



March 13, 2020

RE: Vote “NO” on Cloture to H.R. 6172, the USA FREEDOM Reauthorization Act of 2020

Dear Senator,

The American Civil Liberties Union and FreedomWorks strongly urge you to vote “NO” on cloture to H.R. 6172, the USA FREEDOM Reauthorization Act of 2020. A cloture vote on this bill is expected on Monday, March 16th. The ACLU and FreedomWorks will be scoring this vote.

We would prefer a 45-day extension of the FISA authorities, with the opportunity for positive amendments to H.R. 6172, as proposed by a bipartisan group of Senators. Such an extension would allow Congress to focus on pressing issues raised by the COVID-19 virus, while providing additional time for debate and amendments to H.R. 6172.

Congress has had over four years to consider provisions of the Patriot Act set to expire on March 15, 2020. Despite this, H.R. 6172 is being jammed through without any opportunity for amendments, no markup, and limited debate. Indeed, a prior markup of the bill in the House Judiciary Committee was cancelled after it became clear that efforts to improve the bill would likely have prevailed.

Over the last several years, it has become abundantly clear that many of our surveillance laws are broken. The Foreign Intelligence Surveillance Court is not equipped to protect Americans’ rights – with an Inspector General report finding a litany of errors in the government’s applications to the court to surveil Trump campaign advisor Carter Page. During a House hearing last month, FBI Director Christopher Wray agreed with the characterization of at least a portion of the surveillance of Carter Page as illegal. Also last month, the FISC court itself accepted the Justice Department’s position that at least two of the surveillance applications for spying on Page were “invalid” and the court took extraordinary steps to order the government to try to remedy its wrongdoing and avoid a repeat. Despite the secrecy around FISA proceedings, the Page episode offers a window into the abuses that predictably follow from giving the government extraordinary powers with minimal checks and no meaningful due process.

At the same time, Section 215, which is one of the Patriot Act provisions set to expire on March 15th, has been used to engage in large-scale collection of Americans’ information, and the call detail record program operated under the authority has been suspended following compliance violations that resulted in unlawful collection of information.

Despite this record, disappointingly, the reforms contained in H.R. 6172 are minimal – in many cases merely representing a codification of the status quo. In addition, the bill

contains provisions that would be a step back from even our flawed current law, including an additional criminal penalty. Given this, we believe that a short 45 days extension of the expiring provisions, with the opportunity for additional debate and amendments, would be preferable to the current bill. Thus, we urge members to oppose the bill absent improvements, despite the fact that the bill would be preferable to a long-term extension of the expiring provisions.

The current bill contains several concerning provisions and omits key reforms. For example:

- **The bill fails to require that individuals receive appropriate notice and access to information when FISA information is used against them.** The government asserts 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, this provision is utterly inadequate. The bill wrongly allows the government to continue to evade its notice obligations merely by unilaterally asserting that notice would harm national security – setting a dangerous precedent. It does not define “derived,” despite concerns that the government has narrowly defined this term in the past to avoid providing notice. It limits the notice provision to only cover a small subset of individuals, if any. 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.
- **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, the bill fails to create a presumption that an amicus be appointed in other cases raising targeting US persons or raising constitutional concerns; 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. 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 – which the government has already said is current practice following the Supreme Court’s *Carpenter* decision. However, the bill fails to clearly prohibit the government from collecting other

¹ See 50 USC § 1861.

² See 50 USC § 1861(a).

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. The bill fails to include provisions that would heighten this standard and limit large-scale collection under this authority.
- **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 is riddled with loopholes and exceptions.

Thus, we urge Senators to vote “NO” on cloture to H.R. 6172.

If you have any questions or concerns please contact Neema Singh Guliani (nguliani@aclu.org) or Josh Withrow (josh.withrow@freedomworks.org).

Sincerely,

American Civil Liberties Union
FreedomWorks