Senator Mazie K. Hirono

Questions for the Record following hearing on June 27, 2017 entitled:

"The FISA Amendments Act: Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties"

Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice:

1) Why are "backdoor searches" so concerning? Is the concern abated at all if the information obtained through such searches is not used?

Backdoor searches are in clear tension with both the language of Section 702 and the requirements of the Fourth Amendment of the U.S. Constitution.

Government officials justify warrantless collection of communications under Section 702 by asserting that foreigners overseas have no Fourth Amendment rights. But even if that assertion is correct, Americans do have Fourth Amendment rights in their communications with foreigners—a point the FISA Court has explicitly recognized.

For that reason, Section 702 prohibits "reverse targeting": the practice of collecting foreign targets' communications when the government's intent is to obtain information about particular, known Americans who may be communicating with them.[1] To obtain approval from the FISA Court to conduct a program of surveillance under Section 702, the government must certify that it is not engaging in reverse targeting.[2]

It is perverse to allow warrantless collection on the basis of a pledge that the government is not seeking information on any particular, known Americans, and then to allow the NSA, CIA, FBI, and NCTC to sift through the data searching for information about particular, known Americans. At a minimum, it is a violation of the spirit of the reverse targeting prohibition, if not the letter. Worse, it constitutes an end run around the Fourth Amendment's warrant requirement, which is the heart of the Constitution's protection for Americans' privacy.

The violation of Americans' privacy does not depend on whether the information is actually used. If police search an American's home without a warrant, that person's privacy has been violated—and so has the Fourth Amendment—regardless of whether the police make use of anything they find in the home. The communications collected under Section 702 include e-mails and phone calls between friends, relatives, and close associates, which can include the most

[1] 50 U.S.C. § 1881a(b)(2).
[2] 50 U.S.C. § 1881a(g)(2)(A)(vii).

personal details of Americans' lives. A warrantless search of these communications is a grave intrusion on Americans' privacy even if the phone calls and e-mails are not used against anyone in court.

2) Why is it important to get an estimate of the number of Americans' communications that have been collected under Section 702?

The public's response to the revelation that the NSA was collecting Americans' phone records in bulk was one of outrage. Americans made clear to their representatives in Congress that the NSA should not be collecting their personal information in mass quantities and without individualized judicial oversight. Congress responded by passing the USA Freedom Act, which ended the NSA's bulk collection program.

The government has taken pains to distinguish Section 702 collection on the ground that the program is "targeted" at foreigners, not Americans, and that any collection of Americans' communications is "incidental." These terms have specialized legal meanings, but most Americans are not lawyers, and they might reasonably assume from these assurances that their personal information is *not* being collected in mass quantities. Obtaining an estimate of how many Americans' communications are swept up would pierce the legalese and would give lawmakers and the public a truer sense of the law's impact on Americans' privacy.

Even if the government were barred from conducting back door searches or using Section 702 data against Americans, it would be important to know the volume of Americans' communications being collected and stored. Any government database containing a large amount of sensitive personal information is vulnerable to hacking, data theft, negligent mishandling, or abuse. But knowing how many Americans' communications are collected becomes even more important in light of the government's insistence that it may lawfully search Section 702 data for information about Americans and use that information against them in criminal proceedings unrelated to foreign intelligence or national security.

On this point, I must make a correction to my oral testimony: I stated that the government had not released the list of crimes for which Section 702 data may be used. I was unaware that the government had recently released a memorandum on this subject pursuant to Freedom of Information Act litigation brought by the American Civil Liberties Union. This memorandum indicates that the government may use Section 702 communications as evidence, not only in cases relating to national security, but also in non-national security cases that involve death, kidnapping, substantial bodily harm, certain offenses against minors, incapacitation or destruction of critical infrastructure, cybersecurity, transnational crime, or human trafficking. Importantly, the memorandum does not include any limits on the use of Section 702 communications to *prepare* a criminal prosecution; the only restriction is on its use as evidence in court.

In short, when the government "incidentally" collects an American's communications, it can have a range of significant legal and practical implications. Without some sense of the scope of this collection, Congress and the public cannot make an informed decision about whether Section 702 properly balances national considerations and privacy rights. The government should not ask or expect Congress to move forward with reauthorization in the absence of such critical information.

3) Do you believe that Section 702 collection is constitutional? If not, could you explain why this issue has not been litigated in a traditional Article III court?

My opinion is that Section 702 collection in its current form is unconstitutional. Even assuming that foreigners overseas have no Fourth Amendment rights, it is clear—and the FISA Court has acknowledged[3]—that the incidental collection of Americans' communications implicates the Fourth Amendment. It follows that the government must obtain a warrant to search these communications, unless the search falls within one of the well-established exceptions to the warrant requirement.[4] Before Section 702's enactment, some lower courts had recognized a narrow "foreign intelligence exception" to the warrant requirement; the exception they described, however, would not have justified a massive warrantless collection program where the primary purpose of collection can be something *other than* the acquisition of foreign intelligence, and where the communications can be searched for evidence to use against Americans in criminal cases.[5]

The FISA Court has repeatedly upheld the constitutionality of Section 702. But it is important to note the context in which this case law has evolved. The FISA Court does not operate like a normal court; it acts in secret, usually hearing only from the government's side, and decisions in favor of the government are not subject to appeal. Several scholars and legal experts have pointed out that this secret, non-adversarial system creates an "echo chamber" that inevitably favors the government. Moreover, over time, it is apparent that the FISA Court has come to see itself as the government's partner in the task of implementing surveillance policy. The Court is not a rubber stamp, but it does see its job as "getting to yes," which is simply not an appropriate role for a court.

For several years, regular Article III courts were not able to review the constitutionality of Section 702. The government invoked the state secrets privilege and/or raised standing

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[3] *See* [REDACTED], 61-62 (FISA Ct. Apr. 26, 2017), available at https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf.
[4] *See* Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984); Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967).
[5] *See* United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980); United States v. Brown, 484 F.2d 418 (5th Cir. 1973); United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974) (*en banc*); United States v. Buck, 548 F.2d 871 (9th Cir. 1977).

challenges to block civil lawsuits, and failed to notify defendants in criminal cases when using evidence obtained or derived from Section 702 even though the statute required such notification. In 2013, the government changed its notification policy and gave notice to criminal defendants in a handful of cases. As a result, three district court judges and one court of appeals have now had occasion to rule on Section 702 surveillance.[6]

Thus far, the courts have adopted the reasoning of the FISA Court—which is perhaps unsurprising, given that the FISA Court has dealt with Section 702 surveillance for years, while the issue is still new to regular Article III courts. However, the non-FISA courts have limited their holdings to the facts of the cases before them. One of these courts cautioned that Section 702 could "potentially raise[] complex statutory and constitutional issues" in other cases[7]; another was careful to point out that "the constitutionality of upstream collection is not at issue here"[8]; a third upheld the surveillance in that case but declared, "I am convinced [Section 702] is susceptible to unconstitutional application as an end-run around the Wiretap Act and the Fourth Amendment's prohibition against warrantless or unreasonable searches."[9] The Privacy and Civil Liberties Oversight Board sounded its own note of caution in 2014, noting that "certain aspects of the Section 702 program push the program close to the line of constitutional reasonableness."[10]

If the government faithfully adheres to its obligation to notify criminal defendants when using evidence obtained or derived from Section 702 surveillance, the issue will continue to arise, and it is almost certainly a matter of time before a court finds that Section 702—or some aspect of it—falls on the other side of the constitutional line. Ultimately, the constitutionality of a warrantless surveillance program of this magnitude should be addressed and resolved by the United States Supreme Court, not a secret court operating outside the traditional adversarial process.

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[6] 37 See United States v. Mohamud, 843 F.3d 420 (9th Cir. 2016); United States v. Hasbajrami, 2016 WL 1029500 (E.D.N.Y. Mar. 8, 2016) (No. 11-CR-623 (JG)); United States v. Muhtorov, 187 F.Supp.3d 1240 (D. Col. Nov. 19, 2015); United States v. Mohamud, No. 3:10-CR-00475-KI-1, 2014 WL 2866749 (D. Or. June 24, 2014).
[7] *Mohamud*, 843 F.3d at 438.
[8] *Hasbajrami*, 2016 WL 1029500 at *7.
[9] *Muhtorov*, 187 F.Supp.3d at 1243.
[10] PRIVACY AND CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 9, 88 (2014), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/1211947/pclob-section-702-report-pre-release.pdf.