

May 11, 2020

Dear Senators,

The undersigned organizations write to urge you to support privacy-protective amendments to H.R. 6172, the USA FREEDOM Reauthorization Act of 2020, to oppose the underlying bill if improvements are not adopted, and to oppose amendments offered that would weaken the bill.

We applaud the Senate for not rushing to pass the USA FREEDOM Reauthorization Act without voting on stronger civil liberties protections. Unfortunately, the USA FREEDOM Reauthorization Act has never been marked up or passed by any committee of jurisdiction, nor were amendments permitted on the House floor. This deprived the legislation of any opportunity to cure its defects and, until now, this also deprived every member of Congress from having an opportunity to cast a meaningful vote on the content of this intensely controversial reauthorization.

On March 15, three Foreign Intelligence Surveillance Act (FISA) authorities expired: Section 215 of the USA PATRIOT Act, as well as the “lone wolf” and “roving wiretap” authorities. As you are aware, Majority Leader McConnell and a bipartisan group of Senators, led by Senators Daines, Leahy, Lee, Paul, and Wyden, reached an agreement to consider six amendments to H.R. 6172—three from each side. Ultimately, the Senate passed a 77-day reauthorization; however, the House of Representatives declined to bring it up for a vote.

Since House passage of the USA FREEDOM Reauthorization Act, there have been additional developments that demonstrate the need for more significant reforms. Last year, a Department of Justice Inspector General report revealed a litany of omissions and errors in a FISA application targeting Trump campaign advisor Carter Page. A subsequent audit from the Inspector General released in March demonstrated that the Page incident was not a one-off, but rather indicative of systemic deficiencies. The second audit reviewed 25 FISA applications and found “apparent errors or inadequately supported facts” in *every single case file examined*.¹ The same report identified 4 additional cases where the associated Woods Files, which are intended to help ensure the accuracy of FISA applications, could not be found at all. Moreover, the Office of the Director of National Intelligence Annual Transparency report revealed that the intelligence agencies have had a zero percent compliance rate with 2018 reforms that required a court order for accessing Americans’ communications in certain contexts. These reports are further evidence of systemic

¹ Office of the Inspector General, MANAGEMENT ADVISORY MEMORANDUM FOR THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION REGARDING THE EXECUTION OF WOODS PROCEDURES FOR APPLICATIONS FILED WITH THE FOREIGN INTELLIGENCE SURVEILLANCE COURT RELATING TO U.S. PERSONS (March 2020).

and widespread deficiencies within the intelligence courts and laws.

These newly discovered issues compound concerns stemming from other incidents in recent years, including legal interpretations that contravene clear Congressional intent, several instances of massive overcollection in violation of the law, and the wrongful targeting of activists, communities of color, and other vulnerable groups. The privacy amendments to the USA FREEDOM Reauthorization Act, which extends the expired authorities until 2023, are as reasonable as they are urgent. Specifically:

Senators Lee and Leahy's amendment strengthens the role of “amici curiae,” who are independent, expert advisors to the Foreign Intelligence Surveillance Court (FISC), by increasing their access to information and power to raise issues with the Court. It would also encourage their appointment for surveillance applications that involve political or religious leaders and organizations, as well as the domestic news media. Finally, it would require the Department of Justice and Federal Bureau of Investigation to provide all material evidence, including exculpatory evidence, to the Court.

Unlike the underlying bill, this amendment would meaningfully strengthen the only other voice in the room when the FBI and DOJ seek a surveillance order from the Foreign Intelligence Surveillance Court. At the same time, the amendment preserves the independence of the FISC, providing it the ability to decline to appoint an amicus.

Senators Daines and Wyden's amendment prohibits the use of Section 215 for warrantless surveillance of people in the United States' internet search and browsing history.

It is clearer today than ever before that the websites people browse and search for online are deeply revealing. Many courts have already ruled that collection of this information by law enforcement requires a warrant. This amendment would thus make clear that internet browsing and search history cannot be collected under Section 215, given that it does not require the government to meet a probable cause standard.

As we have seen time and again, the government exploits any ambiguities in the law in the interest of surveilling more information—and it can take decades for Congress or the public to discover, much less rectify, misuse. This amendment is critical to protecting your constituents' right to privacy online.

Senator Paul's amendment prohibits the use of FISA, as well as surveillance conducted under claimed Article II power, against people in the United States or in proceedings against them. In addition, it makes clear that if the government wants to surveil a United States person, they may

only do so pursuant to a warrant in a traditional Article III court.

On March 12, Senator Burr objected to several proposals by Senator Lee to reauthorize these authorities for 45 days in order to permit the consideration of amendments without expiration—specifically saying “I’ll let us go dark.” But Burr also argued that in the absence of these authorities, the President has the inherent authority to conduct records surveillance on people in the United States “without Congress’s permission, with no guardrails.” This amendment would prevent such unlawful actions, which do not recognize Congress’s power to protect rights in this context.

Finally, we urge you to oppose any amendments that may be offered that would weaken the privacy protections in the bill or in FISA.

When these amendments come to the floor, trailed by decades of FISA abuse, your offices will be the sole stewards of this rare opportunity to ensure the protection of your constituents’ freedoms. We urge you to support the Lee-Leahy, Daines-Wyden, and Paul amendments to the USA FREEDOM Reauthorization Act, and to oppose any amendments that undermine the bill’s privacy protections.

Sincerely,

Access Now
American Booksellers for Free Expression
American Civil Liberties Union
Americans for Prosperity
Brennan Center for Justice at NYU School of Law
Center for Security, Race and Rights
Constitutional Alliance
Council on American-Islamic Relations (CAIR)
Defending Rights & Dissent
Demand Progress
Due Process Institute
Electronic Privacy Information Center (EPIC)
Free Press Action
FreedomWorks
Government Accountability Project
Government Information Watch
Human Rights Watch
Liberty Coalition

Media Alliance
National Association for the Advancement of Colored People (NAACP)
National Association of Criminal Defense Lawyers (NACDL)
National Coalition Against Censorship
Oakland Privacy
PEN America
People Demanding Action
People For the American Way
Progress America
Public Citizen
Restore The Fourth
Secure Justice
South Asian Americans Leading Together (SAALT)
TechFreedom
The Project for Privacy and Surveillance Accountability
Union of Concerned Scientists
Woodhull Freedom Foundation
X-Lab