



June 15, 2016

RE: Vote “YES” on Massie-Lofgren Amendment 31 to the Department of Defense Appropriations Act of 2017, H.R. 5293

Dear Representative,

On behalf of the American Civil Liberties Union, we strongly urge you to vote “YES” on Amendment 31 from Reps. Massie (KY) and Lofgren (CA),¹ to the Department of Defense Appropriations Act of 2017, H.R. 5293. This amendment protects Americans privacy and security in the digital age by:

1. Defunding warrantless government searches using U.S. person identifiers (such as the name or phone number of a U.S. person) of the vast database of information collected under Section 702 of the Foreign Intelligence Surveillance Act (FISA), absent certain circumstances.
2. Prohibiting the use of funds to require or request that companies, entities or United States persons build security vulnerabilities into their products or services in order to facilitate government surveillance.

In both 2014 and 2015, this amendment passed with broad, bipartisan support in the House.² **We urge members to vote “YES” on Massie-Lofgren Amendment 31.**

Closing the Backdoor Search Loophole

Massie-Lofgren Amendment 31 would prevent funds from being used to search information collected under Section 702 of FISA for U.S. person identifiers (such as the name or phone number of a U.S. person) unless a warrant is obtained. The amendment contains narrow exceptions to this requirement, including emergencies.

Section 702 currently permits surveillance for purposes that extend far beyond national security needs or counterterrorism. Under Section 702, the government is permitted to target any foreigner if a significant purpose of the surveillance is to collect “foreign intelligence” information – a term defined so broadly that it could include communications between

¹ Amendment 31 is also sponsored by Reps. Poe (TX), Amash (MI), DelBene (WA), Farenthold (TX), Lieu (CA), Nadler (NY), Pocan (WI), Conyers (MI), Jordan (OH), Butterfield (NC), O'Rourke (TX), Gabbard (HI), Labrador (ID), Sensenbrenner (WI), and Issa (CA).

² 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/>.

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international organizations and government whistleblowers; diplomats; or even journalists and sources. The FISA court has a limited role in overseeing Section 702 surveillance and does not approve individual targets.

Although Section 702 of FISA prohibits the government from intentionally targeting the communications of U.S. persons, the NSA collects countless international communications involving U.S. persons under the authority. As a result of an apparent change in the NSA's internal practices in 2011, the NSA asserts the authority to search through these communications using U.S. person names and identifiers without a warrant.³ Through this so-called "backdoor search" loophole, the government has transformed Section 702 – designed to target citizens abroad – into a tool that can be used to conduct surveillance on U.S. citizens. Such a practice is particularly concerning given that internal procedures appear to allow the use of Section 702 information in criminal cases unrelated to national security, such as kidnapping, human trafficking, or certain transnational crimes.⁴

Concerns regarding the "backdoor search loophole" are compounded by the failure of the government to disclose critical information that would allow Congress to assess the law's impact on Americans. Despite requests from over 30 civil society groups,⁵ fourteen members of the House Judiciary Committee,⁶ and several Senators,⁷ the NSA has yet to disclose the number of Americans whose information is collected under Section 702 of FISA. Moreover, the government has also not disclosed the number of "backdoor searches" conducted by the FBI and other relevant agencies.⁸

³ OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITION OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE ACT OF 1978, AS AMENDED (Jan. 8, 2007), *available at* <http://www.dni.gov/files/documents/Minimization%20Procedures%20used%20by%20NSA%20in%20Connection%20with%20FISA%20SECT%20702.pdf>.

⁴ Robert Litt, Gen. Counsel, Office of the Dir. Of Nat'l Intelligence, Speech at the Brookings Institute: U.S. Intelligence Community Surveillance One Year After President Obama's Address (Feb. 4 2015), *available at* http://www.brookings.edu/~media/events/2015/02/04-surveillance/20150204_intelligence_surveillance_litt_transcript.pdf.

⁵ *See*, Coalition Letter to James R. Clapper, Director, Office of the Director of National Intelligence, Regarding Transparency of Section 702 of the Foreign Intelligence Surveillance Act (Oct. 29, 2015), https://www.brennancenter.org/sites/default/files/analysis/Coalition_Letter_DNI_Clapper_102915.pdf.

⁶ Letter from Rep. John Conyers, Jr., et. al. to James R. Clapper, Director, Office of the Director of National Intelligence, Regarding Transparency of Section 702 of the Foreign Intelligence Surveillance Act (Apr. 22, 2016) *available at* https://www.brennancenter.org/sites/default/files/legal-work/Letter_to_Director_Clapper_4_22.pdf.

⁷ Letter from Sen. Ron Wyden et. al. to James R. Clapper, Director, Office of the Director of National Intelligence, July 26, 2012, *available at* <https://www.wyden.senate.gov/download/?id=0C962BEA-1385-42B2-A6E4-B70779448EEB&download=1>.

⁸ The USA Freedom Act required government reporting of backdoor searches, but excluded the FBI.

Protecting Encryption and Securing Online Communications

Massie-Lofgren Amendment 31 would also protect Americans' security and privacy by preventing the government from mandating that companies, app developers, or any U.S. person weaken the encryption of their products or services. Encryption has played an essential role over the past decade in securing online data and communications—paving the way for technological innovation, economic opportunity and a free and open Internet. However, there have been recent calls from some in government to require companies to build “backdoors” into encrypted products to ensure government access. Such proposals jeopardize both security and privacy. Security researchers have repeatedly highlighted the security risks with “backdoors,” emphasizing that they can be exploited by hackers, fraudsters and foreign governments.⁹ In addition, a backdoor mandate would place an improper burden on private entities to build the government's surveillance infrastructure—switching the onus for surveillance from the government to companies (and through them to the American people).

We urge a “YES” vote on the Massie-Lofgren Amendment 31 to the Department of Defense Appropriations Act of 2017, H.R. 5293. This amendment represents a significant step forward in protecting Americans' privacy and security on line.

Please contact Legislative Counsel Neema Guliani with any questions at (202) 675-2322 or nguliani@aclu.org.

Regards,



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⁹ See, IAB and IESG Statement on Cryptographic Tech. & the Internet (Aug. 1996), available at <https://tools.ietf.org/html/rfc1984>; Stephanie K. Pell, *Jonesing for a Privacy Mandate, Getting a Technology Fix—Doctrine to Follow*, 14 N.C. J. L. & TECH. 489 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262397.