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Via Email, Facsimile, and U.S. Mail

The Honorable John Boehner, Speaker of the House of Representatives
The Honorable Eric Cantor, House Majority Leader
The Honorable Nancy Pelosi, House Minority Leader
Members of the House Rules Committee
U.S. House of Representatives
Washington, DC 20515

Re: USA FREEDOM Act

Dear Representatives:

As an organization dedicated to the defense of Americans' constitutional rights, The Rutherford Institute[1] has been at the forefront of the effort to both educate Americans about threats to their freedoms, especially as a result of the government's use of and reliance on emerging technologies in the absence of any coinciding civil liberties safeguards against these technologies being used to undermine and/or violate the rights of the citizenry.

Without sufficient limits and oversight, well-meaning efforts to keep the homeland safe—efforts that rely heavily on the collection and analysis of significant amounts of information about Americans—can adversely impact civil liberties. Indeed, history teaches that insufficiently checked domestic investigative powers frequently have been abused and that the burdens of this abuse most often fall upon disfavored communities and those with unpopular political views.

Investigations triggered by race, ethnicity, religious belief, or political ideology may seem calibrated to address the threat we face, but instead they routinely target

[1] The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened and/or infringed.

innocent people and groups. Beyond the harm done to individuals, such investigations invade privacy, chill religious belief, radicalize communities and, ultimately, build resistance to cooperation with law enforcement.

Since 9/11, Americans have been spied on by surveillance cameras, eavesdropped on by government agents, had our belongings searched, our phones tapped, our mail opened, our email monitored, our opinions questioned, our purchases scrutinized, and our activities watched. We've also been subjected to invasive pat downs and whole-body scans of our persons and seizures of our electronic devices in the nation's airports. We can't even purchase certain cold medicines at the pharmacy anymore without it being reported to the government and our names being placed on a watch list.

These violations of Americans' constitutional rights have only gotten worse in recent years, despite legislative efforts to undo some of the damage wrought by the USA Patriot Act. Even the USA FREEDOM Act, a.k.a. Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection and Online Monitoring Act (USAFA), which was recently approved by the House Judiciary Committee, falls woefully short of imposing any real, lasting reform aimed at curtailing the government's historic breach of Americans' privacy, security and freedom.

It is not enough, as the House of Representatives prepares to consider the USAFA, to dwell on the proposed legislation's shortcomings. Without a proper understanding of the Fourth Amendment and its historic context, as well as a straightforward accounting of the many ways in which that vital safeguard against government abuse is being violated, any attempt by Congress to legislate a solution will be futile, little more than a band aid on a gaping, festering wound.

To this end, I provide the following brief overview and recommendations. I have also enclosed and made available online a more exhaustive and historic analysis of the Fourth Amendment's reasonable expectations of privacy standards, particularly as it relates to the NSA's ongoing surveillance activities.

The Patriot Act and the Onset of the Surveillance State

What began with the passage of the USA Patriot Act in the fall of 2001 has snowballed into a massive assault on our constitutional freedoms, our system of government and our fundamental philosophies and way of life. To our detriment, the Patriot Act and its subsequent incarnations legitimized what had previously been covert and frowned upon as a violation of Americans' long-cherished privacy rights.

Thus, the starting point for any discussion of true legislative reform must begin with the USA Patriot Act, which redefined terrorism so broadly that many non-terrorist political activities such as protest marches, demonstrations and civil disobedience were

considered potential terrorist acts, thereby rendering anyone desiring to engage in protected First Amendment expressive activities as suspects of the surveillance state.

The Patriot Act justified broader domestic surveillance, the logic being that if government agents knew more about each American, they could distinguish the terrorists from law-abiding citizens—no doubt an earnest impulse shared by small-town police and federal agents alike. According to *Washington Post* reporter Robert O'Harrow, Jr., this was a fantasy that had "been brewing in the law enforcement world for a long time." And 9/11 provided the government with the perfect excuse for conducting far-reaching surveillance and collecting mountains of information on even the most law-abiding citizen.

In the name of fighting terrorism, government officials were permitted to monitor religious and political institutions with no suspicion of criminal wrongdoing; prosecute librarians or keepers of any other records if they told anyone that the government had subpoenaed information related to a terror investigation; monitor conversations between attorneys and clients; search and seize Americans' papers and effects without showing probable cause; and jail Americans indefinitely without a trial, among other things.

The federal government also made liberal use of its new powers, especially through the use (and abuse) of the nefarious national security letters, which allow the FBI to demand personal customer records from Internet Service Providers, financial institutions and credit companies at the mere say-so of the government agent in charge of a local FBI office and without prior court approval. The "roving wiretaps" provision allows the FBI to wiretap phones in multiple homes without having to provide the target's name or even phone number—merely the possibility that a suspect "might" use the phone is enough to justify the wiretap. The "lone wolf" provision allows intelligence gathering of people not suspected of being part of a foreign government or known terrorist organization.

Patriot Act Section 215 and the Onset of Bulk Surveillance

Section 215 of the Patriot Act amended 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, and agent thereof or the activities of a foreign power, and instead allowed an order to issue merely upon the showing that the information sought is "relevant" to an investigation seeking foreign intelligence information. Seizing upon this broad language, the government's investigative bodies, including the NSA, convinced the Foreign Intelligence Surveillance Court that the government could require telephone service providers turn over literally all of their records concerning the use of telephones by citizens to the government for storage and analysis because such records could be "relevant" to an investigation of foreign intelligence or terrorism activity.

The revelation of this program of bulk collection of telephone metadata sparked public outrage. When the courts were unwilling to prevent this pervasive invasion of privacy by the government, a legislative solution was demanded by citizens and to the USA FREEDOM Act of 2013, which proposed to stop the bulk collection of data by the government as well as other activities of the government that unreasonably intrude upon the security of citizens.

USA FREEDOM Act Fails to Achieve Substantial Reform

The USAFA reported out of the Judiciary committee is a substitute to the original USAFA represents a significant retreat from the steps proposed by the original legislation. To dilute the original USAFA for the sake of expediency or political compromise at a time when there is significant public support for and political momentum in favor of true reforms on the ability of the government to spy on its citizens is foolhardy and unwise, given that such an opportunity may not present itself again. If we are to have any hope of true reform, Congress must take immediate action to rein in the government's Orwellian programs by adopting legislation even more comprehensive than the original USAFA.

To truly protect the privacy of citizens from the unwarranted surveillance of the National Security Agency and other intelligence apparatus, USAFA must be changed as suggested by the following:

1) Provisions seeking to increase transparency, which were removed from the original USAFA by the substituted version, should be included. Under the current FISA, an entity subject to an order to produce is prohibited from disclosing the existence of the production order. The original USAFA required that the applicant for a production order include a request that the FISC include in the order a requirement of nondisclosure by the applicant, the time nondisclosure is to last, and specific grounds justifying nondisclosure. The purpose was to allow more transparency and to allow the public to know better the scope of government's activities in seeking information under FISA. However, the substituted USAFA revives the general prohibition on disclosure and instead allows for watered-down transparency by simply allowing persons who are subject to disclosure orders to report semi-annually the aggregate number of orders and accounts affected (rounded to the thousands).

2) The main purpose of USAFA was to end the bulk collection of data under Section 215 of the Patriot Act (included in FISA as 50 U.S.C. sec. 1861(b)), which extended FISA disclosure to all "tangible things" relevant to an authorized investigation and without regard to whether the information relates to a person who is associated with a foreign power or an agent of a foreign power. The original USAFA required that an applicant for production of "tangible things" show that the information sought pertains to

a foreign power, an agent of a foreign power, or an individual in contact with a foreign power. However, the substitute USAFA does not apply the requirement of connection to a foreign power to all "tangible things" but only to "call detail records," which is the metadata (call numbers, time, etc.) of telephone calls. Thus, not all "tangible things" are covered by this new requirement of showing a connection to a foreign power and there could be some information (internet records, perhaps) which would still be subject to the bulk collection through a FISA order. The new USAFA does limit "tangible thing" production orders by requiring "a specific selection term to be used as the basis for production." However, it is not clear how this limits the data collection, and one blogger on this subject has expressed doubt as to its effectiveness.[2]

3) The substituted USAFA also removes provision meant to prevent "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."[3] 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. The original USAFA included provisions prohibiting this practice, but it was stripped out by the substituted version that the Judiciary Committee approved. This plain violation of the Fourth Amendment rights of Americans must be forbidden and is an essential part of any legislation reforming FISA.

4) The minimization provisions of the original USAFA have been removed in the substituted version. Under existing 50 U.S.C. 1861(g), the Attorney General is to promulgate minimization procedures governing the retention and dissemination by the FBI of tangible things. The original USAFA provided that a judge may assess compliance with the minimization procedures required by the order, and so did not leave the matter simply to standards set by the Attorney General. However, this authorization for a judge to review minimization compliance is not contained in the substituted USAFA.

5) The original USAFA contained a provision which limited the Attorney General's authority to require production in emergency situations to the production of "call records." Under the substituted USAFA, this emergency authority extends to include the production of all "tangible things."

While The Rutherford Institute and other concerned organizations and individuals will continue to challenge these shortcomings and violations at all levels of the judicial system, the power to institute true reform rests with Congress. Thus, I urge Congress to

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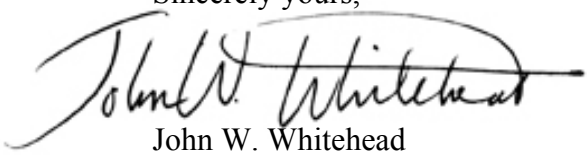
[2] See http://www.emptywheel.net/2014/05/06/specific-selection-term-still-not-convinced/ (posted May 6, 2014).
[3] *See* https://www.eff.org/deeplinks/2014/05/way-nsa-uses-section-702-deeply-troubling-heres-why.

act not simply to quell public outrage over the government's surveillance program but to impose real and significant restraints on the intrusions that have been perpetrated for almost a decade.

To this end, I gladly make myself and The Rutherford Institute available should you need any further guidance or insight.

Sincerely yours,



John W. Whitehead
President

Enclosure: A Report by The Rutherford Institute on "The Founding Fathers and the Fourth Amendment's Historic Protections Against Government Surveillance: A Historic Analysis of the Fourth Amendment's Reasonable Expectations of Privacy Standards as It Relates to the NSA's Surveillance Activities"[4] (available for download at link below)

cc: President Barack Obama
Members of the U.S. House of Representatives

[4] John W. Whitehead, Douglas McKusick, Adam Butschek, "The Founding Fathers and the Fourth Amendment's Historic Protections Against Government Surveillance: A Historic Analysis of the Fourth Amendment's Reasonable Expectations of Privacy Standards as It Relates to the NSA's Surveillance Activities," The Rutherford Institute (May 2014), https://www.rutherford.org/files_images/general/2014_Historic_4th_Amendment-NSA_Metadata.pdf.