

October 13, 2017

Dear Chairman Goodlatte and Ranking Member Conyers:

Last week, many of the undersigned groups wrote to you expressing concern regarding news reports that suggested that the Section 702 reform bill being drafted failed to completely address concerns with the so-called “backdoor search loophole.”¹ The government uses this loophole to conduct warrantless searches for the information of individuals who are not targets of Section 702, including U.S. citizens and residents.

Unfortunately, the Section 702 reform bill introduced last week, the *USA Liberty Act*, fails to address many of the concerns raised in our letter. We cannot support the *USA Liberty Act* at this stage without further changes to strengthen the warrant requirement for searching databases containing Section 702 information.²

The *USA Liberty Act* departs from the recommendation made by the President’s Review Group on Surveillance,³ appropriations amendments that have previously passed the House,⁴ and urgings of civil society organizations,⁵ which would have required a probable cause warrant prior to searching the Section 702 database for information about a U.S. citizen or resident absent narrow exceptions. As written, it raises several concerns.

First, the bill’s most glaring deficiency is that it does not require a warrant to access content in cases where the primary purpose is to return foreign intelligence. This is an exception that threatens to swallow the rule.

For example, under this exception, the government would have free rein to search and access the content of religious organizations and civil society groups, Congressional staff, and other innocent Americans without a warrant simply if it asserted that the primary purpose was to gather information related to the policies of a foreign country. Similarly, if the government wanted to gather information about the veracity of assertions that extreme weather impacts national defense, it would have free rein to search through the Section 702 database with identifiers associated with every scientist in the country and access related content without a

¹ Letter from 58 Organizations to the House Judiciary Committee (Oct. 3, 2017), <https://www.aclu.org/letter/broad-coalition-58-organizations-urge-meaningful-reform-section-702-surveillance>.

² For some organizations, a backdoor search fix is necessary but insufficient to garner support for the bill.

³ RICHARD A. CLARKE ET. AL., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES (Dec. 12, 2013) available at https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

⁴ In 2014 and 2015, amendments to close the backdoor search loophole were passed in the House with bipartisan majorities. See Sam Sacks, *NSA Backdoor Searches Would End if House Amendment Survives*, The Intercept, June 12, 2015, <https://theintercept.com/2015/06/12/house-hopes-provision-close-surveillance-loophole-will-survive-time/>.

⁵ See *supra* note 1.

warrant. The government could then use any information obtained that was considered evidence of a crime in either of these examples in domestic criminal assessments, investigations or prosecutions, and the bill fails to make clear that such use would require the government to fulfill its obligation to provide notice to defendants of the government's use of Section 702 data.

Second, the bill's current language leaves room for the government to conduct queries and access content for law enforcement purposes without a warrant. For example, the current language does not make clear that the government must have a warrant to access content for law enforcement searches where the purpose may not be to specifically obtain evidence of a crime, or in cases where there may be a dual foreign intelligence and criminal purpose. As such, the bill could still permit the government to conduct queries and access content without a warrant in cases involving criminal investigations and prosecutions.

Third, the bill's consent and emergency exceptions are too broad. For example, the emergency provision does not parallel analogous provisions in FISA and require imminence or that the government go back to the FISA court for a warrant after beginning the emergency surveillance. At the same time, the consent provision could be read to allow individuals who are not a party to a communication to consent to its access.

Fourth, the bill fails to require any court approval to access what it terms "noncontents" information. This is at odds with current law, including the reforms passed as part of the *USA Freedom Act*, which recognized the need for a court order to access metadata. Compounding this concern is the fact that the bill does not exhaustively list the types of information that it would treat as noncontents information and thus fall under this exception.

Finally, the bill's warrant requirement fails to make clear that an independent judge – not the government – must make a finding of probable cause as part of the warrant process. To remedy this, the bill language should parallel analogous provisions in Title III.

We urge you to strengthen the warrant requirement for searches of databases containing Section 702 information by addressing the concerns above. If you have questions, feel free to contact Neema Singh Guliani at nguliani@aclu.org or 202-675-2322.

Sincerely,

18MillionRising.org
Advocacy for Principled Action in Government
American Association of Law Libraries
American Civil Liberties Union
American Library Association
American-Arab Anti-Discrimination Committee (ADC)

Asian American Legal Defense and Education Fund (AALDEF)
Brennan Center for Justice
Center for Democracy & Technology
The Center for HIV Law and Policy
Center for Media Justice
The Center for Security, Race and Rights, Rutgers Law School
Color Of Change
Constitutional Alliance
The Constitution Project
Council on American-Islamic Relations (CAIR)
Defending Rights & Dissent
Demand Progress Action
Electronic Frontier Foundation
Equality California
Fight for the Future
Friends Committee on National Legislation
Free Press Action Fund
Free the People
Freedom of the Press Foundation
Government Accountability Project
Government Information Watch
Japanese American Citizens League
Liberty Coalition
Media Alliance
NAACP
National Association of Criminal Defense Lawyers
National Center for Transgender Equality
National Council of Churches
National Immigration Law Center
National LGBTQ Task Force Action Fund
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OCA - Asian Pacific American Advocates
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PEN America
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South Asian Americans Leading Together (SAALT)
Wikimedia Foundation
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Yemen Peace Project