July 8, 2013

Dear Members of the Privacy and Civil Liberties Oversight Board,

We welcome the Board's review of NSA surveillance programs and the impact of these programs on privacy and civil liberties. Many of our organizations are separately presenting their own comments, but we are submitting this coalition letter to emphasize our organizations' agreement on some overall concerns and recommendations.

While additional information is necessary to fully understand the secret legal authorities being used by the government, recent disclosures regarding NSA programs under Section 215 of the Patriot Act and under Section 702 of the FISA Amendments Act raise serious legal and constitutional concerns about the scope of government surveillance. For example, it is difficult to understand how collection of the phone records of millions of Americans who are not suspected of any connection to terrorism could be authorized under the plain terms of Section 215. More significantly, the vast scope of the reported surveillance under Section 215 and Section 702 threatens Americans' First Amendment rights of free association and Fourth Amendment rights. The lack of full information about the scope of such secret national security surveillance increases our concern.

We understand that the NSA's collection of phone records under Section 215 includes metadata and not the content of phone conversations. Although traditionally, courts have not treated such information as being protected by the Fourth Amendment, rapid changes in technology have made metadata more revealing of an individual's private life and courts are taking note. Last year, in *United States v. Jones*, the Supreme Court began to recognize that continuous electronic surveillance for an extended period of time implicates the Fourth Amendment. Although the case involved GPS tracking of a car on public roads and the majority decided the case on relatively narrow grounds, five Justices acknowledged the intrusiveness of powerful electronic surveillance technologies and that continuous use of such technologies over extensive periods of time can impinge on reasonable expectations of privacy. The data collected in the Section 215 program show what numbers are calling each other, when the calls are made, the duration of the calls, and the frequency with which particular numbers call each other. This information, like the pattern of the car's movements in the *Jones* case, can be highly revealing, including demonstrating the patterns of individuals' daily activities and their associations with others. And all of this information is being collected on millions of Americans who are not even suspected of any connection to terrorism. Extensive collection of such non-content meta-data about individuals threatens both First Amendment rights of free association and Fourth Amendment rights to be free from unreasonable searches and seizures.

Similarly, the reportedly broad surveillance of communications content under Section 702 of the FISA Amendments Act threatens First and Fourth Amendment rights. Even though Section 702 surveillance must "target" non-U.S. persons reasonably believed to be abroad, recent disclosures indicate that this surveillance is collecting vast amounts of communications in which U.S. persons (citizens and permanent legal residents) and people located within the

United States are on one end of the communication. As the Section 702 surveillance is conducted inside the United States and is deliberately collecting the content of communications of people with recognized Fourth Amendment rights, the limited review conducted by the FISA court under existing law is not adequate to protect these constitutional rights.

We urge you to write a comprehensive and public report concerning these surveillance authorities and the risks to civil liberties. In doing so, we urge you to review how other authorities, for example national security letter authorities, overlap, expand or complement the specific authorities under sections 215 and 702. As part of its report, the PCLOB should recommend critical reforms to ensure that government surveillance programs include robust safeguards for constitutional rights.

We believe that such reforms should include tightening the standards for collection and use of information, including communications metadata; increasing meaningful judicial authorization and review of such programs, and limiting the secrecy of such programs.

At a minimum, they should include:

1. Recommending that Congress prohibit bulk collection of Americans' communications metadata under Section 215 or any other authority. It should also clearly bar use of Section 215 for prospective surveillance.

2. Determining the scope of existing repositories of bulk metadata on U.S. persons and the authorities under which these data were collected and seeking public disclosure of this information, to determine whether or how the government should be permitted to use the bulk metadata already collected.

3. Recommending that Congress incorporate more rigorous safeguards in Section 702 to restrict the warrantless collection of the content of communications by and metadata concerning U.S. persons or people inside the United States.

4. As detailed in the letter many of our groups sent to you on June 18th, the PCLOB should continue to seek public disclosure of the information necessary for public understanding of the scope of surveillance authorities, safeguards for privacy rights and civil liberties, and the historical development of the law since 2001.
   Thank you for your consideration.

   Sincerely,

   American Civil Liberties Union
   Association of Research Libraries
   Bill of Rights Defense Committee
   Brennan Center for Justice

Center for Democracy and Technology
Center for National Security Studies
The Constitution Project
Cyber Privacy Project
Defending Dissent Foundation
Electronic Frontier Foundation
Electronic Privacy Information Center
Freedom of the Press Foundation
Government Accountability Project
National Association of Criminal Defense Lawyers
OpenTheGovernment.org
PEN American Center
Public Knowledge
Rights Working Group
World Privacy Forum