



January 10, 2018

Re: Vote “YES” on the *USA RIGHTS Act* amendment, and vote “NO” on S.139 if *USA RIGHTS* does not pass.

Dear Representative,

As early as this week, we anticipate the House could vote on S.139, a modified version of the House Intelligence Committee’s FISA Amendments Reauthorization Act of 2017 (H.R. 4478), which would reauthorize Section 702 of the Foreign Intelligence Surveillance Act (FISA) with changes. Section 702 is set to expire on January 19, 2018.

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The ACLU strongly opposes S.139 in its current form and urges you to vote “NO” on the bill unless it is amended. S.139 is not reform. It risks codifying illegal practices that have been used to collect purely domestic communications and fails to meaningfully restrict the use of Section 702 to spy on Americans without a warrant.

The ACLU also urges you to vote “YES” on the *USA RIGHTS Act* amendment to S.139, which would modify Section 702 to help close the backdoor search loophole; end warrantless collection of purely domestic communications; and ensure that individuals get notice when Section 702 information is used against them. The ACLU would support S.139 if modified by the *USA RIGHTS Act* amendment. We anticipate that this will be the only amendment to strengthen the bill that will be permitted.

Opponents of the *USA RIGHTS Act* amendment incorrectly claim that it jeopardizes national security. On the contrary, the amendment leaves intact the core parts of the program that the government claims have national security value. For example, the amendment would allow the government to search without a warrant in a true emergency. In addition, it places no additional restrictions on the targeting of individuals overseas; permits surveillance for broad intelligence purposes; allows the government to continue warrantless searches of Section 702 data to obtain the information of individuals abroad; and permits the government to view the sensitive information of Americans returned in the course of looking for the information of foreigners overseas. Many of these practices raise constitutional and human rights concerns that are not fully addressed in the compromise reflected in the amendment.

The ACLU will be scoring these votes.

The ACLU opposes Section 702 because it allows unconstitutional warrantless surveillance of American citizens and residents.

The ACLU has long opposed Section 702 for allowing the government to unconstitutionally collect Americans' international communications without judicial oversight, or probable cause to believe that a surveillance target is engaged in criminal activity or is a "foreign power or agent of a foreign power" (i.e. members of a terrorist group, foreign government, etc.).¹

Since Section 702 was last reauthorized in 2012, Congress and the public have learned that the authority has been abused in the following ways:

The government performs "backdoor searches" on Section 702 data to obtain information about US citizens and residents. Section 702 explicitly prohibits the government from targeting US persons (defined as citizens and legal permanent residents) or individuals located in the US for surveillance. The government nevertheless searches Section 702 data looking specifically for information about US persons,² a practice often referred to as a "backdoor search." This permits Section 702 to be exploited as a tool against Americans in foreign intelligence and domestic criminal investigations alike. The NSA performs over 30,000 backdoor searches annually.³ While the FBI refuses to report the number of backdoor searches it performs, the Privacy and Civil Liberties Oversight Board reports that the number of these searches is "substantial," in part because it is "routine practice" for the FBI to conduct a query when an agent initiates a criminal assessment or investigation related to any type of crime.⁴

The government has collected purely domestic communications that are not to or from an overseas target without a warrant. The clear text of Section 702 only permits the collection of communications "to" or "from" a target. Notwithstanding this limit, the government has interpreted Section 702 to allow the collection of communications that are merely "about" a particular target, *including purely domestic communications*. In April 2017, the government halted this practice following a period of over five years during which it failed to comply with court-imposed privacy protections. Nevertheless, the government maintains that it has the legal authority to restart this collection.

The government does not comply with its obligation to provide notice to individuals who have Section 702 information used against them. Although the government is required to provide notice to individuals who have information obtained under or derived from Section 702 used against them, prior to 2013, no criminal defendant had received notice. Since that time, to our knowledge, notice

¹ 50 U.S.C. § 1801

² See *Public Hearing on Section 702 of the FISA Amendments Act Before the Privacy and Civil Liberties Oversight Board*, (Mar 19, 2014) (submission of Jameel Jaffer, Dep. Legal Dir., A.C.L.U), https://www.aclu.org/sites/default/files/assets/pclob_fisa_sect_702_hearing_-_jameel_jaffer_testimony_-_3-19-14.pdf.

³ OFF. OF THE DIR. OF NAT'L INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT REGARDING USE OF NATIONAL SECURITY AUTHORITIES, PP. 59, 137 (May 2, 2017), *available at* https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016

⁴ PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SEC. 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014) <https://www.pclob.gov/library/702-Report.pdf>. [Hereinafter "PCLOB Report on 702"].

has been provided to only 10 defendants.⁵ Given this, there are serious concerns that the government is misinterpreting its notice obligations, in part to avoid judicial review of Section 702.

The ACLU opposes S.139 without amendments for failing to meaningfully reform Section 702 and for making the law worse in several respects.

S.139 fails to meaningfully reform Section 702 and contains various provisions that make current law worse. We urge you to oppose the bill for the following reasons:

The bill contains language that could be used to argue that the government has codified “about” collection. Instead of prohibiting “about” collection, the bill allows the government to restart this practice if it gets FISA court approval, and Congress fails to pass legislation prohibiting the practice within a one-month time period. The government will likely argue that in passing this provision, the government has codified “about” collection, although no court outside of the FISA court has assessed its legality.

The bill contains ambiguous language that could be used to argue that Congress has expanded permissible “about” collection. In the past, “about” collection involved acquiring communications that contained a specific “selector” associated with a target, such as an email or phone number, and not merely an individual’s name. However, the current bill suggests that collection that references a target is permissible, which could be read by the government to allow “about” collection of communications that simply reference the name of an individual.

The provisions that purport to reform backdoor searches are mere fig leaves for reform. Even the FBI has stated the “warrant” requirement in the bill will not apply in the vast majority of cases.⁶ S.139 would require the government to get a warrant only when searching Section 702 data for information about US persons when there is a predicated criminal investigation and the search is not designed to return foreign intelligence. Thus, the bill would still allow warrantless US person searches in the pre-investigative stage, before there are the facts necessary to open a criminal investigation, which is the stage that FBI guidance encourages querying of agency databases. In addition, it would place no restrictions on foreign intelligence searches, despite the fact that the government is required to get a FISA warrant when targeting Americans for this type of surveillance. Nevertheless, the government will likely argue these provisions codify backdoor searches.

The ACLU supports the USA RIGHTS Act amendment to S. 139 because it meaningfully reforms Section 702.

The *USA RIGHTS Act* amendment meaningfully reforms abuses that have occurred under Section 702. Specifically:

The amendment helps close the backdoor search loophole. It requires the government to obtain a warrant before searching for the communications of US citizens and residents, who are not supposed

⁵ See Patrick C. Toomey, *Why Aren’t Criminal Defendants getting Notice of Section 702 Surveillance—Again?*, Just Security (Dec. 11, 2015), <https://www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again/>; Charlie Savage, *Warrantless Surveillance in Terror Cases Raises Constitutional Challenge*, N.Y. Times, Apr. 26, 2016, <http://www.nytimes.com/2016/04/27/us/warrantless-surveillance-in-terror-case-raises-constitutional-challenge.html>.

⁶ “Nadler Statement on Intel 702 Bill to be Considered on House Floor Next Week,” (Jan. 50, 2018), available at <https://democrats-judiciary.house.gov/news/press-releases/nadler-statement-intel-702-bill-be-considered-house-floor-next-week>

to be targeted under Section 702. However, the bill permits warrantless searches in a true emergency, provided the government obtains after-the-fact judicial approval.

The amendment ends the government's practice of collecting information that is not to or from a surveillance target, or a known wholly domestic communications. Unlike S.139, the amendment would stop the government from collecting information that is not to or from a surveillance target, and would prohibit the collection of known wholly domestic communications.

The bill makes clear that the government must provide notice to individuals who have Section 702 information used against them. The amendment clarifies that the government must provide notice to individuals who have Section 702 used against them if the government would not have had this information but for Section 702 surveillance.

The bill would allow individuals to challenge Section 702 in court. Opponents of the *USA RIGHTS Act* amendment have wrongly mischaracterized the bill's provisions as intended to allow spies to sue the US government. On the contrary, the amendment's standing provisions merely ensure that courts are able to provide judicial oversight of the Section 702 program. To date, no civil court has reached the merits on a challenge to the Section 702 program, in part because of the difficulty litigants face in establishing standing. The bill would provide standing for individuals to challenge surveillance in cases in which they engage in international communications and have taken steps to insulate themselves from government surveillance.

We urge you to vote "YES" on the *USA RIGHTS Act* amendment, and vote "NO" on S.139 if the *USA RIGHTS Act* amendment does not pass.

If you have questions, feel free to contact Legislative Counsel, Neema Singh Guliani at nguliani@aclu.org or 202-675-2322.



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