction

¹¹ Office of the Director of Nat’l Intelligence, IC on the Record, *Release of Documents Related to the 2018 FISA Section 702 Certifications* (Oct. 8, 2019), <https://icontherecord.tumblr.com/post/188217887058/release-of-documents-related-to-the-2018-fisa>.

¹² Privacy and Civil Liberties Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 7 (2014).

¹³ See Testimony of EPIC President Marc Rotenberg, *supra* note 2.

or interpretation of any provision of law [...] and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion.¹⁴

This provision has improved transparency and required the declassification of new FISC opinions. However, many older opinions remain classified. Retroactive declassification of FISC opinions should be prioritized. This will help ensure public oversight of the FISC.

Thank you for your timely attention to this pressing issue. We ask that this statement be entered in the hearing record.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Alan Butler

Alan Butler
EPIC Senior Counsel

¹⁴ 50 U.S.C. § 1872.