

July 10, 2017

The Honorable Bob Goodlatte
Chairman
House Committee on the Judiciary
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
Ranking Member
House Committee on the Judiciary
2426 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers,

The undersigned civil rights and civil liberties organizations write to highlight the risks of overbroad domestic law enforcement use of Section 702 of the Foreign Intelligence Surveillance Act (FISA). As you consider the reauthorization of Section 702, we strongly urge reforms to ensure this surveillance tool is not improperly co-opted for purely domestic law enforcement purposes, and oppose any reauthorization that does not include substantial reforms. This is critical given America's history of selective targeting, persecution, and abuse directed at persons of color, religious minorities, and dissidents when the government has obtained surveillance powers absent adequate checks and oversight.

Section 702 is a warrantless surveillance authority that allows monitoring of non-US persons¹ abroad for broad foreign intelligence purposes, including these individuals' communications with individuals in the United States. This powerful tool—subject to far fewer checks than domestic surveillance—was passed to combat threats from hostile foreign powers and international terrorism, and was not intended for domestic law enforcement investigation of U.S. persons for matters unrelated to foreign intelligence.

Despite its stated purpose, the government interprets Section 702 to permit the FBI to deliberately seek out—without a warrant—communications of U.S. persons, a problem commonly called the “backdoor search loophole.” The *sole restriction* for FBI search queries is that they be for “foreign intelligence” or “law enforcement purposes.” No suspicion of wrongdoing is required. According to former Privacy and Civil Liberties Board Chair David Medine, even when “the FBI has *absolutely no suspicion of wrongdoing* . . . they're just sort of entitled to ‘poke around’” in communications obtained via Section 702.² The FBI's own Section 702 Minimization Guidelines state that it is an “encouraged practice” for FBI personnel to search FISA data “in making an initial decision to open an assessment.”³ According to FISA Court Special Advocate Amy Jeffress, “an assessment can be the subject of a query, *and assessments can be initiated for virtually any reason.*”⁴ This low standard circumvents Fourth Amendment requirements, and further raises concerns that there are inadequate protections to prevent Section 702 information from being used to improperly target communities of color, religious minorities, and activists.

Unrestricted law enforcement use of 702 data also amplifies existing concerns regarding selective targeting of communities of color, religious minorities, and activists. The FBI can use Section 702 data to start or support the investigation of *any* federal crime, including crimes completely unrelated to foreign intelligence or national security. Even if some restrictions on Section 702 are imposed, the potential for abuse still exists given the ability to use search queries that target certain groups and fish for evidence to start criminal investigations totally unrelated to foreign intelligence. The possibility that the FBI could expand the scope of queries in the

¹ As defined in 50 U.S.C. 1801(i).

² See, Senate Judiciary Committee Hearing, *Oversight and Reauthorization of the FISA Amendments Act* (May 10, 2016) (emphasis added).

³ FBI Section 702 Minimization Guidelines (September 16, 2016), fn 3.

⁴ Transcript of Proceedings Held Before The Honorable Thomas F. Hogan Foreign Intelligence Surveillance Court (October 20, 2015), 10 (emphasis added).

future to this end is unnecessary and unacceptable. Potential dissemination to and use of such information by other federal, state, and local law enforcement agencies exacerbates this problem.

The potential misuse of Section 702 is too serious a threat to ignore given America's history of using surveillance tools to target and persecute persons of color, religious minorities, and dissidents. The government's use of an ostensibly counterintelligence program, COINTELPRO, for surveillance against civil rights leaders and anti-war activists is a major reason FISA was originally created. But given recent trends of targeting surveillance at Muslim communities⁵ and Black Lives Matter protests,⁶ the risk of future abuse remains a threat, and requires that stronger checks and protections for Section 702 be put into place.

In order to address these serious concerns, we strongly recommend that the Committee support reforms that require a judicial warrant for Section 702 U.S. person queries to close the backdoor search loophole; limits *all* law enforcement use of Section 702 by federal, state, and local entities to foreign intelligence purposes; and clarify the definition of derivative use so that any law enforcement use of Section 702 data within these exceptions is subject to proper notice requirements to defendants.

Additionally, it is important to limit the scale of collection to prevent overbroad surveillance of innocent individuals not connected to wrongdoing. We recommend the Committee support reforms limiting the purpose of acquisition to combatting serious threats so that individuals in the U.S. with family, friends, and business associates abroad are not needlessly swept up in Section 702 surveillance, as well as codifying the prohibition on collecting communications "about" a target that are neither to nor from a target and prohibiting the collection of wholly domestic communications. Finally, we recommend additional oversight and transparency measures so that the public can evaluate the effectiveness of these measures, and impacted individuals can gain access to justice to legally challenge unlawful and unconstitutional Section 702 surveillance.

These reforms will help enhance protection of fundamental privacy, due process, and civil rights.

Sincerely,

African American Ministers In Action
American Civil Liberties Union
American-Arab Anti-Discrimination Committee
Black Alliance for Just Immigration
The Brennan Center for Justice
Center for Media Justice
Color of Change
Concerned Archivists Alliance
The Constitution Project
Council on American-Islamic Relations
Defending Rights & Dissent
Demand Progress
Government Information Watch
Hollaback!
Friends Committee on National Legislation

⁵ See, The American Civil Liberties Union, *Factsheet: The NYPD Muslim Surveillance Program*, available at <https://www.aclu.org/other/factsheet-nypd-muslim-surveillance-program>

⁶ See, e.g., George Joseph, *The Intercept, Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson* (July 24, 2015), available at <https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/>.

Martinez Street Women's Center
Media Alliance
NAACP
National Association of Criminal Defense Lawyers
National Center for Transgender Equality
National Coalition of Anti-Violence Programs
National Immigration Law Center
National LGBTQ Task Force
OpenTheGovernment
Restore the Fourth
RootsAction.org
South Asian Americans Leading Together
The Sunlight Foundation
X-Lab

CC: Members of the House Judiciary Committee