

March 1, 2017

The Honorable Bob Goodlatte, Chair
The Honorable John Conyers, Ranking Member
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

RE: Hearing on Section 702 of the Foreign Intelligence Surveillance Act

Dear Chairman Goodlatte and Ranking Member Conyers:

We write to you regarding the hearing on “Section 702 of the Foreign Intelligence Surveillance Act” that will be held March 1, 2017.

EPIC testified before this Committee during the 2012 FISA reauthorization hearings.¹ At the time, we urged the Committee to adopt stronger public reporting requirements. We noted, prior to the disclosures of Edward Snowden, that the scope of surveillance by the Intelligence Community was likely far greater than was known to the public or even to the Congressional oversight committees.

We write now to restate our earlier views that routine public reporting on the use of Section 702 authority should be strengthened. Public dissemination of a comprehensive, annual FISA report, similar to reports for other forms of electronic surveillance, would improve Congressional and public oversight of the Government’s information gathering activities. In addition, Congress should require publication of decisions of the Foreign Intelligence Surveillance Court (“FISC”). At present, the FISA grants broad surveillance authority with little to no public oversight. To reauthorize the expansive provisions of Title VII of the FAA without improved transparency and oversight would be a mistake.

The Need for Improved Reporting on FISA

For over twenty years, EPIC has reviewed the annual reports produced by the Administrative Office of the US Courts on the use of federal wiretap authority as well as the letter provided each year by the Attorney General to the Congress regarding the use of the FISA

¹ See Testimony of EPIC President Marc Rotenberg, *The FISA Amendments Act of 2008*, Hearing before the House Committee on the Judiciary, U.S. House of Representatives, May 31, 2012, <https://epic.org/privacy/testimony/EPIC-FISA-Amd-Act-Testimony-HJC.pdf>.

authority.² EPIC routinely posts these reports when they are made available and notes any significant changes or developments.³

The annual report prepared by the Administrative Office of the U.S. Courts provides a basis to evaluate the effectiveness of wiretap authority, to measure the cost, and even to determine the percentage of communications captured that were relevant to an investigation. These reporting requirements ensure that law enforcement resources are appropriately and efficiently used while safeguarding important constitutional privacy interests.

By way of contrast, the Attorney General's annual FISA report provides virtually no meaningful information about the use of FISA authority other than the applications made by the government to the Foreign Intelligence Surveillance Court.⁴ There is no information about cost, purposes, effectiveness, or even the number of non-incriminating communications of US persons that are collected by the government. Moreover, as the FAA allows programmatic surveillance without judicially-approved targets, and it is almost impossible to assess the impact of such surveillance on individuals. While we acknowledge Congress's 2006 amendment to the FISA reporting requirements that now requires disclosure of the numbers of National Security Letter requests made by the FBI concerning US persons, this information alone, without more, does not provide an adequate basis to evaluate these programs. By way of contrast, the reports prepared by the Department of Justice Inspector General concerning the misuse of NSL authority provide a great deal of information, but these reports are not prepared annually. So while FISA and NSL authorities remain in place, there is little information available to Congress or the public about how these authorities are used and what impact that has on the privacy of individuals.

We recognize that section 702 contains internal auditing and reporting requirements. The Attorney General and DNI assess compliance with targeting and minimization procedures every six months, and provide reports to the FISC, congressional intelligence committees, and the Committees on the Judiciary.⁵ The inspector general of each agency authorized to acquire foreign intelligence information pursuant to FISA must submit similar semiannual assessments. The head of each authorized agency must also conduct an annual review of FISA-authorized "acquisitions" and account for their impacts on domestic targets and American citizens.⁶ Yet none of this information is made available to the public, and there is not sufficient public

² See, e.g., Administrative Office of the US Courts, *Wiretap Report 2015*, <http://www.uscourts.gov/statistics-reports/wiretap-report-2015>; Letter from Assistant Attorney General Peter Kadzik to Charles Grassley, Chairman, U.S. Senate Committee on the Judiciary, et al., Apr. 28, 2016 ("2015 FISA Annual Report to Congress"), <https://fas.org/irp/agency/doj/fisa/2015rept.pdf>.

³ See *Title III Wiretap Orders: 1968-2015*, EPIC, http://epic.org/privacy/wiretap/stats/wiretap_stats.html; *Foreign Intelligence Surveillance Act*, EPIC, <http://epic.org/privacy/terrorism/fisa/>; *Foreign Intelligence Surveillance Court (FISC)*, EPIC, <https://epic.org/privacy/terrorism/fisa/fisc.html>.

⁴ It is clear from the Attorney General's annual reports that FISC applications are routinely approved with very rare exceptions. See *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 140 (2d Cir. 2011) ("Empirical evidence supports this expectation: in 2008, the government sought 2,082 surveillance orders, and the FISC approved 2,081 of them."). Of the Government's 1,499 requests to the FISC for surveillance authority in 2015, none were denied in whole or in part. See 2011 FISA Annual Report to Congress, *supra*, note 3.

⁵ 50 U.S.C. § 1881a(l)(1).

⁶ 50 U.S.C. § 1881a(l)(2).

oversight. There is simply no meaningful public record created for the use of these expansive electronic surveillance authorities.

Similar internal auditing procedures have failed in the past, and Congress should establish more robust public reporting requirements and oversight procedures.

The use of aggregate statistical reports has provided much needed public accountability of federal wiretap practices. These reports allow Congress and interested groups to evaluate the effectiveness of Government programs and to ensure that important civil rights are protected. Such reports do not reveal sensitive information about particular investigations, but rather provide aggregate data about the Government's surveillance activities. That is the approach that should be followed now for FISA.

Transparency is Necessary for Adequate Oversight

As EPIC explained in testimony before this Committee in 2012, over classification thwarts effective government oversight. Declassification is an especially important priority with respect to legal opinions issued by the Foreign Intelligence Surveillance Court (FISC), often referred to as a “secret court.”⁷ Congress recognized in the USA FREEDOM Act that FISC opinions contain important interpretations of law relevant to the privacy of individuals and the oversight of government surveillance programs. The law now requires the Director of National Intelligence, in consultation with the Attorney General, to:

conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 601(e)) that includes a significant construction or interpretation of any provision of law [...] and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion.⁸

Though this provision has improved transparency by requiring the declassification of new FISC opinions, many older opinions remain unnecessarily classified. Retroactive declassification of FISC opinions should be prioritized to ensure public oversight of the broad surveillance authority held by the court. Public oversight helps ensure that law enforcement resources are appropriately and efficiently used while safeguarding important constitutional privacy interests.

Section 702 and the Privacy of Non-U.S. Persons

Today EPIC made submissions to the Irish High Court in the case *Data Protection Commissioner v. Facebook*, a case concerning privacy protections for transatlantic data transfers.⁹

⁷ See Testimony of EPIC President Marc Rotenberg, *supra* note 2.

⁸ 50 U.S.C. § 1872.

⁹ Amended Outline Submissions of Behalf of the Amicus Curiae (EPIC), *Data Protection Comm'r v. Facebook*, 2016/4809 P, available at <https://epic.org/privacy/intl/schrems/02272017-EPIC-Amended-Submissions.pdf>.

The *DPC v. Facebook* case follows a landmark decision of the European Court of Justice which found that there were insufficient legal protections for the transfer of European consumer data to the United States, largely due to the surveillance authority granted to the U.S. government under Section 702.¹⁰ Mr. Schrems, an Austrian privacy advocate who brought the original case, has again challenged Facebook's business practices.¹¹ Other similar suits have been brought in the EU challenging the Privacy Shield agreement. Section 702 is the central focus of all of these legal challenges.

Section 702 authorizes bulk surveillance on the communications of non-U.S. persons, including EU citizens, by the U.S. government. Without reforms by Congress, Privacy Shield and other transatlantic data transfer mechanisms could very well be invalidated by the European Court of Justice.

Considering the interests of US citizens, our foreign allies, and commercial trade, there is a clear need to improve the privacy protections and the means of public reporting in Section 702.

Conclusion

In the lead up to the passage of the FISA Amendments Act of 2008, there was much discussion of the need to “balance” national security and privacy interests. But the better way to understand the challenge facing Congress may be to think in terms of the need to establish a counter-balance. Where the government is given new authorities to conduct electronic surveillance, there should be new means of oversight and accountability. The FISA Amendments Act has failed this test. There is simply too little known about the operation of Section 702 today to determine whether it is effective and whether the privacy interests of Americans are adequately protected. Before renewing the Act, we urge the committee to carefully assess these new procedures and to strengthen the oversight mechanisms by (1) improving public reporting requirements, and (2) strengthening the authority of the FISA Court to review the government’s use of FISA authorities.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

¹⁰ Judgment of Oct. 6, 2015, *Schrems v. Data Protection Comm’r*, Case C-362/14, EU:C:2015:650, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=EN>.

¹¹ *Data Protection Comm’r v. Facebook*, 2016/4809 P (H. Ct.) (Ir.)