

# THE RUTHERFORD INSTITUTE

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June 1, 2015

Via Facsimile

United States Senate  
Washington, D.C. 20510

**Re: USA FREEDOM Act (Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection and Online Monitoring Act)**

Dear Senator:

The Rutherford Institute<sup>1</sup> has been a longtime critic of the government's efforts to bypass key Fourth Amendment protections that afford Americans the right to be free from unreasonable searches and seizures by government agents. Most notably, the Institute has been a vocal opponent of the USA Patriot Act, which drove a stake through the heart of the Bill of Rights, by opening the door to broader domestic surveillance and rendered law-abiding citizens indistinguishable from suspected terrorists.

With the expiration of Section 215 of the Patriot Act, which served as the purported legal authority for the National Security Agency's (NSA) massive collection of information about the telephone calls of United States citizens, it is our hope that Congress will seize this historic opportunity to not only end this clearly unconstitutional practice but rein in the NSA and other government agencies bent on furthering the surveillance state that already exists in this country, and thereby truly protect the personal privacy, security and freedom of Americans.

That said, it is our belief that the USA FREEDOM Act (Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection and Online Monitoring Act), which has been proposed as the answer to the problem of the NSA's invasive domestic spying programs, will do more damage than good.

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<sup>1</sup> The Rutherford Institute is a non-profit civil liberties organization dedicated to the defense of Americans' constitutional rights that provides free legal representation to individuals whose civil rights are threatened and/or infringed.

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## The USA FREEDOM Act will do more damage than good

While the USA FREEDOM Act has been hailed as a step in the right direction, unfortunately, it amounts to little more than a paper tiger: threatening in appearance, but lacking any real bite. Indeed, the Act endangers the cause of citizen privacy by creating a false impression that Congress has taken steps to prevent the government from spying on the telephone calls of citizens, while in fact ensuring the NSA's ability to continue invading the privacy and security of Americans.<sup>2</sup>

## The USA FREEDOM Act actually reauthorizes Section 215 of the Patriot Act

A fundamental problem with the USA FREEDOM Act is that it reauthorizes the provision of the Patriot Act which was the basis for the bulk collection of telephone metadata even as that provision expired on June 1. Section 215 of the Patriot Act amended the Foreign Intelligence Surveillance Act (FISA) to broadly allow seizure of "tangible things" in relation to purported antiterrorism operations. It removed any requirement that the "things" sought be related to a foreign power, an agent thereof or the activities of a foreign power, and instead allowed the collection of metadata merely upon the showing that the information sought is "relevant" to an investigation seeking foreign intelligence information. Although the unwarranted power Section 215 confers on the government has expired, if the USA FREEDOM Act is enacted, it will be extended until 2019.

## The USA FREEDOM Act does not prevent government surveillance; it merely delegates it to communication services providers

Another glaring flaw in the USA FREEDOM Act is that it does nothing to prevent the government from monitoring the information collected about Americans' telephone calls. While the Act inhibits the *government* from engaging in the bulk collection of telephone metadata, it instead simply delegates this responsibility to communication services providers; the data is then subject to searching and examination by the government under the same overly-permissive standard that the NSA had previously used. As pointed out by Rep. Justin Amash (R-Mich.) on his Facebook page:

It's true that the bill ends the phone dragnet as we currently know it—by having the phone companies themselves hold, search, and analyze certain data at the request of the government, which is worse in many ways given the broader set of

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<sup>2</sup> Peter Baker and David E. Sanger, "Why the N.S.A. Isn't Howling Over Restrictions," *The New York Times* May 1, 2015 (available at [http://www.nytimes.com/2015/05/02/us/politics/giving-in-a-little-on-national-security-agency-data-collection.html?\\_r=1](http://www.nytimes.com/2015/05/02/us/politics/giving-in-a-little-on-national-security-agency-data-collection.html?_r=1)).

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data the companies hold—but H.R. 2048 actually expands the statutory basis for the large-scale collection of most data.<sup>3</sup>

Indeed, the idea of storing telephone metadata with the service providers themselves was originally suggested by the former director of the NSA, who saw this as a means of deflecting criticism of the program without losing access to the information.<sup>4</sup>

The USA FREEDOM Act gives the government too broad authority to surveil persons who are not suspected of any connection with terrorist activity

Additionally, the version of the USA FREEDOM Act passed by the House gives too broad authority to the government to examine the records and data of persons who are not suspected of having any connection with terrorist activity. When the government searches telephone metadata, it does so by using computer queries that are based on a phone number associated with a person suspected to be associated with a foreign terrorist organization. This query, or “first hop,” results in additional phone numbers contacted by the alleged suspect, which are then also queried in a so-called “second hop.”<sup>5</sup> However, these “second hop” numbers are searched for metadata even though the government has no basis for suspecting the numbers are used by a foreign terrorist organization, other than the number was contacted using the number in the “first hop.” This “second hop” examination is a patent search without any probable cause or reasonable suspicion, yet it is allowed under the version of the Act passed by the House. It is vital that any legislation prohibit this kind of suspicionless search of records relating to an individual.

The USA FREEDOM Act fails to curtail “back door” information collection

The Act also fails to address whatsoever laws that allow “back door” information collection regarding U.S. citizens. Under existing law, specifically 50 U.S.C. § 1881a, orders may be obtained allowing the collection of information on persons believed to be outside the United States for a period of up to one year. However, many have pointed out that this authority is used to obtain the communications of American citizens by employing an overly-broad construction of what constitutes a “target.”<sup>6</sup> This “back door” search does not involve simply the kind of “metadata” obtained by the NSA from telephone records, but extends to the contents of communications of U.S. citizens. This plain violation of the Fourth Amendment rights of Americans must be forbidden and is an essential part of any legislation reforming FISA.

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<sup>3</sup> Rod Kackley, “Patriot Act, USA Freedom Act, or none of the Above for Privacy vs. National Security?”, available at <http://pjmedia.com/blog/patriot-act-usa-freedom-act-or-none-of-the-above-for-privacy-vs-national-security/>

<sup>4</sup> Peter Baker and David E. Sanger, *supra*, n. 2.

<sup>5</sup> *American Civil Liberties Union v. Clapper*, *supra*, 2015 WL 2097814 at \*6.

<sup>6</sup> Nadia Kayyali, “The Way the NSA Uses Section 702 is Deeply Troubling. Here’s Why,” available at <https://www.eff.org/deeplinks/2014/05/way-nsa-uses-section-702-deeply-troubling-heres-why>.

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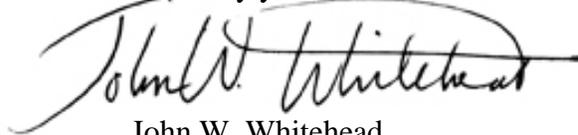
## Congress must address the shortcomings in the USA FREEDOM Act

Each of these glaring shortcomings must be addressed by the legislation Congress ultimately passes in response to the Executive branches attempts to turn our country into a surveillance state. Otherwise, history will judge the law's title "Freedom Act" as a cruel irony.

As long as government agencies are allowed to make a mockery of the law—be it the Constitution, the FISA Act or any other law intended to limit their reach and curtail their activities—and are permitted to operate behind closed doors, relaying on secret courts, secret budgets and secret interpretations of the laws of the land, there will be no reform. Indeed, presidents, politicians and court rulings have come and gone over the course of the NSA's 60-year history, but none of them have done much to put an end to the NSA's "technotyranny."

It is our sincere hope that Congress will act not simply to quell public outrage over the government's surveillance program but will impose real and significant restraints on the intrusions that have been perpetrated by the NSA and every other government agency that has been allowed to operate outside of the system of checks and balances established by the Constitution.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead  
President

cc: The Honorable Barack Obama