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COMMENTS OF THE CENTER FOR DEMOCRACY AND TECHNOLOGY TO THE REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES

OCTOBER 2, 2013

Dear members of the Review Group:

It was a pleasure to meet with you on September 9, 2013 to discuss with other civil society groups recommendations you could make with respect to intelligence surveillance. Because of the nature of the meeting, it was impossible to put all of our recommendations on the table for discussion. Accordingly, we summarize them below.

Section 215 Reform:

We recommend that the Review Group embrace the following reforms regarding bulk collection of records pursuant to Section 215 of the PATRIOT Act, codified at 50 U.S.C. §1861:

- **Ending Bulk Collection of Telephony Metadata:** The bulk collection of metadata under §215 is illegal under the statute and may violate the Constitution in light of *U.S. v. Jones*. The government's overbroad interpretation of relevance lacks strong legal foundation, is inconsistent with Congressional intent, and is so sweeping as to permit collection of data ranging from location information to Internet metadata to financial information without meaningful limit. Section 215 should be amended to require a finding of specific and articulable facts giving reasonable grounds to believe each piece of information sought pertains to an agent of a foreign power or a person in contact with an agent of a foreign power. To ensure that other intelligence authorities that operate under a relevance standard are not used for bulk collection, the same change should be made to the pen/trap statute 50 U.S.C. §1842 and the NSL statutes, including 18 U.S.C. § 2709.
- **Prohibit Prospective Surveillance Under Section 215:** Prospective surveillance has no place in §215; authority to conduct ongoing surveillance is already provided in the pen/trap statute. Further, prospective orders under §215 are unprecedented in their lack of particularity. Section 215 should be amended to ensure that tangible things sought with this authority must exist at the time an order is served, and the pen/trap statute should be amended to clarify that 50 U.S.C. §1842 is the exclusive means for prospective collection.

Section 702 Reform:

We recommend the following reforms regarding collection of electronic communications content pursuant to §702 of FISA, which was added in the 2008

FISA Amendments Act and is codified at 50 U.S.C. §1881a:

- **Raise the Standards for Targeting:** Reports reveal that NSA deems 51% certainty in “foreignness” sufficient to meet requirements that surveillance under the statute targets people reasonably believed to be abroad. Surveillance that is merely “about” targets is collecting international communications on a mass scale. Section 702 should be reformed to raise the standard for determining “foreignness” of targets, and limit surveillance to communications to which a target is a party, rather than merely mentioned.
- **Require Court Order for Search for Americans’ Communications:** Section 702 was designed to bar the targeting of U.S. persons for surveillance. However, the product of this surveillance is being searched for communications of particular U.S. persons. If such a search were to be conducted at the targeting stage, it would require a full FISA order based on a finding of probable cause that the U.S. person is an agent of a foreign power. This loophole should be closed so that the product of §702 surveillance cannot be searched for communications of a particular U.S. person absent an individualized Foreign Intelligence Surveillance Court (“FISC”) determination of probable cause.
- **Ensure Intelligence Surveillance Occurs for Foreign Intelligence Purposes:** NSA shares for law enforcement purposes communications obtained pursuant to §702. It also tips off law enforcement entities, including the DEA, when this surveillance reveals evidence of crime, and the source of this evidence is hidden from defendants, rendering them unable to challenge its constitutionality. This incentivizes surveillance of Americans, and allows domestic surveillance absent appropriate legal protections. In order to prevent this, §702 should be amended to require that collection of foreign intelligence information be the “primary purpose” of surveillance activities.
- **Recognize Protections for Human Rights:** Section 702 surveillance infringes not only on the rights of Americans, but also on the privacy rights individuals worldwide. Targeting and minimization guidelines designed to protect Americans give scant assurance to non-U.S. persons who are abroad. Mass surveillance violates the human rights and is inconsistent with U.S. privacy obligations under Article 17 of the International Covenant on Civil and Political Rights. It has reduced America’s global standing, and could have profound economic repercussions as users abroad shy away from American telecommunication and Internet services. The Review Group should recommend that the U.S. acknowledge that has privacy obligations to persons abroad under the ICCPR. To honor those obligations, the U.S. should limit its collection under Section 702 to the purposes of thwarting terrorism, espionage and hostile attacks, and protecting national security.

Transparency:

We recommend the following reforms regarding increased transparency:

- **Permit Disclosure of Information by Companies:** While secrecy regarding surveillance orders is sometimes necessary, the law currently restricts companies in an indiscriminate manner. This has inhibited public scrutiny of surveillance programs without aiding security. Companies should be permitted to report periodically on the number of orders received and customer accounts affected under each intelligence surveillance authority. Additionally, gag orders should not be issued as a default, but rather only when the government establishes that harm would result from disclosure.
- **Publicly Disclose FISC Opinions:** Recent disclosures reveal that the FISC has vastly expanded government surveillance authority in secret. Its decisions often hinge on complex technical questions, to which outside experts could provide valuable insight. Further, its decisions involve Constitutional rights of critical importance. Significant legal interpretations and rulings of the FISC should be released promptly and routinely, with necessary

redactions to protect national security. An unclassified summary can be substituted for the redacted opinion when necessary.

FISA Court Reforms

We recommend the following reforms regarding the procedures of the FISC:

- **Appoint a Special Advocate to Protect Privacy and Civil Liberties:** FISC proceedings are conducted in secret; government is the only party advocating on key questions of surveillance authority. Recent disclosures revealed that this has resulted in repeated misrepresentations and prolonged misconduct that violated the Constitution. The FISC often faces challenging technical questions and needs technical guidance beyond that the government provides in support of its surveillance demands. A Special Advocate tasked with preserving privacy and civil liberties should be appointed to counterbalance government demands for surveillance authority, and aid the FISC in better evaluating issues in a evenhanded manner. The Special Advocate should have technical experts on staff, or readily available, to provide the FISC with assistance in evaluating technical matters.

These recommendations are more fully explained in the attached testimony CDT submitted to the Privacy and Civil Liberties Oversight Board on July 9, 2013¹ and to LIBE Committee of the European Parliament on September 24, 2013², and in a September 11 blog post.³

Sincerely,



Leslie Harris,
President and CEO



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Joseph Lorenzo Hall,
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¹ Greg Nojeim, The Center for Democracy and Technology, *Surveillance Programs Operated Pursuant to PATRIOT Act Section 215 and Foreign Intelligence Surveillance Act Section 702* (July 9, 2013), available at <https://www.cdt.org/files/pdfs/CDT-PCLOB-Statement-for-the-Record.pdf>.

² Leslie Harris, The Center for Democracy and Technology, *Testimony of Leslie Harris Before the European Parliament LIBE Committee Inquiry on Electronic Mass Surveillance of EU Citizens* (September 24, 2013), available at <https://www.cdt.org/files/pdfs/LIBEstestimony24September.pdf>.

³ Alissa Cooper, The Center for Democracy and Technology, *The NSA's Laziness Masquerading as Reasonableness* (September 11, 2013), available at <https://www.cdt.org/blogs/alissa-cooper/1109nsa's-laziness-masquerading-reasonableness>.