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Dear Mr. Maltby:

The American Civil Liberties Union (ACLU) welcomes the President's interest in strengthening privacy protections and safeguarding civil liberties at a crucial moment—one where surveillance, buoyed by new technologies, has the potential to become far more intrusive and widespread than ever before. As a society, we are at a pivotal point in defining what privacy will mean in an immersively digital age. The safeguards that the Executive Branch adopts today, during this period of rapid change, will establish the institutional norms that constrain future administrations and anchor future debates. President Obama has the opportunity to set us on the right path—and these decisions will shape the President's legacy for generations.

The ACLU has six specific recommendations for reform, described in more detail below. By way of preview, we urge the president to: (1) declassify the legal opinions that purport to justify these programs; (2) stop collecting bulk domestic metadata; (3) restore the long-standing requirement of individualized suspicion before accessing the content of Americans' communications; (4) purge records on Americans that are inappropriately obtained in the program targeted at foreign persons; (5) notify criminal defendants when foreign intelligence surveillance plays a role in their case; and (6) allow full judicial review, on the merits, of these surveillance programs.

The public still has a great deal to learn about surveillance programs that intelligence officials now concede have been in place for years. But based on recent disclosures about NSA programs under Section 215 of the Patriot Act and under Section 702 of the Foreign Intelligence Surveillance Act (FISA), the ACLU has serious legal and policy concerns about the scope of government surveillance and the threat it presents to Americans' Fourth Amendment right to privacy and their First Amendment rights of free association and free expression.

For instance, 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. Although the Section 215 program collects metadata, not content, the government's ability to aggregate and mine this data, revealing sensitive information about individuals, raises privacy concerns we have not confronted before. The President can set the standards that will protect information Americans rightly expect will remain private.

The same is true with respect to the content of our electronic communications. Even though surveillance under Section 702 must "target" only non-U.S. persons reasonably believed to be abroad, recent disclosures indicate that Americans' electronic communications are intentionally and unintentionally collected and retained in NSA's and/or other agencies' databases on massive scale. Americans justifiably expect that when the government "inadvertently" or "incidentally" collects their data when conducting surveillance that is supposed to exclude it, that data will be destroyed. Yet the NSA's procedures indicate that the agency retains such communications and, in some instances, even shares them with other government agencies.

Critically, the lack of full information in the public domain about the scope of such secret national-security surveillance increases our concern. Amendments to FISA since 2001 have substantially expanded the government's surveillance authorities, but the public is still without crucial information about the way these authorities have been interpreted by the FISA Court and implemented by the Executive Branch. In a democracy like ours, the public can only consent to laws when that consent is *informed*. Yet administration officials have said there are over a dozen secret judicial opinions issued by the FISA Court, some close to one hundred pages long. Our institutional mechanisms—including the people's ability to hold representatives accountable for their votes on legislation and their support for government actions—cannot function in the prevailing information vacuum.

Based on these concerns, we believe the President should immediately take the following steps to reform the NSA's surveillance programs and strengthen public oversight:

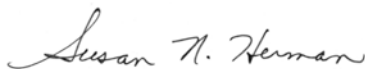
1. Increase Transparency: The President should direct the Department of Justice to declassify, on an expedited basis, all FISA Court or FISA Court of Review opinions and orders interpreting the meaning, scope, and constitutionality of the surveillance laws. He should do the same with respect to future FISA Court or FISA Court of Review rulings of the same kind, with the knowledge that this practice may prompt the FISA Court's judges to prepare opinions in a form suitable for publication going forward. Finally, the President should order the Department of Justice to release annual statistics about how often the government uses its national-security authorities, how many Americans' communications are swept up in these programs, and how and when Americans' information is accessed and used.
2. Halt Mass Acquisition of Domestic Metadata: The President should direct the NSA to stop acquiring bulk metadata concerning Americans' telephonic and electronic communications, or any other type of records, and limit the NSA's acquisition of domestic metadata to individuals who are agents of a foreign power or a designated terrorist organization. With respect to bulk information already gathered, the

President should order the NSA and other agencies to purge the data collected through these programs.

3. Halt Warrantless Acquisition of Domestic and U.S.-Person Content: The President should restore the requirement that when the government seeks to examine the content of a communication involving a U.S. person, or any communication with at least one end in the United States, it may do so only on the basis of individualized suspicion.
4. Strengthen Minimization Procedures to Better Protect U.S. Persons: In order to ensure that the NSA's warrantless surveillance is "targeted" at foreigners located abroad, as intelligence officials have assured the public, the President should direct the NSA to destroy any communications to or from U.S. persons or others located inside the United States that are intentionally, "inadvertently" or "incidentally" acquired under Section 702 of the FAA.
5. Provide Adequate and Unambiguous Notice in Criminal Prosecutions: The President should direct the Department of Justice to provide adequate notice in criminal cases involving foreign-intelligence surveillance, including specific notice of prosecutors' intent to use or disclose information derived from surveillance conducted pursuant to the FISA Amendments Act of 2008.
6. Allow Judicial Review of Surveillance Programs on the Merits: The President should instruct the Department of Justice to refrain from broad invocations of legal doctrines that prevent judicial review of government surveillance programs on their merits. Surveillance programs that implicate millions of Americans, whether intentionally or incidentally, should not be altogether insulated from court review. Public accountability to the judiciary strengthens, rather than endangers, the legitimacy of such laws by assuring the public that they are consistent with the Constitution. Expansive uses of the state-secrets privilege and the political-question doctrine prevent courts from reaching these core legal issues, as do unduly narrow formulations of the standing doctrine.

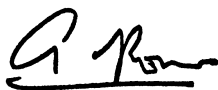
We urge the President to adopt and implement these recommendations, and to take the opportunity history has afforded him to set down careful, enduring rules for the protection of Americans' digital privacy.

Sincerely,



Susan N. Herman

President, American Civil Liberties Union



Anthony Romero

Executive Director, American Civil Liberties Union