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November 14, 2014

Majority Leader Harry Reid
United States Senate

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United States Senate

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US Senate Committee on the
Judiciary

Chairman Dianne Feinstein
Vice Chairman Saxby Chambliss
US Senate Select Committee on
Intelligence

Dear Majority Leader Reid, Minority Leader McConnell, Chairmen Leahy and Feinstein, Ranking Member Grassley, and Vice Chairman Chambliss:

I urge the Senate to pass the USA FREEDOM Act (S. 2685) without delay and without amendments that would weaken its provisions or add new data retention requirements.

The United States has long prided itself on being a leader in democratic values, including freedoms of expression, association, and the press. Yet as Human Rights Watch and the American Civil Liberties Union (ACLU) documented in their joint July 28 report, *With Liberty to Monitor All*, overbroad surveillance programs are undermining those very values, and threatening the heart of American democracy. Our report found that large-scale surveillance and excessive government secrecy are hampering the work of US journalists and lawyers, and ultimately corroding press **freedom, the public's right to information, and the right to counsel.** While the USA FREEDOM Act would not resolve all these concerns, it would represent an important first step towards addressing some of them.

In the course of our investigation, we spoke to nearly fifty prominent US journalists who cover national security, intelligence, and law enforcement. We found that surveillance is impeding the work of journalists, who increasingly find that sources are unwilling to speak with them, even about unclassified matters of public concern, out of fear that their communications could be monitored. Sources fear that if they are linked to a journalist, they could face retaliation, lose their security clearance, be fired, or even come under criminal investigation or prosecution. The



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administration's Insider Threat Program, which requires federal employees to report each other for "suspicious" behavior that may suggest intent to leak information, gives real weight to that concern. In response, journalists are adopting expensive or time-consuming measures such as encryption or avoiding digital communications altogether, in an environment of tremendous uncertainty, to protect the security and confidentiality of sources. The result is that fewer stories are published and less information of public concern reaches the American people.

Mass surveillance programs are also creating barriers to the right to counsel. We spoke to dozens of lawyers who reported that large-scale surveillance has created concern about their ability to meet their professional responsibilities to maintain confidentiality of client information. Lawyers also rely on free exchange of information with their clients to build trust and develop legal strategy. Fear of surveillance makes it harder for attorneys (especially, but not exclusively, defense attorneys) to build trust with their clients or protect legal strategies. Both problems corrode the ability of lawyers to represent their clients effectively and erode of the right to counsel, a pillar of procedural justice under human rights law and the US Constitution.

International human rights law is clear: while the US government has an obligation to protect national security, and may engage in surveillance to that end, it may do so only to the extent that surveillance is lawful, proportionate, and necessary to protect against tangible threats. Many of the programs revealed by former NSA contractor Edward Snowden are overbroad, and threaten freedom of expression, the right to counsel, and the **public's ability to hold its government to account. It's time for Congress to reform** surveillance laws to address these harms.

As we described in a letter to Congressional leadership on July 30, 2014, the USA FREEDOM Act in its current form in the Senate would be an important step towards such reform.¹ It **would prohibit "bulk" and limit large-scale** data collection under Section 215 of the USA PATRIOT Act and other authorities. It would also promote transparency and enable private companies to report more information on government requests for data. A panel of advocates would be appointed to the FISA court to argue on behalf of privacy and civil liberties in certain cases, strengthening oversight mechanisms.

This bill is not comprehensive and only addresses some of the issues discussed in our report. It does not deal with surveillance under Section 702 of the FISA Amendments Act or

¹ Human Rights Watch, "Joint Letter in Support of the USA FREEDOM Act (S. 2685)," July 30, 2014, <http://www.hrw.org/news/2014/07/30/joint-letter-support-usa-freedom-act-s-2685>.

Executive Order 12333. **However, it is a critical first step towards addressing the harms to basic freedoms and democratic values we have documented.** Beyond S. 2685, we urge the Senate to take up comprehensive reforms to Section 702 in separate legislation.

Finally, as we state in our July 30 letter, the goals of USA FREEDOM Act would be significantly weakened if any new mandatory data retention requirement were added to the bill. Requiring companies to retain call data and location information on all phone subscribers that they would not otherwise maintain is a disproportionate intrusion into the privacy of ordinary people, the vast majority of whom will never be linked to wrongdoing. Such a mandate would also increase data security risks since newly created databases would be vulnerable to data breaches or misuse. Finally, a data retention mandate could further undermine press freedom by making it more difficult for journalists to shield contact with sources from undue monitoring.

I urge the Senate to swiftly pass the USA FREEDOM Act (S. 2685) without any amendments that would dilute its safeguards, and ensure it achieves its stated purpose of ending dragnet collection of private records.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth Roth', written in a cursive style.

Kenneth Roth
Executive Director
Human Rights Watch