



December 17, 2015

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
U.S. Senate
522 Hart Senate Office Building
Washington, DC 20510

RE: Opposition to H.R. 2029, the Consolidated Appropriations Act, 2016, with Cybersecurity, Surveillance, and Visa Waiver Discrimination Provisions

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Dear Majority Leader McConnell and Minority Leader Reid,

We write to you today to express our opposition to critical provisions of H.R. 2029, the Consolidated Appropriations Act, 2016 (“Act”) and, assuming the measure is approved and forwarded by the House, to urge all members to vote “No” when the matter comes to the floor of the Senate later this week if the provisions remain in the bill.

For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU defends all people from government abuse and overreach. While we understand the importance of adopting legislation to fund the federal government, our organizational mission rests on the foundational premise of preserving our nation’s civil rights and civil liberties protections.

Accordingly, we urge all Senators to oppose this legislation because of the onerous new threats to individual privacy, such as are contained in the cybersecurity provisions of this bill. We urge them to oppose it because of restrictions that would severely limit the powers of the Privacy and Civil Liberties Oversight Board, one of the few executive agencies dedicated to balancing terrorism protection efforts with preservation of individual rights and freedoms. And we surely urge them to oppose the first law in the wake of the Paris and San Bernardino attacks to enshrine discrimination against certain dual nationals of several predominantly Muslim countries. We urge Senators to amend this bill to remove these provisions that diminish the rights of individuals and to vote “No” if these provisions remain in the bill that comes to the floor.

A. Cybersecurity Provisions Create New Form of Corporate-Supported Mass Surveillance

We oppose Division N, the Cybersecurity Act of 2015, which would expand the government's surveillance authority, threaten privacy and civil liberties, and undermine cybersecurity. The Cybersecurity Act is modeled on the language in the Cybersecurity Information Sharing Act, opposed by 40 privacy and civil liberties groups from across the political spectrum; security experts; academics; major technology companies such as Apple and Salesforce; and business trade associations including the Business Software Alliance (BSA) and the Computer and Communications Industry Association.¹

The Cybersecurity Act expands government surveillance, and greatly expands the ability of companies to share private consumer information with the government. Specifically, we are concerned by provisions that:

- Grant companies liability protection, and exempt them from all privacy laws when sharing broadly defined “cyber threat indicators,” with the Department of Homeland Security (DHS) and other agencies designated by the President (which can include the FBI). This information is automatically disseminated to the NSA, and could include private information about consumers.
- Permit companies to share “cyber threat indicator” information directly with the FBI and NSA even in the absence of basic due process protections, such as warrant, notice, probable cause, or individualized suspicion.
- Allow the use of “cyber threat indicator” information to investigate and prosecute crimes having nothing to do with cybersecurity, including those under the Espionage Act that have been used to target whistleblowers.
- Fail to require that companies conduct a meaningful privacy scrub to remove personal identifying information of customers before sharing information with DHS, FBI, or NSA.

B. Discriminatory Visa Waiver (“VW”) Provisions Will Codify Differential Treatment of VW Citizens Who Are Dual Nationals of Iran, Iraq, Sudan, or Syria

We oppose the following provisions in Title II of Division O of the omnibus appropriations bill, the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act”:

- **Title II of Division O would arbitrarily discriminate against certain dual nationals who are citizens of visa waiver program (“VWP”) countries – based on their nationality and parentage.** This includes dual nationals born to Iranian, Syrian, Sudanese, or Iraqi fathers, even if they have never set foot inside those countries. Unlike

¹ See, Letter from Civil Society Organizations, Security Experts, and Academics Urging Opposition to the Cybersecurity Information Sharing Act to President Obama (July 27, 2015), https://static.newamerica.org/attachments/4459-massive-coalition-of-security-experts-companies-and-civil-society-groups-urge-obama-to-veto-cisa-3/Final_Coalition%20Ltr%20Urging%20Pres.%20to%20Veto%20CISA.ab124b18f5fb4f3397aa89761f43aef8.pdf, and Katie Bo Williams, *Tech Scrambles to Oppose Cyber Bill*, Oct. 2, 2015, <http://thehill.com/policy/cybersecurity/255710-tech-scrambles-to-oppose-cyber-bill> and

the U.S., which grants citizenship to all children born on U.S. soil, birth within Syria, Iran, or Sudan does not automatically confer citizenship. Rather citizenship is conferred by naturalization, marriage, or descent. For example, under the visa waiver bill, a British citizen who has lived in London her entire life will lose her visa waiver travel privileges if she was born to an Iranian father – even if she herself has never been in Iran. The new law will create two tiers of citizens in VWP countries: (1) those who can continue to travel to the U.S. visa-free; and (2) those who can't because they're dual nationals of Iran, Iraq, Sudan, or Syria. That's patent discrimination based on nationality and parentage.

- **Title II of Division O would unduly restrict travel of scholars, human rights investigators, refugee social workers, United Nations agency employees, and other professionals who have traveled to Iraq, Syria, Iran, or Sudan since March 1, 2011.** Title II would end VWP privileges for anyone who has been present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011. This broad travel restriction contains a very narrow exception for certain military personnel and government officials. Under the visa waiver bill, the following types of travelers would lose their visa waiver privileges:
 - Belgian human rights investigator documenting atrocities committed by ISIL;
 - German weapons inspector investigating nuclear facilities in Iran as part of the Iran Nuclear Deal;
 - Swiss social worker interviewing Kurds at refugee camp in northern Iraq;
 - French physician treating patients at Darfur clinic.

For these reasons, civil liberties organizations,² European ambassadors,³ the Iranian Deputy Foreign Minister,⁴ and Iranian-American leaders⁵ have raised concerns about these provisions.

C. PCLOB Oversight Surveillance Activities Are Weakened

² Nahal Toosi, *Civil liberties groups slam Obama-backed visa waiver changes*, POLITICO (Dec. 8, 2015), <http://www.politico.com/story/2015/12/obama-visa-waiver-changes-backlash-215875>.

³ See David O'Sullivan, European Union's (EU) Ambassador to the United States, and the ambassadors to the U.S. of the 28 EU member states, Opinion, *What the Visa Waiver Program means to Europe*, THE HILL (Dec. 14, 2015), <http://thehill.com/blogs/congress-blog/foreign-policy/262999-what-the-visa-waiver-program-means-to-europe>; and Geoff Dyer and Alex Barker, *Iran nuclear deal: EU aides fear US visa restrictions breach pact*, FINANCIAL TIMES (Dec. 16, 2015), <http://www.ft.com/cms/s/0/cb199be4-a3c9-11e5-873f-68411a84f346.html#axzz3uVRAfitv>.

⁴ Charles Hoskinson, *Iran: Visa waiver restrictions could violate nuclear deal*, WASH. EXAMINER (Dec. 14, 2015), <http://www.washingtonexaminer.com/iran-visa-waiver-restrictions-could-violate-nuclear-deal/article/2578284>.

⁵ See Dana Milbank, Opinion, *Middle Eastern by birth, American by choice and terrified of Trump*, WASH. POST (Dec. 14, 2015), https://www.washingtonpost.com/opinions/middle-eastern-by-birth-american-by-choice-and-terrified-of-trump/2015/12/14/6cc565ca-a2aa-11e5-b53d-972e2751f433_story.html; Bahman Kalbasi, *Iranians upset by potential changes to US visa waivers*, BBC (Dec. 10, 2015), <http://www.bbc.com/news/world-us-canada-35064719>; Farshad Farahat, Actor, Opinion, *Iranian Americans Are Not Second Class Citizens*, HUFF. POST (Dec. 14, 2015), http://www.huffingtonpost.com/farshad-farahat/iranian-americans-are-not_b_8799192.html; and Trita Parsi, President of the National Iranian American Council, *Will Congress Use Trump's Racist Rhetoric to Create Second Class Americans?*, HUFF. POST (Dec. 8, 2015), http://www.huffingtonpost.com/trita-parsi/will-congress-use-trumps-_b_8748200.html.

We oppose Division M, Sec. 305, which would significantly impact the ability of the Privacy and Civil Liberties Oversight Board (PCLOB) to conduct meaningful oversight of U.S. surveillance programs and other covert programs, including its ongoing review of Executive Order 12333. This provision would allow agencies to deny PCLOB access to any information “regarding” covert action—a broad restriction that would severely limit PCLOB’s ability to access information needed to understand and review U.S. surveillance and other key covert action programs. Such a restriction is wholly unnecessary given that members of the PCLOB receive the appropriate security clearances and are required to comply with rules regarding the treatment of classified information.⁶ If Sec. 305 becomes law, PCLOB would be unable to fulfill its statutory mission of ensuring a balance between government efforts to prevent terrorism while protecting privacy and civil liberties.

We encourage Senators to take the remaining days before the expiration of the current continuing resolution to remove or modify these specific provisions so as to preserve the principles of individual privacy and equal protection at stake. In the absence of such changes, we reluctantly urge you to vote “No” when H.R. 2029 comes before you for consideration. In the event these provisions become law, we encourage you to take corrective action as soon as possible when Congress reconvenes in 2016.

Please contact Michael Macleod-Ball at 202-675-2309 or at mmacleod@aclu.org if you have questions or comments.

Sincerely,



Karin Johanson
Director, Washington Legislative Office



Michael W. Macleod-Ball
Chief of Staff

cc: United States Senate

⁶ 42 U.S.C. § 2000ee