

September 18, 2019

The Honorable Jerrold Nadler, Chair
The Honorable Doug Collins, Ranking Member
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler and Ranking Member Collins:

We write to you regarding the hearing on FISA Legislation.¹

The Electronic Privacy Information Center (“EPIC”) testified before this Committee during the 2012 FISA reauthorization hearings.² At the time, EPIC urged the Committee to adopt stronger public reporting requirements. We noted, prior to the disclosures of Edward Snowden, that the scope of surveillance by the Intelligence Community was likely far greater than was known to the public or even to the Congressional oversight committees.

EPIC writes now to urge you *not* to renew Section 215 of the Patriot Act, to end “about” collection authority, and increase transparency at the Foreign Intelligence Surveillance Court (FISC).

Section 215 Authority Must Not Be Renewed

Since Congress acted to curtail Section 215 authority in 2015 with passage of the USA Freedom Act, the 215 program has been the subject of multiple documented compliance violations by the NSA. In June 2018, the NSA announced it collected unauthorized call detail records.³ The agency was unable to identify the unauthorized records from those which were legitimately collected and was advised to purge all the records collected since 2015.⁴ And, while the agency stated the root

¹ *Oversight of the Foreign Intelligence Surveillance Act*, H. Comm. on the Judiciary (Sept. 18, 2019), <https://judiciary.house.gov/legislation/hearings/oversight-foreign-intelligence-surveillance-act>.

² See Testimony of EPIC President Marc Rotenberg, *The FISA Amendments Act of 2008*, Hearing before the House Committee on the Judiciary, U.S. House of Representatives, 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).

⁴ *Id.*

of the compliance issue was resolved, a subsequent compliance incident was recently revealed in litigation.⁵

Director of National Intelligence Dan Coats recently confirmed that the NSA recently suspended the call detail records program that uses Section 215 authority 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.”⁶ Five years ago, the Privacy and Civil Liberties Oversight Board 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.”⁷

The right outcome is clear: *Section 215 authority should be ended permanently now.*

End “About” Collection Authority

The FISA Amendments Reauthorization Act expressly authorized the restarting of “about” collection. This practice involves surveillance of communications “in which the selector of a targeted person (such as that person’s email address) is contained within the communication but the targeted person is not necessarily a participant in the communication.”⁸ 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.⁹ The NSA ended the program in 2017 because it was unable to comply with privacy strictures put in place by the FISC.¹⁰ However, the Act permits the government to restart this controversial “about” collection program after providing thirty-day’s notice to Congress.¹¹

If the NSA cannot comply with the privacy rules set out by Congress, “about” collection authority should be removed.

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 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>.

⁷ 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).

⁸ Privacy and Civil Liberties Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 7* (2014).

⁹ *Id.*

¹⁰ Statement, NSA Stops Certain Section 702 “Upstream” Activities (Apr. 28, 2017), <https://www.nsa.gov/news-features/press-room/statements/2017-04-28-702-statement.shtml>.

¹¹ The FISA Amendment Reauthorization Act of 2018, Public Law No: 115-118, 132 Stat. 3 § 2 (2018).

Transparency is Necessary for Adequate Oversight

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.”¹² 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 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.¹³

Though this provision has improved transparency by requiring the declassification of new FISC opinions, many older opinions remain unnecessarily classified. Retroactive declassification of FISC opinions should be prioritized to ensure public oversight of the broad surveillance authority held by the court. Public oversight helps ensure that law enforcement resources are appropriately and efficiently used while safeguarding important constitutional privacy interests.

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

/s/ Eleni Kyriakides

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¹² See Testimony of EPIC President Marc Rotenberg, *supra* note 2.

¹³ 50 U.S.C. § 1872.