

March 4, 2025

The Honorable Tulsi Gabbard  
Director of National Intelligence  
Office of the Director of National Intelligence  
Washington, D.C. 20511

Dear Director Gabbard,

We, the undersigned civil society organizations, are writing following your confirmation as Director of National Intelligence (DNI) to express our interest in engaging with you and your office on issues related to surveillance and civil liberties. We appreciate your long history of leadership and thoughtful consideration on these issues, and we welcome the perspectives on the intersection of privacy and intelligence-gathering that you bring to the DNI's role. This includes your commitment to ensuring that a warrant is required before agencies subject Americans to queries of their private data acquired through Section 702 of the Foreign Intelligence Surveillance Act (FISA). As Senator Mike Lee has stated, "The Fourth Amendment protects our right to be free from unreasonable searches and seizures, including the search of our private electronic communications."<sup>1</sup>

As Congress begins early discussions about the 2026 reauthorization of Section 702, we believe it is critical that policymakers and the public have access to key factual information that will ensure the legislative debate is based on a full and accurate understanding of the program's impact. Accordingly, we urge you to take the following initial steps to enhance public trust and oversight of government surveillance authorities:

1. **Declassify the Type of Service Provider at Issue in the New "Electronic Communications Service Provider" Definition:** As you are aware, in the Reforming Intelligence and Securing America Act (RISAA), Congress modified the definition of "electronic communications service provider" (ECSP). Both the New York Times<sup>2</sup> and multiple Senators during the floor debate<sup>3</sup> indicated that the modification was intended to address a ruling by the Foreign Intelligence Surveillance Court (FISC) that data centers for cloud computing do not constitute ECSPs. But because that part of the FISC opinion remained (and still remains) classified, the RISAA provision was deliberately drafted in broad terms to conceal the type of provider at issue. On its face, the new definition significantly expands the National Security Agency's (NSA) power, allowing the agency to compel nearly any U.S. business to assist in Section 702 surveillance. Senator Ron

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<sup>1</sup> Press Release, Sen. Chris Coons, Senators Coons, Lee Introduce Bipartisan Bill to Limit Secret Government Collection of Electronic Data (Apr. 16, 2024), <https://www.coons.senate.gov/news/press-releases/senators-coons-lee-introduce-bipartisan-bill-to-limit-secret-government-collection-of-electronic-data>.

<sup>2</sup> Charlie Savage, Senate Moves Toward Vote on Warrantless Surveillance Program, N.Y. Times (Apr. 16, 2024), <https://www.nytimes.com/2024/04/16/us/fisa-surveillance-bill-program.html>.

<sup>3</sup> 170 Cong. Rec. S2833 (daily ed. Apr. 18, 2024), <https://www.congress.gov/congressional-record/volume-170/issue-68/senate-section/article/S2833-7>.

Wyden has called the change “one of the most dramatic and terrifying expansions of government surveillance authority in history.”<sup>4</sup>

During last year’s reauthorization then Senate Intelligence Committee Chairman Mark Warner acknowledged that the provision “could have been drafted better”<sup>5</sup> and promised to work to narrow the provision in an upcoming legislative vehicle. However, the only way to make good on this promise without merely incorporating the FISC opinion by reference (a solution that would create “secret law”<sup>6</sup>) is for the administration to declassify the type of provider at issue—information that has now been in the public domain for almost a year. Without such basic transparency, the law will likely continue to permit sweeping NSA surveillance on domestic soil that threatens the civil liberties of all Americans. In addition, pending the legislative narrowing of this definition, we further request that you commit to applying the new definition only to the type of provider at issue in the FISC decision, in keeping with the statement that Senator Warner placed in the Congressional Record regarding the intent of the provision.<sup>7</sup>

2. **Publish a U.S. Person Estimate for Section 702:** For years, intelligence officials have refused to provide basic transparency about the number of U.S. persons whose communications are collected under Section 702 surveillance, despite repeated bipartisan requests from Congress. The public and lawmakers cannot meaningfully debate Section 702’s renewal without knowing its true impact on Americans’ privacy. While previous DNI officials have occasionally claimed that producing an estimate is infeasible (although ODNI’s position on this point has been inconsistent<sup>8</sup>), Princeton researchers have published a paper detailing a methodology that could reliably estimate the scale of “incidental” collection of Americans’ communications.<sup>9</sup> The intelligence community’s refusal to produce the requested estimate undermines trust and weakens the legitimacy of Section 702. Understanding the extent to which Americans’ private communications are

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<sup>4</sup> Press Release, Sen. Ron Wyden, *Wyden: I Will Do Everything in My Power to Stop Bill Expanding Government Surveillance Under FISA 702* (Apr. 16, 2024), <https://www.wyden.senate.gov/news/press-releases/wyden-i-will-do-everything-in-my-power-to-stop-bill-expanding-government-surveillance-under-fisa-702>.

<sup>5</sup> 170 Cong. Rec. S2833 (daily ed. Apr. 18, 2024),

<https://www.congress.gov/118/crec/2024/04/18/170/68/CREC-2024-04-18-senate.pdf>.

<sup>6</sup> Elizabeth Goitein, *Secret Law and Overbroad Surveillance Authority*, Just Security (May 2, 2024),

<https://www.justsecurity.org/96638/secret-law-overbroad-surveillance-authority/>.

<sup>7</sup> 170 Cong. Rec. S3309 (daily ed. May 2, 2024), <https://www.govinfo.gov/content/pkg/CREC-2024-05-02/html/CREC-2024-05-02-pt1-PgS3309-2.htm> (“Congress intends that the amended ECSP definition will be used exclusively to cover the type of service provider at issue in the litigation before the FISC—that is, those technology companies providing the service the FISC concluded (and the FISC-R affirmed) fell outside the then-existing statutory definition.”).

<sup>8</sup> For example, ODNI previously told Congress an estimate was not only feasible but could be provided in a matter of months. See Dustin Volz, *U.S. to Disclose Estimate of Number of Americans Under Surveillance*, Reuters (Dec. 13, 2016), <https://www.reuters.com/article/us-usa-cyber-surveillance/u-s-to-disclose-estimate-of-number-of-americans-under-surveillance-idUSKBN1452FX>.

<sup>9</sup> Aastha Kulshrestha et al., *Content-Agnostic Detection of Anomalous Cross-Device Tracking*, 2022 U.S. Sec. Symp. 2075 (Aug. 2022), <https://www.usenix.org/system/files/sec22-kulshrestha.pdf>.

swept up in this surveillance program is fundamental to assessing its implications for privacy and civil liberties and developing appropriate reforms.

Finally, previous administrations have taken meaningful steps to engage with and meet with civil society organizations on surveillance and transparency issues on a regular basis, and we strongly encourage you to continue this practice. Ongoing dialogue between the intelligence community and civil society is vital to ensuring that surveillance policies reflect democratic principles and the public interest.

We appreciate your commitment to ensuring transparency and accountability in the intelligence community, and we believe this commitment is of critical importance to the American public. We look forward to working with you to advance these shared values. We would welcome the opportunity to discuss these issues further at your earliest convenience. Please do not hesitate to reach out to us to arrange a meeting.

Sincerely,

Access Now

American Civil Liberties Union

Asian Americans Advancing Justice | AAJC

Brennan Center for Justice at NYU School of Law

Center for Democracy & Technology

Defending Rights & Dissent

Demand Progress Education Fund

Due Process Institute

Electronic Frontier Foundation

Electronic Privacy Information Center (EPIC)

Free Press Action

Freedom of the Press Foundation

Muslim Advocates

National Association of Criminal Defense Lawyers

New America's Open Technology Institute

Project On Government Oversight

Project for Privacy and Surveillance Accountability

Restore The Fourth

Whistleblower & Source Protection Program (WHISPeR) at ExposeFacts

X-Lab