

November 6, 2017

Dear Senator:

The undersigned privacy, civil rights, civil liberties, and government oversight organizations write in strong opposition to the FISA Amendments Reauthorization Act of 2017 (S. 2010). This legislation is masquerading as a moderate “reform” bill. In fact, however, it would reauthorize Section 702 of the Foreign Intelligence Surveillance Act for eight years without making any meaningful reforms to better protect privacy. Indeed, in some respects, the bill represents an expansion of the government’s surveillance authorities under Section 702. The FISA Amendments Reauthorization Act includes many problematic provisions. The most concerning of those would:

- **Increase the government’s surveillance authority under Section 702 by expanding what can be targeted for surveillance under Section 702 in general.** The FISA Amendments Reauthorization Act could be interpreted as significantly expanding collection under Section 702 because it includes language that could be read to permit the government to target “a facility, place, premises, or property” for surveillance, which is far more expansive than what the law currently allows. As a result, the government could target, for example, entire facilities containing hundreds of users, even if many of those users were US persons that the government is prohibited from targeting.
- **Codify “abouts” collection in a way that permits more collection of information about non-targets.** “About” collection occurs when the government collects communications that are neither to nor from a target, but only “about” a target, such as communications that contain a target’s email address or phone number. The FISA Court has twice held that this type of collection raises significant and unique Fourth Amendment concerns, and imposed special privacy rules to protect certain kinds of data collected this way. The NSA recently stopped “abouts” collection after it could not comply with the Court’s privacy rules, but has signaled its intent to resume it.

In the guise of ending “abouts” collection, the bill actually permits the NSA to collect communications that are neither to nor from a target as long as the government’s collection was unintentional and directed at a “facility, place, premises, or property” the target uses more generically. It therefore explicitly authorizes the collection of communications that a target is not a party to, making Section 702 even broader than it is now.

Finally, the bill would, for the first time, codify intentional “abouts” collection. The bill would permit the government to restart this practice with the approval of the FISA Court, which could happen regardless of whether this provision of the bill becomes law. Once intentional “abouts” collection is re-approved by the Court, the bill would impose an one-month time period in which Congress could pass a law preventing it from re-starting -- a

time period so short that it would virtually ensure Congress' approval through inaction.

- **Codify the government's illegal practice of warrantlessly searching Americans' communications.** The government routinely conducts warrantless searches in databases containing information collected pursuant to Section 702 to look for specific Americans' communications, a practice referred to as "backdoor searches." The House of Representatives has overwhelmingly voted to end this practice on two occasions by voting for amendments that would require the government to obtain a warrant before conducting US person searches.¹ Two dozen Senators² have also sponsored legislation or amendments that include a warrant requirement, including most recently, Senators Feinstein and Harris.

Nonetheless, the FISA Amendments Reauthorization Act does not include a warrant requirement for these searches. Instead, if a query returned data concerning a "known" US person, the bill would require the FBI to submit its justifications for those queries to the FISA Court, which the court would review to ensure the search was lawful. However, the FISA Court has already held that warrantless backdoor searches are lawful, even in run-of-the mill criminal cases and even at the "assessment" stage -- before there is actual evidence to justify opening an investigation. The Court's review of individual searches would therefore offer no protection against government officials reading Americans' emails and listening to their phone calls without any evidence of wrongdoing, let alone a warrant.

- **Inadequately limit how Section 702 collected data can be used.** The justification for collecting communications without a warrant under Section 702 is that the only targets are foreigners, who the government argues are not entitled to constitutional protections, and the government is seeking to obtain foreign intelligence information. It goes against the premise of the law to use these communications against Americans in matters having nothing to do with foreign intelligence. While the FISA Amendments Reauthorization Act would impose some limits on when Section 702 data can be introduced as evidence in a criminal prosecution, those limitations are insufficient. The list of prosecutions in which Section 702 communications can be introduced as evidence is extremely expansive. It includes low-level crimes and crimes that are unrelated to national security or foreign intelligence, such as violations of the Computer Fraud and

¹ Massie-Lofgren Amendment, H.Amdt.935, 113th Cong. (amending H.R.4870, Jun. 16, 2014), <https://www.congress.gov/amendment/113th-congress/house-amendment/935/text?q=%7B%22search%22%3A%5B%22hr+4870%22%5D%7D>, and Massie-Lofgren Amendment, H.Amdt.503, 114th Cong. (amending H.R.2685, Jun. 11, 2015), <https://www.congress.gov/amendment/114th-congress/house-amendment/503/text?q=%7B%22search%22%3A%5B%22hr+2685%22%5D%7D>.

² USA FREEDOM Act, S. 1599, 113th Cong.—Cosponsors, <https://www.congress.gov/bill/113th-congress/senate-bill/1599/cosponsors> (last visited Oct. 24, 2017); USA RIGHTS Act of 2017, S. 1997, 115th Cong.—Cosponsors, <https://www.congress.gov/bill/115th-congress/senate-bill/1997/cosponsors> (last visited Oct. 24, 2027); Press Release, Dianne Feinstein, *Intelligence Committee Votes Down Section 702 Warrant Requirement* (Oct. 24, 2017), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=C4A6499F-F3F6-4980-9778-8C5CE8C4B9A9>

Abuse Act and some drug crimes. The bill also contains no restriction on using Section 702 communications as evidence in civil and administrative proceedings. And it contains no limits on the use of Section 702 communications outside of the courtroom -- for instance, to initiate or further an investigation.

- **Increase criminal penalties for unauthorized removal of classified information.** The bill would reclassify the misdemeanor of unauthorized removal of classified information as a felony offense, and it would increase the maximum penalty from one year to 10 years. This change is both unnecessary and incongruous when viewed in the context of other laws. The U.S. Code already contains several criminal provisions that carry 10-year sentences in cases where classified information is removed and disclosed to people unauthorized to receive it. Removal without disclosure is clearly a lesser offense, and it makes no sense to treat it with the same severity. Changing the offense to a felony would also remove a bargaining tool for the Department of Justice when attempting to obtain plea deals in leak cases.

The FISA Amendments Reauthorization Act would make Section 702 worse. We urge you to voice your opposition to this bill and instead, to support the meaningful reforms included in other legislative proposals.³

Sincerely,

18MillionRising.org
Advocacy for Principled Action in Government
American-Arab Anti-Discrimination Committee
American Civil Liberties Union
American Library Association
Arab American Institute
Association of Research Libraries
Brennan Center for Justice
Center for Democracy & Technology
Center for Human Rights and Privacy
Center for Media Justice
Color of Change
Constitutional Alliance
The Constitution Project
Council on American-Islamic Relations
Daily Kos
Defending Rights & Dissent
Demand Progress Action

³ See Press Release, Dianne Feinstein, *supra* note 2, and Coalition Letter to Senate, Letter from 42 Orgs in Support of USA RIGHTS Act (Oct. 24, 2017), https://s3.amazonaws.com/demandprogress/letters/Letter_from_42_Orgs_in_Support_of_USA_RIGHTS_Act_2017-10-24.pdf

Electronic Frontier Foundation
Engine
Fight for the Future
Freedom of the Press Foundation
FreedomWorks
Free Press Action Fund
Friends Committee on National Legislation
Government Accountability Project
Government Information Watch
Human Rights Watch
Indivisible
Liberty Coalition
Media Alliance
NAACP
National Association of Criminal Defense Lawyers
National Coalition Against Censorship
National Immigration Law Center
New America's Open Technology Institute
OpenTheGovernment
PEN America
Project On Government Oversight
Restore the Fourth
R Street Institute
Sunlight Foundation
TechFreedom
X-Lab
Yemen Peace Project