

October 3, 2017

Dear Chairman Goodlatte and Ranking Member Conyers,

On September 12, 2017, the *New York Times* reported that you were currently negotiating a bill to reauthorize and reform Section 702 of the Foreign Intelligence Act (FISA) in advance of its expiration at the end of this year. Specifically, the article reported that you are considering a reform to close what is commonly referred to as the “backdoor search loophole,” where the government warrantlessly searches Section 702 data for information about U.S. citizens and residents. According to the *New York Times*, the proposed fix would require that “FBI agents obtain warrants before searching the program’s repository of intercepted messages for information about American criminal suspects.”¹ *The Hill* followed up with a story stating, “investigators would apparently only be required to seek a warrant to use Americans’ data in criminal investigations, not national security investigations.”²

While full details regarding the bill have not yet been made public, the undersigned groups write to express our concern that the reform as described by the *New York Times* and *The Hill* would leave the so-called “backdoor search loophole” wide open. We urge you to ensure that any reform proposal include a full fix requiring all agencies to obtain a warrant based on probable cause to search Section 702 data for information about U.S. citizens and residents in all investigations.

Our groups have long expressed concern that Section 702 permits the government to unconstitutionally collect Americans’ international communications without a warrant or individualized approval from a judge. These concerns are compounded by the fact that the government routinely searches Section 702 data for the information of U.S. citizens and residents despite the fact that Section 702 explicitly prohibits the targeting of such persons. The government conducts these searches in broadly defined “foreign intelligence” investigations that may have no nexus to national security, in criminal investigations that bear no relation to the underlying purpose of collection, and even in the pre-assessment phase of investigations where there are no facts to believe someone has committed a criminal act.

Applying a warrant requirement only to searches of Section 702 data involving “criminal suspects,” is not an adequate solution to this problem. Most fundamentally, it ignores the fact that the Fourth Amendment’s warrant requirement is not limited to criminal or non-national security related cases. To the contrary, under traditional FISA, agencies wishing to collect Americans’ communications in foreign intelligence investigations are required to apply to the FISA Court for an individualized warrant. Warrantless searches of Section 702 data thus

¹ Charlie Savage, *Lawmakers Want Limits on Wiretaps Despite Trump Administration Objections*, N.Y. TIMES, Sept. 12, 2017, https://www.nytimes.com/2017/09/12/us/politics/fisa-warrantless-surveillance-law-reauthorization-debate.html?_r=0.

² Katie Bo Williams, *Lawmakers Grapple with Warrantless Wiretapping Program*, THE HILL, Sept. 18, 2017, <http://thehill.com/policy/national-security/351272-lawmakers-grapple-with-warrantless-wiretapping-program>.

undermine constitutional protections and create an unacceptable loophole to access Americans' communications in criminal and foreign intelligence investigations alike.

This is not just an abstract legal concern. As a practical matter, limiting the warrant requirement to "criminal suspects" would likely exclude thousands of searches by the NSA, CIA, and FBI that target U.S. citizens and residents. Specifically, it would exclude searches performed by the NSA, CIA, and NCTC – agencies whose missions are focused on foreign threats – yet nevertheless perform tens of thousands of searches on Section 702 data looking for information about U.S. citizens and residents. In 2016, the CIA and NSA reported performing 30,000 searches for information about U.S. persons, a strikingly high number that does not even include CIA metadata searches.³

In addition, such a formulation also would likely exclude thousands of FBI searches conducted for broad "foreign intelligence" purposes or as part of investigations of national security crimes. For instance, FBI investigations may often have dual foreign intelligence and criminal purposes. It is unclear whether or how the proposed warrant requirement would apply to searches that are purportedly for "foreign intelligence" purposes but are also linked to an ongoing criminal investigation. Moreover, the broad definition of "foreign intelligence," which can include information that merely relates to "foreign affairs,"⁴ makes searches for this purpose particularly vulnerable to abuse. Existing policies make it far too easy for the government to engage in searches that disproportionately target Muslim Americans and immigrants with overseas connections based merely on the assertion of a nebulous "foreign intelligence" purpose. The proposed change thus threatens to create a two-tiered system in which certain ethnic or religious groups are not protected by warrants, while others are.

Finally, the proposal described in the *New York Times* and *The Hill* provides no clarity as to what standard will apply to searches involving metadata such as call or email logs. In 2015, through passage of the USA Freedom Act, the House overwhelmingly acknowledged Americans' privacy interest in metadata and voted to limit the manner in which the government collects this information. In the same vein, any Section 702 reform bill should ensure that Section 702-acquired metadata is not queried under procedures that are less protective than what would currently apply to the government's domestic collection of Americans' metadata.

There are numerous reforms that must be made to Section 702 to ensure that it complies with the constitution. Nevertheless, we believe closing the loophole cited above would be a significant step forward in addressing the constitutional concerns with Section 702. Thus, we urge you to ensure that any Section 702 reform proposal completely closes this loophole by requiring a warrant based on probable cause for any search of Section 702 data for information about U.S. citizens and residents.

³ Off. of the Dir. of Nat'l Intelligence, *Statistical Transparency Report Regarding the Use of National Security Authorities For Calendar Year 2016*, IC ON THE RECORD, (April 2017), available at https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016.

⁴ 18 U.S.C. 1801 (e)(2)(B).

Sincerely,

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American Civil Liberties Union
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