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By email

May 11, 2020

The Honorable Mitch McConnell
Majority Leader, United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Chuck Schumer
Minority Leader, United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Re: Amendments to the USA FREEDOM Reauthorization Act of 2020

Dear Majority Leader McConnell and Minority Leader Schumer:

The Reporters Committee for Freedom of the Press writes in support of two amendments to H.R. 6172, the USA FREEDOM Reauthorization Act of 2020, that would provide important checks on the use of Foreign Intelligence Surveillance Act authorities against members of the news media. We urge the Senate to pass the amendments as introduced, without weakening the important protections they provide for the press.

First, an amendment sponsored by Senators Mike Lee (R-UT) and Patrick Leahy (D-VT) would strengthen protections for the press in the Foreign Intelligence Surveillance Court by requiring the FISC to appoint an amicus curiae in FISA cases that present a “sensitive investigative matter,” including the rare case that might involve the activities of the “domestic news media.” Amicus curiae are court-appointed experts who can present “legal arguments that advance the protection of individual privacy and civil liberties.”¹

Currently, the law obligates the FISC to appoint amicus curiae only when it determines that an application for FISA surveillance authorities or FISC review of the use of those authorities “presents a novel or significant interpretation of the law.”² The Lee-Leahy amendment extends mandatory appointments to several other scenarios, including, crucially, when a case before the court “presents or involves” an “investigative matter involving the activities of . . . the domestic news media.”

The Lee-Leahy amendment would also helpfully extend the amicus requirement to cases that “present[] significant concerns with respect to the activities of a United States person that are protected by the first amendment to the Constitution of the United States.”

Under current law and the proposed amendment, the FISC could decline to appoint an amicus if it “issues a finding that such appointment is not appropriate.” Despite that limitation, the proposed amendment would significantly improve protections for the news media by ensuring that, in most cases affecting the media, the interests of an independent press and related First Amendment arguments will be presented to the FISC.

Second, Senators Steve Daines (R-MT) and Ron Wyden (D-OR) have introduced an amendment that would offer protections for journalists and their sources by prohibiting applications under the FISA “business records” provision that seek “internet website browsing information or internet search history information.”³

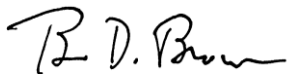
The current version of H.R. 6172 would prohibit the use of the business records provision to access cell site location. As the Reporters Committee noted in the recent Supreme Court decision requiring a warrant for more than seven days of such information, digital fingerprints like location information can expose “sources and journalistic methods [and] can put sources’ jobs and lives at risk, compromise the integrity of the newsgathering process, and have a chilling effect on reporting.”⁴

The same concern arises with web browsing and search history, which can also reveal newsgathering methods and source identities. Under the amendments, the government would still be able to seek location information and browsing or search history with a FISA warrant supported by a showing of probable cause.

If improperly tailored, both criminal and foreign intelligence surveillance authorities can, and historically have been, used to interfere with a free and independent press through the monitoring of newsgathering and attempts to stifle news reporting on matters of significant public interest. We urge the Senate to adopt these proposed amendments.

Please do not hesitate to contact Gabe Rottman, director of the Technology and Press Freedom Project at the Reporters Committee, with any questions. He can be reached at grottman@rcfp.org.

Sincerely,



Bruce D. Brown
Executive Director



Gabe Rottman
Director of the Technology and Press Freedom Project

cc: The Honorable Steve Daines
United States Senate

The Honorable Patrick Leahy
United States Senate

The Honorable Mike Lee
United States Senate

The Honorable Ron Wyden
United States Senate

¹ 50 U.S.C. § 1803(i)(4)(A).

² 50 U.S.C. § 1803(i)(2)(A).

³ 50 U.S.C. § 1861.

⁴ Brief of Amicus Curiae the Reporters Committee for Freedom of the Press et al. at 18, *Carpenter v. United States*, 138 S. Ct. 2206 (2018), <https://www.rcfp.org/wp-content/uploads/imported/2017-08-14-carpenter-v-us.pdf>.