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March 16, 2020

Dear Senator,

The undersigned groups are writing to urge you to vote against cloture for HR 6172, the USA FREEDOM Reauthorization Act of 2020. In the four years since the USA FREEDOM Act was passed, several revelations have made clear that the FISA authorities in question lack sufficient safeguards for Constitutional rights, and that agencies have not even complied with the safeguards that exist. Such sweeping surveillance authorities that have repeatedly been shown to violate privacy rights should not be passed without open debate and opportunity for amendment.

HR 6172 was passed in the House after a cancelled markup with no opportunity for amendments. Congress has had more than four years to evaluate the scope and operation of these surveillance authorities. It is utterly unacceptable to push through a reauthorization without adequately addressing the shortcomings that have become apparent in the time since Congress last considered these issues.

The reforms contained in H.R. 6172 fall far short of what is needed. The provision ending the call detail records ("CDR") program is a significant reform, but it is also the bare minimum, given the widespread agreement in Congress that the program must be ended because it is expensive, ineffective, and violates Americans' privacy. The other reforms in the bill are minimal or contain exceptions that undermine their effectiveness. In some cases, these changes merely represent a codification of the status quo.

Specifically,

- **The bill fails to require that individuals receive adequate notice and access to information when FISA information is used against them.** The government has long asserted that it has no obligation to provide notice to individuals whose records are collected under Section 215, even if those records are then introduced into evidence against those individuals in court. While the bill contains a provision requiring notice when information "obtained or derived" from Section

215 is used against targets of collection, mirroring language in the 702 surveillance context, it does not define "derived," despite concerns that the government has narrowly defined this term in the past to avoid providing notice. The bill also allows the government to evade its notice obligations by unilaterally asserting that notice would harm national security. And it fails to ensure that individuals or their counsel are able to access FISA applications and orders so that they may fully and fairly defend themselves, greatly undermining the effectiveness of notice if and when it is provided.

- **The bill fails to fully address deficiencies with the FISA court that have led to illegal surveillance.** Pursuant to the *USA Freedom Act*, the FISA court has the discretion to appoint an amicus in "novel and significant" cases. H.R. 6172 expands this provision to also permit appointment in cases where there are "exceptional" First Amendment concerns. However, *any* First Amendment concerns should trigger amicus participation, not just "exceptional" ones. Moreover, the bill fails to create a presumption that an amicus be appointed in other key categories of cases, such as applications targeting US persons or involving sensitive investigative matters; does not provide amici with access to sufficient information to allow them to intervene in cases where there are pronounced concerns; and fails to ensure that amici are not denied access to necessary materials. While a previous version of the bill allowed amici to petition the Foreign Intelligence Court of Review (FISCR) to review FISA Court decisions, this version takes a step backward by requiring amici to ask the FISA Court to certify its own decision for review—a request the FISA Court is much less likely to grant. We are particularly disappointed that the sponsors rejected meaningful amicus improvements proposed by prominent members on both sides of the aisle.

- **The bill fails to appropriately limit the types of information that can be collected under Section 215 of the Patriot Act.** Under Section 215, the government is permitted to obtain literally "any tangible thing."[1] Though the government has not disclosed a complete list of the types of items it obtains under Section 215, this collection can include phone records, tax returns, medical and other health information, gun records, book sales and library records, and a host of other sensitive information.[2] This bill prohibits the NSA from using Section 215 from collection cell site and GPS information – types of data the government has already said it does not collect following the Supreme Court's *Carpenter* decision. However, the bill fails to clearly prohibit the government from collecting other types of sensitive records, including web browsing and search history, despite thoughtful proposals from members of both parties to exclude these and other types of sensitive information.

- **The bill fails to appropriately raise the standard for collecting information under Section 215**. Section 215 of the Patriot Act lowered the standard for collecting business records to mere "relevance." This standard is so opaque, the FISA court ruled that the NSA could rely on it to collect Americans' telephone records in bulk. Although the USA FREEDOM Act prohibited bulk collection—i.e., indiscriminate collection with no target—the low relevance standard still permits "bulky" collection—i.e., targeted collection that nonetheless sweeps in large amounts of personal information about Americans other than the target. The bill fails to include provisions that would heighten this standard and limit the collection of innocent Americans' data under this authority.

[1] See 50 USC § 1861.
[2] See 50 USC § 1861(a).

- **The bill fails to appropriately limit the retention of information collected under Section 215**. Based on the public minimization procedures for other FISA authorities—including Section 702 and CDR collection activities—it is safe to assume that the government retains Section 215 data for a *minimum* of 5 years, regardless of whether anyone has determined that the data includes foreign intelligence information. H.R. 6172 puts in place a 5-year retention limit – however this limitation contains a "national security" exception that is certain to swallow the rule.

All of these issues and more deserve a full airing and discussion by committee members and Congress as a whole. Rushing through such consequential legislation while Congress is focused on measures to address the spread of COVID-19 across the country is unnecessary and ill-advised. Congress can pass a short-term 45-day extension or let the authorities expire and allow Senators to give meaningful consideration to these sweeping and invasive surveillance authorities. Congress should not rubber stamp a bill that would continue to allow many of the problems that have been revealed to continue. For more information please contact Jumana Musa at jmusa@nacdl.org, Jason Pye at jpye@freedomworks.org or Jeremiah Mostellar at jeremiah@idueprocess.org.

Sincerely,

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