Congress of the United States
Washington, DC 20515

November 20, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Doug Collins
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Adam Schiff
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Devin Nunes
Ranking Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler, Ranking Member Collins, Chairman Schiff, and Ranking Member Nunes:

We write to urge you to take up meaningful surveillance reform legislation as part of the debate over whether to reauthorize Section 215 and other provisions of the Foreign Intelligence Surveillance Act set to expire this year. As legislation moves forward, we urge you to include provisions to:

1. Repeal the call detail records authority under Section 215 and place limits on other intelligence programs, including Section 702 of the Foreign Intelligence Surveillance Act (FISA);
2. Impose a strict prohibition on surveillance that threatens First Amendment protected activities or discriminates on the basis of race, ethnicity, national origin, or other protected characteristics;
3. Prevent large-scale collection under the Patriot Act and limit the types of information that can be obtained under Patriot Act authorities;
4. Impose strict limits on querying, using, retaining, and sharing of information for criminal and other unrelated purposes and ensure that the government provides notice to individuals when information obtained or derived from these authorities is used against them;
5. Establish sufficient transparency for the public to measure whether reforms are working and how intelligence authorities are being used; and
6. Adopt structural reforms to the FISA court to ensure that civil liberties and privacy arguments are appropriately considered.

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Absent such reform, we believe Congress should allow Section 215 and the two other expiring Patriot Act authorities to sunset.

Disclosures over the past several years make clear that existing expansive surveillance powers pose an unacceptable threat to civil rights and civil liberties. These laws contain numerous loopholes that can be exploited to improperly surveil people based on speech, race, religion, and other impermissible factors. These deficiencies are of particular concern in the current environment where national security has been used as false justification for policies that are designed to discriminate against communities of color, religious minorities, and other vulnerable individuals. We must be vigilant to guard against these types of actions given our history of wrongly surveilling activists, immigrants, and communities of color under the guise of protecting national security.

It has also become clear that though the reforms in the 2015 USA Freedom Act contained positive elements, they did not go far enough. The government still has the power to engage in large-scale collection of sensitive information under the reformed Patriot Act authorities and has failed to comply with the law in several instances. In addition, the final version of the bill omitted reforms to other critical authorities, including Section 702 of FISA. This omission is notable, given that over two-thirds of House Democrats and 58 Republicans voted last year in favor of an amendment that would have instituted sweeping and substantial changes to this law.[1] In addition, recently declassified Foreign Intelligence Surveillance Court (FISC) opinions revealed significant privacy violations related to this authority, including searches that violate the statute and the Fourth Amendment, efforts by the FBI to avoid complying with existing law, and additional concerns regarding the extent of the government's so-called "about" collection.[2]

There must be an opportunity for a full debate on these important issues. Members should be given the opportunity to consider and vote on surveillance reform legislation as a standalone measure in the House, and not tucked into an expansive omnibus or budget bill.

We believe a meaningful surveillance reform package must:

1. **Repeal the call detail record authority under Section 215 and place limits on other intelligence programs, such as Section 702 of FISA.**

As part of the reforms in the USA Freedom Act, Congress created a new call detail record authority under Section 215, which was designed to replace the prior bulk collection program with a more targeted one. This program has reportedly been halted and Congress should permanently end this authority.[3] The call detail records program has no proven intelligence

[1] "FISA Amendments Reauthorization Act of 2017 (S. 139), Amash Amendment No. 1." Roll Call Vote No. 14 (Jan. 11, 2018) http://clerk.house.gov/evs/2018/roll014.xml.
[2] Trevor Aaronson, *A Declassified Court Ruling Shows How the FBI Abused NSA Mass Surveillance Data*, The Intercept (Oct. 10, 2019) https://theintercept.com/2019/10/10/fbi-nsa-mass-surveillance-abuse.
[3] Charlie Savage, *Trump Administration Asks Congress to Reauthorize N.S.A.'s Deactivated Call Records Program*, N.Y. TIMES (Aug. 15, 2019) https://www.nytimes.com/2019/08/15/us/politics/trump-nsa-call-records-program.html.

value, has been beset with years-long compliance issues, and has resulted in the collection of over a billion call records.[4]

However, repealing the call detail records authority alone is far from enough. Without additional reforms, there is a risk that the government will simply replicate the abuses of the call detail records program under other authorities. Congress should place additional restrictions on National Security Letter and pen register and trap and trace authorities, which were both reformed as part of the USA Freedom Act. In addition, Congress must also reform other provisions of the Patriot Act and Section 702 of FISA. Last year, over two-thirds of House Democrats and 58 Republicans voted in favor of an amendment that would have closed the Section 702 warrantless "backdoor search" loophole, ended collection of purely domestic communications or those to which a target is not a party, and strengthened notice requirements.[5] Further, on two occasions, the House has passed amendments that would close the Section 702 "backdoor search" loophole.[6] Such reforms should be included in any surveillance reform package.

2. **Impose a strict prohibition on surveillance that threatens First Amendment protected activities or discriminates on the basis of race, ethnicity, national origin, or other protected characteristics.**

Existing provisions in the Patriot Act and other surveillance statutes do not do enough to prevent surveillance based on speech, political views, race, religion, or other impermissible factors. While Section 215 prohibits surveillance based solely on First Amendment protected activities, the little information we have suggests that this prohibition is interpreted and applied far too narrowly. In addition, the existing statutory provision does not prohibit racial profiling, or contain sufficient oversight mechanisms to even measure whether such profiling is occurring.

There are several examples of discriminatory intelligence assessments, including the FBI assessment leaked last year that wrongly labeled "Black Identity Extremists" as threats despite the fact that no such category exists.[7] Also, just a month ago a federal court found that the FBI maintained records of First Amendment protected activity in violation of the Privacy Act, and ordered the records destroyed. The memos were about the editors of the libertarian website Antiwar.com who were erroneously targeted by the FBI based on First Amendment protected political statements and articles.[8] While these examples are related to the domestic context, Congress must ensure that similarly flawed assessments in the international counterterrorism or

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[4] Office of the Director of National Intelligence, Office of Civil Liberties, Privacy, and Transparency, *Statistical Transparency Report Regarding the Use of National Security Authorities Calendar Year 2018* (Apr. 2019) https://www.dni.gov/files/CLPT/documents/2019_ASTR_for_CY2018.pdf.

[5] "FISA Amendments Reauthorization Act of 2017 (S. 139), Amash Amendment No. 1." Roll Call Vote No. 14 (Jan. 11, 2018) http://clerk.house.gov/evs/2018/roll014.xml.

[6] "Department of Defense Appropriations Act, 2015 (H.R. 4870), Massie Amendment." Roll Call Vote No. 327 (Jun. 19, 2014) http://clerk.house.gov/evs/2014/roll327.xml; "Department of Defense Appropriations Act, 2016 (H.R. 2685), Massie Amendment." Roll Call Vote No. 356 (Jun. 11, 2015) http://clerk.house.gov/evs/2015/roll356.xml.

[7] FBI Intelligence Report, "Black Identity Extremists Likely Motivated to Target Law Enforcement Officers," (Aug. 3, 2018) https://www.documentcloud.org/documents/4067711-BIE-Redacted.html.

[8] Garris v. FBI, No. 18-15416 (9th Cir., 2019) http://cdn.ca9.uscourts.gov/datastore/opinions/2019/09/11/18-15416.pdf.

foreign intelligence context are not used as pretext to use intelligence authorities to improperly surveil individuals based on speech or other impermissible factors. Thus, Congress should pass legislation that includes nondiscrimination provisions for Patriot Act and other surveillance authorities, and should strengthen First Amendment protections to prevent surveillance predicated on First Amendment protected activities.

3. **Prevent large-scale collection under the Patriot Act and limit the types of information that can be obtained under Patriot Act authorities.**

A stated goal of the USA Freedom Act was to end bulk and large-scale collection under the Patriot Act;[9] however, this collection continues under Patriot Act authorities. For example, in 2018, the government collected over 430 million call records under the Section 215 call detail records provision.[10] Though this program has been suspended, this authority should be permanently repealed to ensure it is never restarted. Additionally, under Section 215, the government also collects other types of business records and documents. Under the tangible things authority, in 2018, investigations of 60 targets resulted in the collection of information regarding 214,000 unique phone numbers, email addresses, or other account identifiers. Reforms must be adopted to prevent large-scale surveillance under the Patriot Act and ensure that it is more targeted by, among other things, narrowing the definition of permissible selectors.

Congress must also reform the types of information that can be obtained through Patriot Act authorities. In 2018, the Supreme Court held that individuals had a privacy interest in historic cell site location data held by third parties.[11] Though that case dealt with location information, the Court's reasoning in that case would apply equally to other types of sensitive digital data. Given this, Congress should place additional restrictions on the types of data that can be obtained through Section 215 and other authorities, which permit the government to obtain information under a standard more lenient than what is required for a probable cause warrant.

4. **Set forth strict limits on querying, using, retaining, and sharing information for criminal and other unrelated purposes and ensure that the government provides notice to individuals when information obtained or derived from these authorities is used against them.**

Increasingly, evidence shows that information collected for intelligence or counterterrorism purposes is routinely searched and used for purposes unrelated to the purposes for which it was collected.[12] This allows the government to circumvent restrictions it might otherwise be forced to comply with and represents a threat to individuals' rights. Such concerns are exacerbated by the government's failure to comply with its obligation to provide notice to individuals when

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[9] Rep. Jim Sensenbrenner, "Joint Release: House Judiciary Committee Overwhelmingly Approves the USA FREEDOM Act" (Apr. 30, 2015) https://sensenbrenner.house.gov/2015/4/joint-release-house-judiciary-committee-overwhelmingly-approves-the-usa-freedom-act

[10] Office of the Director of National Intelligence, *Statistical Transparency Report: Regarding the Use of National Security Authorities* (Apr. 2019) https://www.dni.gov/files/CLPT/documents/2019_ASTR_for_CY2018.pdf.

[11] Carpenter v. United States, 585 U. S. _ (2018)

[12] Alex Emmons, *In Secret Court Hearing, Lawyer Objected to FBI Sifting Through NSA Data like it was Google*, The Intercept (Apr. 21, 2017) https://theintercept.com/2017/04/21/in-secret-court-hearing-lawyer-objected-to-fbi-sifting-through-nsa-data-like-it-was-google.

information obtained or derived from this collection is used in a proceeding, including a criminal prosecution. This failure adversely impacts individuals and also insulates the government from judicial review because individuals may not have the information necessary to raise legal challenges. Congress must put in place limits on how Section 215 and other intelligence information is shared, used, and retained, and must require the government to provide notice to individuals when such information is used against them.

5. **Establish sufficient transparency for the public to measure whether reforms are working and how intelligence authorities are being used.**

While the USA Freedom Act contained positive transparency reforms, the public and Congress still lack basic information about how our intelligence authorities are being used. For example, the USA Freedom Act failed to establish transparency around the total number of records collected under "traditional" business records orders or the types of information for which such orders are issued. Also related to "traditional" business records orders, the law only requires the government to estimate the number of "unique identifiers used to communicate information," which does not appear to capture potentially voluminous collection of other types of identifiers, like those attached to individuals' purchase and location information. Collectively, these reporting gaps fail to provide the public and Congress with information about concerning surveillance practices.

Congress provides the government with discretion over transparency issues at its own peril. Among numerous other failures to be transparent, and despite a promise to Congress, the NSA has reneged on its commitment to provide information regarding how many people in the United States are impacted by surveillance under Section 702. Congress should require the government to release more information regarding how it interprets and uses its surveillance powers, including more information about how often the FBI searches information collected under Section 702 to obtain information about individuals in the U.S. and how many individuals in the U.S. have information collected under the authority. In addition, Congress should not have to rely solely on the oversight of the FISC to uncover the FBI's mishandling of data. The intelligence community should notify Congress of their agents' mishandling of data gathered under FISA and what the agency is going to do to prevent the future mishandling of such data.

6. **Adopt structural reforms to the FISA court to ensure that civil liberties and privacy arguments are appropriately considered.**

There have only been a handful of FISA court opinions declassified and released since passage of the USA Freedom Act. While the USA Freedom Act required disclosure of certain Foreign Intelligence Surveillance Court (FISC) opinions, these provisions should be expanded to require disclosure within a certain timeframe, expand the types of opinions that must be disclosed, and make clear that the government must also disclose novel or significant opinions issued prior to passage of the USA Freedom Act. Congress should also make structural changes to the FISA courts, including by strengthening the amicus created under the USA Freedom Act to ensure they are able to access critical information and seek review of FISC orders by the Foreign Intelligence Surveillance Court of Review and the Supreme Court.

We thank you for your leadership and your commitment to our shared values to defend our country while upholding the civil rights, civil liberties, and privacy rights that are foundational to our democracy. We look forward to working with you as legislation moves forward.

Sincerely,

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Congressional
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MARK POCAN
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ANDY BIGGS
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cc: The Honorable Nancy Pelosi, Speaker, U.S. House of Representatives
The Honorable Kevin McCarthy, Minority Leader, U.S. House of Representatives

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