



## FreedomWorks' Principles for FISA Reform

The current authorization for Title VII, including the controversial Section 702 of the Foreign Intelligence Surveillance Act (FISA), will expire on December 31, 2017.<sup>1</sup> Discussion of reauthorization with reform has already begun in the House. In the Senate, however, Republican members of the Select Committee on Intelligence have backed legislation<sup>2</sup> that would permanently reauthorize FISA without any reform.

We all agree that the United States needs extraordinary tools to thwart acts of terrorism. Still, FreedomWorks believes Congress should use this opportunity to thoughtfully reexamine FISA and the power it has given the intelligence community, specifically as it relates to Section 702.

Section 702 allows the intelligence community to collect electronic communications by non-citizens of interest on foreign soil. Officially, the program is not supposed to target U.S. citizens, but intelligence agencies cast a wide net and often the communications of Americans are swept up by the surveillance as well. The intelligence community has refused to provide Congress or the public with an estimate of how many Americans are affected by this collection.

Although the intelligence community is not allowed to use Section 702 to surveil Americans, the National Security Agency (NSA) has collected Americans' communications, including emails and phone calls. What's more, a declassified court opinion from 2011 stated that more than 250 million communications were collected annually.<sup>3</sup> That figure has likely only increased over time. According to available information, nine of 10 accounts that were collected through Section 702 were not the target and "nearly half of the surveillance files, a strikingly high proportion, contained names, e-mail addresses or other details that the NSA marked as belonging to U.S. citizens or residents."<sup>4</sup>

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<sup>1</sup> H.R. 5949, 112th Congress (2012) <https://www.congress.gov/bill/112th-congress/house-bill/5949>

<sup>2</sup> S. 1297, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/1297>

<sup>3</sup> Kimberly Dozier and Stephen Braun, "Secret court scolded NSA over surveillance in 2011, declassified documents reveal," Associated Press, August 22, 2013 <http://www.nbcnews.com/news/other/secret-court-scolded-nsa-over-surveillance-2011-declassified-documents-reveal-f6C10974392>

<sup>4</sup> Barton Gellman, Julie Tate and Ashkan Soltani, "In NSA-intercepted data, those not targeted far outnumber the foreigners who are," The Washington Post, July 5, 2014 [https://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322\\_story.html](https://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html)



Additionally, the wide net the intelligence community has cast has caused Americans to curtail their online activity. As a March 2015 survey from the Pew Research Center noted, “34% of those who are aware of the surveillance programs (30% of all adults) have taken at least one step to hide or shield their information from the government.”

Many in Congress often speak about finding “the balance between security and privacy.” Surveilling innocent Americans fundamentally fails to strike such a balance. Now is the time to reform FISA and ensure that Americans are protected from this form of government overreach.

**Sunset of Reauthorization:** Any reauthorization of Title VII of FISA must include a sunset. A sunset provision would ensure that a controversial and powerful law like FISA is subject to regular renewal by Congress. This allows lawmakers to thoughtfully review how the law has been used and whether Americans’ civil liberties have been infringed upon by the intelligence community. FreedomWorks strongly opposes any permanent reauthorization, such as S. 1297.

**Codification of the End of “About” Collection:** In April 2017, the NSA announced that it had ended “about” collection.<sup>5</sup> Prior to this change, the NSA had collected Americans’ electronic communications related to, or about, certain surveillance targets. These communications were not sent to or from surveillance targets, only written about them. This form of surveillance ran afoul of rules put in place by the Foreign Intelligence Surveillance Court (FISC). The NSA didn’t disclose rule violations to FISC for months and the NSA’s certification was delayed.<sup>6</sup> Moreover, such collection was not explicitly authorized by Section 702. Any reauthorization of FISA should include strong language to codify the end of “about” collection into law.

**Increased Transparency and Limitations on Information Collected:** The public is frequently told that FISA is used for counterterrorism and espionage. But this marketing of FISA only touches part of how the law is actually used. FISA is also used for an unknown number of other purposes, including cybersecurity, and technically it allows for the collection of anything related to the conduct of foreign affairs, which is clearly far too permissive.

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<sup>5</sup> Charlie Savage, “N.S.A. Halts Collection of Americans’ Emails About Foreign Targets,” The New York Times, April 28, 2017 <https://www.nytimes.com/2017/04/28/us/politics/nsa-surveillance-terrorism-privacy.html>

<sup>6</sup> Charlie Savage, “N.S.A. Halts Collection of Americans’ Emails About Foreign Targets,” April 28, 2017 <https://www.nytimes.com/2017/04/28/us/politics/nsa-surveillance-terrorism-privacy.html>



Congress should narrow the scope of information collected by the intelligence community under Section 702. The current definition of “[f]oreign intelligence information” is overly broad. In particular, surveillance is permitted simply if it relates to “the conduct of the foreign affairs of the United States.”<sup>7</sup>

The way a term like “foreign affairs” is interpreted highlights another critical issue. Legal opinions authored by the Department of Justice’s Office of Legal Counsel (OLC) provide guidance to the Attorney General and the President about what the Department of Justice considers legal.

Despite their immense power, these opinions are not always made available to the public.<sup>8</sup> These opinions include the justification for the extrajudicial drone strike that targeted an American citizen.<sup>9</sup> Secret interpretations of law are dangerous for the civil liberties of Americans, especially as it relates to Section 702 and other surveillance laws. Congress should ensure that any OLC guidance that touches on Section 702 is made public.

Additionally, the tech community should be allowed more latitude to disclose demands for information from the government to companies. The economic impact of surveillance on businesses was expected to surpass \$35 billion in 2016.<sup>10</sup> Allowing these companies to be more transparent could mitigate those losses, and given the government’s opacity around this issue, it would provide a slightly wider window for the public to assess this surveillance.

**Close the Backdoor Search Loophole:** Warrantless searches violate the Fourth Amendment rights of Americans. Full stop. The intelligence community and FBI, however, regularly conduct searches of information collected through Section 702 for “known U.S. person[s].”<sup>11</sup> There have been amendments offered in the past by Reps. Thomas Massie (R-Ky.) and Zoe Lofgren (D-

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<sup>7</sup> 50 USC §1801(e)(2)(B)

<sup>8</sup> Daniel Schuman and Adeb Sahar, “39% of Office of Legal Counsel Opinions Kept from the Public,” Sunlight Foundation, August 15, 2012 <https://sunlightfoundation.com/2012/08/15/39-of-office-of-legal-counsel-opinions-kept-from-the-public/>

<sup>9</sup> Greg Miller, “Legal memo backing drone strike that killed American Anwar al-Awlaki is released,” The Washington Post, June 23, 2014 [https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1\\_story.html](https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html)

<sup>10</sup> David McCabe, “Study: Surveillance will cost US tech sector more than \$35B by 2016,” The Hill, June 9, 2015 <http://thehill.com/policy/technology/244403-study-surveillance-will-cost-us-tech-sector-over-35b-by-2016>

<sup>11</sup> Office of the Director of National Intelligence, “Statistical Transparency Report Regarding Use of National Security Authorities for Calendar Year 2016,” April 2017 [https://icontherecord.tumblr.com/transparency/odni\\_transparencyreport\\_cy2016](https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016)



Calif.) to end backdoor searches. While these amendments were adopted by the House in 2014<sup>12</sup> and 2015,<sup>13</sup> the language was subsequently stripped out by leadership.<sup>14</sup>

Congress must close the backdoor loophole by requiring the government obtain a warrant consistent with Fourth Amendment standards before searching for Americans' communications. Additionally, although this is a separate but still connected issue, lawmakers should consider restrictions on the use of information collected under Section 702 in domestic, non-terrorism related criminal cases.<sup>15</sup>

**Disclosure of Incidental Collection:** During his confirmation hearing, Director of National Intelligence Dan Coats said that he would work to provide Congress with an estimate of the number of Americans whose electronic communications have been incidentally collected under Section 702 surveillance.<sup>16</sup> House Judiciary Committee Chairman Bob Goodlatte (R-Va.) and Ranking Member John Conyers (D-Mich.) have requested this estimate from DNI Coats.<sup>17</sup> Recently, DNI Coats claimed such an estimate would be difficult to produce,<sup>18</sup> telling members of the Senate Intelligence Committee that he would not provide the long sought after data.

Reauthorization of FISA must include language that mandates the intelligence community disclose an estimate of Americans whose electronic communications have been incidentally collected through Section 702 surveillance.

There are other reform proposals Congress should consider as it approaches reauthorization of FISA, including improvements to notice requirements for defendants, prohibitions on evidence laundering (parallel construction), and greater limitations on data retention.

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<sup>12</sup> Roll Call 327, 113th Congress (2014) <http://clerk.house.gov/evs/2014/roll327.xml>

<sup>13</sup> Roll Call 356, 114th Congress (2015) <http://clerk.house.gov/evs/2015/roll356.xml>

<sup>14</sup> Ryan Hagemann, "Massie-Lofgren Amendment Defends Encryption," Niskanen Center, June 13, 2016 <https://niskanencenter.org/blog/massie-lofgren-amendment-defends-encryption/>

<sup>15</sup> Jake Laperruque, "Closing Section 702 'Backdoor Search Loophole' Also Means Companion Reforms to Use Restrictions," Lawfare, February 15, 2017 <https://www.lawfareblog.com/closing-section-702-backdoor-search-loophole-also-means-companion-reforms-use-restrictions>

<sup>16</sup> Amir Nasr, "Coats Questioned on Russia Hacking, Surveillance at Confirmation Hearing," Morning Consult, February 28, 2017 <https://morningconsult.com/2017/02/28/coats-questioned-russia-hacking-surveillance-confirmation-hearing/>

<sup>17</sup> Letter from Reps. Bob Goodlatte and John Conyers to Director of National Intelligence Dan Coats, April 7, 2017 [https://judiciary.house.gov/wp-content/uploads/2017/04/040717\\_Letter-to-DNI-Coats.pdf](https://judiciary.house.gov/wp-content/uploads/2017/04/040717_Letter-to-DNI-Coats.pdf)

<sup>18</sup> Dustin Volz, "NSA backtracks on sharing number of Americans caught in warrant-less spying," Reuters, June 9, 2017 <http://www.reuters.com/article/us-usa-intelligence-idUSKBN19031B>



Additionally, FreedomWorks believes Congress should act sooner rather than later to reform and reauthorize Title VII of FISA. House and Senate leadership's proclivity for "governing by crisis" -- meaning waiting until the last minute to move on "must-pass" legislation -- is unacceptable. FreedomWorks will forcefully oppose reauthorization of Section 702 with no or weak reforms, especially if it comes at the last second. Lawmakers must approach this issue thoughtfully, with plenty of time to consider long overdue reforms.