WASHINGTON
LEGISLATIVE OFFICE

May 23, 2015

RE: S. 1123, the USA Freedom Act of 2015

Dear Members of the Senate:

Section 215 of the Patriot Act expanded the reach of the intelligence agencies in unprecedented ways and is the basis for collecting and retaining records on millions of innocent Americans. The ACLU opposed Section 215 when it was introduced, has fought it at each successive reauthorization, and urges Congress to let it sunset on June 1st.

This week, the Senate is scheduled to vote on S. 1123, the USA Freedom Act of 2015, which proposes modest reforms to Section 215, Section 214 (the pen register and trap and trace device provision, "PR/TT"), and national security letter authorities. The bill also seeks to increase transparency over government surveillance activities but could be construed to codify a new surveillance regime of more limited, yet still massive scope.

Earlier this month, the Second Circuit unequivocally ruled that the government's bulk metadata program violated the law.[1] In light of this decision, it is clear that more robust surveillance reform is needed. Though an improvement over the status quo in some respects, the USA Freedom Act does not go far enough to rein in NSA abuses and contains several concerning provisions. Accordingly, we support allowing Patriot Act Section 215 surveillance authorities to expire by operation of law on June 1st. Notwithstanding the foregoing, the ACLU is not taking a position in support of or opposition to S. 1123.

We urge the following changes to strengthen the bill:

1. **Amend the definition of "specific selection term" to ensure that the NSA does not engage in overbroad collection that sweeps up the information of individuals with no nexus to terrorism.**

The 2015 USA Freedom Act would authorize the collection of records and communications related to a "specific selection term" (SST) under Section 215, PR/TT authorities, and national security letter authorities. This language would prohibit nationwide bulk collection under these authorities. In addition,

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[1] ACLU v. Clapper, No. 14-42-cv, 2015 WL 2097814 (2d Cir. Sept. 2, 2014), *available at* https://www.aclu.org/sites/default/files/field_document/clapper-ca2-opinion.pdf.

it would prohibit many forms of "bulky" surveillance, such as collection of a large geographic area or entire service provider (i.e. gmail).

However, the current definition of "specific selection term" is not sufficiently narrow and could be construed to permit the type collection that the act was designed to prohibit. For example, the bill's definition of "specific selection term" could be interpreted to allow the government to collect the information of hundreds of people who share an IP address, all hotel records within a given area, or an entire company.

The definition of SST would be strengthened by, among other things, including language explicitly codifying the Second Circuit's ruling; omitting 'IP address' as a permissible SST; clarifying that the relevance standard must be met for the "second hop" for prospective CDR collection; including an exhaustive list of SSTs for Section 215 tangible things and PR/TT authorities; limiting the definition of person to exclude entire corporations; and striking the language "reasonably practicable" and "consistent with the purpose of the investigation" in Section 107, which defines SST for Section 215 tangible things and PR/TT authorities.

2. Require enhanced minimization procedures to ensure the timely purging of irrelevant information collected under Section 215 and PR/TT provisions.

The 2015 bill excludes language contained in prior versions of the USA Freedom Act that would have required the prompt destruction of irrelevant records collected by the government under Section 215 and the PR/TT provisions.[2] Given the extent to which the current bill could be construed to conduct broad surveillance impacting individuals with no demonstrable connection to terrorism, such minimization procedures are critical to protecting personal information from improper government retention, use, and dissemination. Additionally, such minimization procedures are particularly important given a report released just this week by the Department of Justice's Office of Inspector General, finding that the department had failed to have sufficient Section 215 minimization procedures in place for nearly 7 years.[3] In addition, lack of appropriate minimization procedures could result in the ballooning of record repositories.

Indeed, strong minimization procedures contained in prior versions of the bill were specifically intended mitigate the harm associated with a definition of SST that may permit overbroad surveillance. To address this concern, the bill should include the minimization procedures contained in Section 201 of the USA Freedom Act of 2013 as introduced, as well as additional provisions to ensure the timely destruction of irrelevant material collected under Section 215, PR/TT, or national security letter authorities.

3. Improve transparency by requiring additional reporting of surveillance conducted under Section 702 of FISA.

[2] The Senate version of the USA Freedom Act of 2014 required enhanced minimization procedures for collection under Section 215 in which the specific selection term was not sufficiently narrow. The USA Freedom Act of 2013, originally introduced in the House and Senate, required additional minimization procedures for collection under Section 215 and PR/TT authorities.

[3] OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF SECTION 215 ORDERS: AN ASSESSMENT OF PROGRESS IN IMPLEMENTING RECOMMENDATIONS AND EXAMINATIONS OF USE IN 2007 THROUGH 2009 (May 2015), *available at* https://oig.justice.gov/reports/2015/o1505.pdf#page=1.

The current bill language requires the government to provide to Congress and the public additional information about significant FISA court decisions, as well as surveillance programs operated under Section 702, Section 215, and PR/TT surveillance programs. In addition, it enables companies who receive national security informational requests to inform customers more fully about the extent to which the government is collecting their data. These provisions are an improvement over the status quo.

However, these transparency provisions alone will not provide a full picture of the surveillance programs operated by the government. Specifically, the FBI is exempt from reporting the searching of the Section 702 database for U.S. person information, and the bill does not require the government to fully disclose the number of U.S. persons and accounts impacted by Section 702 surveillance authorities. Additionally, the government is only required to report on the collection of communications – and not other records – collected under Section 215. Section 602 should be amended to close these Section 702 and Section 215 reporting loopholes.

4. Strengthen the amicus provision to require the appointing of an advocate, with the express mission of advancing privacy and civil liberties, in all significant and novel cases.

As the Second Circuit decision noted, an adversarial judicial process is vital. However, currently the Foreign Intelligence Surveillance Court generally only hears the government's arguments when deciding whether to approve an application for surveillance. In an effort to address this deficiency, Section 401 creates an amicus curiae that the FISA court may appoint to participate in novel or significant proceedings; and to provide arguments to advance privacy and civil liberties, technical assistance, or information relevant to an issue before the court. Under the bill's provisions, such an amicus shall be granted access to relevant materials.

While the provision is a step in the right direction, it falls short of creating a strong advocate to ensure the protection of privacy and civil liberties. Specifically, it opens the door to the appointment of an amicus that does not argue in favor of privacy and civil liberties arguments, and provides the FISA court the discretion to decide when to appoint an amicus. To address these concerns, the bill should (1) require the appointment of an amicus in any significant or novel proceedings, instead of leaving this to the discretion of the court, and (2) require any appointed amicus to provide technical assistance or advance arguments in favor of privacy and civil liberties.

5. Close the Section 702 backdoor search loophole and prohibit NSA anti-encryption efforts.

Although Section 702 prohibits the government from intentionally targeting the communications of U.S. persons, it does contain language imposing restrictions on querying those communications if they were inadvertently or incidentally collected under Section 702. As a result of an apparent change in the NSA's internal practices in 2011, the NSA has asserted the

authority to conduct searches using U.S. person names and identifiers without a warrant.[4] Through this so-called "backdoor search" loophole, the government has transformed Section 702 – designed to target citizens abroad – into a tool that can be used to conduct surveillance on U.S. citizens.

The 2015 USA Freedom Act omits provisions, which overwhelmingly passed the House last year as an amendment to the Defense Appropriations bill, that would require a probable cause warrant prior to searching the Section 702 database for U.S. person identifiers. In addition, the bill excludes language from the same amendment that would prohibit the NSA from requiring or requesting developers to build backdoors into their products. Unfortunately, such provisions were not included in the final omnibus appropriations bill. These critical restrictions should be added to the bill.

6. Strike provisions expanding the current material support provisions.

Current laws punishing individuals for providing "material support" to terrorism are overly broad, vague, and impact individuals and organizations having no intent to support terrorism. Current material support laws can be used to penalize individuals or organizations that simply seek to provide humanitarian assistance, simply because they target areas under the functional control of terrorist organizations. Instead of doing away with material support provisions entirely or attempting to improve due process standards, Section 704 exacerbates these current problems by increasing the criminal penalty for material support violations under 18 U.S.C. 2339B. The Committee should simply strike Section 704 in its entirety.

7. Strike provisions expanding surveillance under Section 702 of FISA, in cases where a target enters the United States.

Section 701 of the current bill expands the ability of the government to conduct warrantless surveillance under Section 702. Specifically, the bill permits the continued surveillance of non-U.S. persons within the United States for a period of up to 72 hours in cases where there is a threat of death or serious bodily harm.

Such an expansion of Section702 authority raises significant constitutional concerns and is unnecessary. Under FISA, the government already has the authority to conduct surveillance with Attorney General approval in emergency situations. Thus, expanding Section 702 in this manner is unnecessary and creates the risk that the government will engage in improper surveillance in unwarranted circumstances. Accordingly, Section 702 should be struck from the bill.

8. Address other authorities, such as the administrative subpoena statute, which have been used to conduct bulk collection

[4] OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITION OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE ACT OF 1978, AS AMENDED (Jan. 8, 2007), *available at* http://www.dni.gov/files/documents/Minimization%20Procedures%20used%20by%20NSA%20in%20Connection%20with%20FISA%20SECT%20702.pdf.

We now know that the government has conducted bulk surveillance not only under Section 215, but also under a host of other statutes, including existing administrative subpoena authorities. For example, until last year, the Drug Enforcement Agency had a program collecting the international call records of all Americans in bulk, purportedly under existing administrative subpoena statutes. [5]

The ACLU has long opposed such administrative subpoena authority due to concerns that such authority is vulnerable to abuse and contrary to constitutional standards. Failure to repeal or, at a minimum, amend such statutes to ensure that they cannot be construed to authorize bulk collection raises the concern that existing nationwide bulk collection programs can continue. Accordingly, the USA Freedom Act should repeal, or at a minimum, amend such authorities to prevent abuse, consistent with the Second Circuit's opinion

9. Decrease the reauthorization time period for the three expiring provisions.

Prior versions of the USA Freedom Act proposed extending the expiring Patriot Act provisions, as modified by the bill, for two years and aligning them with the expiration of Section 702. However, the current bill would instead extend these provisions, as modified by the bill, for four years. Section 215 was never intended to be permanent, and Congress should quickly assess the extent to which any modifications provide sufficient protection for privacy and civil liberties. Thus, the bill would be strengthened by decreasing the reauthorization to two years, and aligning the sunset with the expiration of Section 702 in 2017.

Though the ACLU is not taking a position on this bill, we urge you to consider the substantial yet reasonable improvements offered herein. If you have any questions, feel free to contact Legislative Counsel Neema Singh Guliani at 202-675-2322 or nguliani@aclu.org.

Sincerely,

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[5] Brad Heath, *U.S. Secretly Tracked Billions of Calls for Decades*, USA TODAY (Apr. 8, 2015, 10:36 AM), http://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/