

**STATEMENT OF**

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**BEFORE THE**

**UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

**HEARING ON**

**OVERSIGHT AND REAUTHORIZATION OF THE FISA AMENDMENTS ACT:  
THE BALANCE BETWEEN NATIONAL SECURITY, PRIVACY AND CIVIL LIBERTIES**

**MAY 10, 2016**

Chairman Grassley, Ranking Member Leahy, and members of the committee, thank you for this opportunity to testify on behalf of the Brennan Center for Justice at New York University School of Law.<sup>1</sup> The Brennan Center is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. I co-direct the Center's Liberty and National Security Program, which works to advance effective counterterrorism policies that respect constitutional values and the rule of law.

Our nation faces real threats from international terrorism. The challenge and the responsibility you face as members of Congress is to ensure that these threats are addressed, not only effectively, but in a way that is consistent with the Constitution, the privacy interests of law-abiding individuals, and our nation's economic interests. Section 702 surveillance in its current form does not accomplish these aims.

## **I. A Massive Expansion in Government Surveillance**

Technological advances have revolutionized communications. People are communicating at a scale unimaginable just a few years ago. International phone calls, once difficult and expensive, are now as simple as flipping a light switch, and the Internet provides countless additional means of international communication. Globalization makes such exchanges as necessary as they are easy. As a result of these changes, the amount of information about Americans that the NSA intercepts, even when targeting foreigners overseas, has exploded.<sup>2</sup>

But instead of increasing safeguards for Americans' privacy as technology advances, the law has evolved in the opposite direction since 9/11, increasingly leaving Americans' information outside its protective shield. Section 702 is perhaps the most striking example.

Before 2007, if the NSA, operating domestically, sought to collect a foreign target's communications with an American inside the U.S., it had to show probable cause to the Foreign Intelligence Surveillance Court (FISA Court) that the target was a foreign power – such as a foreign government or terrorist group – or its agent. The Protect America Act of 2007 and the FISA Amendments Act of 2008 (which created Section 702 of FISA) eliminated the requirement of an individualized court order. Domestic surveillance of communications between foreign targets and Americans now takes place through massive collection programs that involve no case-by-case judicial review.<sup>3</sup>

In addition, the pool of permissible targets is no longer limited to foreign powers or their agents. Under Section 702, the government may target for foreign intelligence purposes any person or group reasonably believed to be foreign and located overseas.<sup>4</sup> The person or group need not pose any threat to the United States, have any information about such threats, or be

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<sup>1</sup> This testimony is submitted on behalf of a Center affiliated with New York University School of Law but does not purport to represent the school's institutional views on this topic. More information about the Brennan Center's work can be found at <http://www.brennancenter.org>.

<sup>2</sup> See ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CTR FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT 19-21 (2015), [https://www.brennancenter.org/sites/default/files/analysis/What\\_Went\\_%20Wrong\\_With\\_The\\_FISA\\_Court.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf).

<sup>3</sup> See 50 U.S.C. § 1881a.

<sup>4</sup> 50 U.S.C. § 1881a(b).

suspected of any wrongdoing. This change not only renders innocent private citizens of other nations vulnerable to NSA surveillance; it also greatly increases the number of communications involving Americans that are subject to acquisition – as well as the likelihood that those Americans are ordinary, law-abiding individuals.

Further expanding the available universe of communications, the government and the FISA Court have interpreted Section 702 to allow the collection of any communications to, from, *or about* the target.<sup>5</sup> The inclusion of “about” in this formulation is a dangerous leap that finds no basis in the statutory text and little support in the legislative history. In practice, it has been applied to collect communications between non-targets that include the “selectors” associated with the target (e.g., the target’s e-mail address or phone number). In theory, it could be applied even more broadly to collect any communications that even mention ISIS or a wide array of foreign leaders and public figures who are common topics of conversation. Although the NSA is prohibited from intentionally acquiring purely domestic communications, such acquisition is an inevitable result of “about” collection.

Other than the foreignness and location criteria (and certain requirements designed to reinforce them), the only limitation on collection imposed by the statute is that the government must certify that acquiring foreign intelligence is a significant purpose of the collection.<sup>6</sup> FISA’s definition of foreign intelligence, however, is not limited to information about potential threats to the U.S. or its interests. Instead, it includes information “that relates to . . . the national defense or the security of the United States; or . . . the conduct of the foreign affairs of the United States.”<sup>7</sup> This could encompass everyday conversations about current events. A conversation between friends or colleagues about the merits of the Trans-Pacific Partnership Agreement, for instance, “relates to the conduct of foreign affairs.” Moreover, while a significant purpose of the program must be the acquisition of foreign intelligence, the primary purpose may be something else altogether.<sup>8</sup> Finally, the statute requires the FISA Court to accept the government’s certifications under Section 702 as long as they contain the required elements.<sup>9</sup>

The government uses Section 702 to engage in two types of surveillance. The first is “upstream collection,” whereby a huge proportion of communications flowing into and out of the United States is scanned for selectors associated with designated foreigners. Although the data are first filtered in an attempt to weed out purely domestic communications, the process is imperfect and domestic communications are inevitably acquired.<sup>10</sup> The second type of Section 702 surveillance is “PRISM collection,” under which the government provides selectors, such as e-mail addresses, to U.S.-based electronic communications service providers, who must turn

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<sup>5</sup> PRIVACY AND CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 37 (2014) [hereinafter PCLOB 702 REPORT], available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1211947/pclob-section-702-report-pre-release.pdf>.

<sup>6</sup> 50 U.S.C. § 1881a(g)(2)(A)(v).

<sup>7</sup> 50 U.S.C. § 1801(e)(2).

<sup>8</sup> *In re Sealed Case*, 310 F.3d 717, 734 (FISA Ct. Rev. 2002).

<sup>9</sup> 50 U.S.C. § 1881a(i)(3)(A).

<sup>10</sup> PCLOB 702 REPORT, *supra* note 5, at 36-41.

over any communications to or from the selector.<sup>11</sup> Using both approaches, the government collected more than 250 million Internet transactions a year as of 2011.<sup>12</sup>

Due to the changes wrought by Section 702, it can no longer be said that FISA is targeted at foreign threats. To describe surveillance that acquires 250 million Internet communications a year as “targeted” is to elevate form over substance. And on its face, the statute does not require that the targets of surveillance pose any threat, or that the purpose of the program be the collection of threat information.

It is certainly possible that the government is choosing to focus its surveillance more narrowly than Section 702 requires. The certifications that the government provides to the FISA Court – which include the foreign intelligence categories at which surveillance is aimed, and could therefore shed some light on this question – have not been publicly disclosed by the government. Even if actual practices stop short of what the law allows, however, the available statistics suggest a scope of surveillance that is difficult to reconcile with claims of narrow targeting. Moreover, one certification, listing the foreign nations and factions about which foreign intelligence could be sought, was leaked; it included most of the countries in the world, ranging from U.S. allies to small countries that play little role on the world stage.

More important, Americans’ privacy should never depend on any given administration’s voluntary self-restraint. Nor should it depend on additional requirements layered on by the FISA Court, given that the court’s membership changes regularly and its judges generally are not bound by others’ decisions. Section 702 establishes the boundaries of permissible surveillance, and it clearly allows collection of communications between Americans and foreigners who pose no threat to the U.S. or its interests. That creates an enormous opening for unjustified surveillance.

## **II. Constitutional Concerns**

The warrantless acquisition of millions of Americans’ communications presents deep Fourth Amendment concerns. The communications being obtained under Section 702, like any e-mails or phone calls, include not only mundane conversations, but the most private and personal confidences, as well as confidential business information and other kinds of privileged exchanges. Since the Supreme Court decided *Katz v. United States* in 1967, the government has been required to obtain a warrant to wiretap Americans’ communications.<sup>13</sup> Moreover, in a subsequent case, the Court made clear that this requirement applied in domestic national security cases as well as criminal cases.<sup>14</sup>

### **A. “Incidental” Collection**

The government nonetheless justifies the warrantless collection of international communications under Section 702 on the ground that the targets themselves are foreigners

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<sup>11</sup> *Id.* at 33-34.

<sup>12</sup> [Redacted], 2011 WL 10945618, at \*9 (FISA Ct. Oct. 3, 2011).

<sup>13</sup> 389 U.S. 347 (1967).

<sup>14</sup> *United States v. U.S. Dist. Court for the E. Dist. Of Mich. (Keith)*, 407 U.S. 297 (1972).

overseas, and the Supreme Court has held (in a different context) that the government does not need a warrant to search the property of a non-U.S. person abroad. Although the communications obtained under Section 702 sometimes involves both foreigners and Americans, the FISA Court has held that the right to conduct warrantless surveillance of the foreign target entails the right to “incidentally” collect the communications of those in contact with the target.

But there is nothing “incidental” about the collection of Americans’ communications under Section 702. Indeed, with one exception,<sup>15</sup> Section 702 wrought no change to the government’s authority to collect foreign-to-foreign communications. The primary change brought about by Section 702 was to eliminate the requirement of an individual court order when a foreign target communicates *with an American*. The legislative history makes clear that facilitating the capture of communications to, from, or about Americans was a primary purpose, if not the primary purpose, of the statute.<sup>16</sup>

In any event, outside of Section 702, the case law does not support the existence of a right to warrantless “incidental” collection. In criminal cases, courts have held that the government need not obtain separate warrants for everyone in contact with the target. But they have emphasized the existence of a warrant for the target (which affords some vicarious protection to those in contact with him) and the application of strict minimization procedures.<sup>17</sup> In the Section 702 context, there is no warrant to help mitigate “incidental” collection, and the minimization procedures are significantly weaker than those that apply in the domestic criminal context.<sup>18</sup>

## **B. The Foreign Intelligence Exception**

Alternatively, the FISA Court (and, more recently, a district court following its lead<sup>19</sup>) has relied on the “foreign intelligence exception” to the Fourth Amendment’s warrant requirement. The Supreme Court has never recognized this exception, and there is significant controversy over its scope. The FISA Court has construed the exception extremely broadly,

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<sup>15</sup> See *infra* Part VII(A).

<sup>16</sup> See, e.g., *FISA for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9 (2006), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg43453/pdf/CHRG-109shrg43453.pdf> (statement of Michael Hayden, Director, Nat’l Sec. Agency) (“[W]hy should our laws make it more difficult to target the al Qaeda communications that are most important to us—those entering or leaving this country.”); see also Transcript of Privacy and Civil Liberties Oversight Board Public Workshop, Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act 109 (July 9, 2013), available at <http://www.pclob.gov/library/20130709-Transcript.pdf> (statement of Steven G. Bradbury, Former Principal Deputy Ass’t Att’y Gen., Dep’t of Justice Office) (“But it is particularly focused on communications in and out of the United States because . . . those are the most important communications you want to know about if you’re talking about a foreign terrorist suspect communicating to somebody you don’t know inside the United States.”).

<sup>17</sup> See, e.g., *United States v. Kahn*, 415 U.S. 143 (1974); *United States v. Figueroa*, 757 F.2d 466 (2d Cir. 1985).

<sup>18</sup> See Brief for Appellant at Argument I, *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (No. 02-001) (noting that “FISA’s minimization standards are more generous than those in Title III”).

<sup>19</sup> *United States v. Mohamud*, No. 3:10-cr-00475, 2014 WL 2866749 (D. Or. June 24, 2014).

stating that it applies even if the target is an American and even if the primary purpose of collection has no relation to foreign intelligence.<sup>20</sup>

In the era before FISA, however, several federal courts of appeal had the opportunity to review foreign intelligence surveillance, and they articulated a much narrower version of the exception.<sup>21</sup> They held that it applies only if the target is a foreign power or agent thereof, and only if the acquisition of foreign intelligence is the primary purpose of the surveillance. They also emphasized the importance of close judicial scrutiny (albeit after-the-fact) in cases where the target challenges the surveillance. While these cases addressed surveillance activities that differed in many respects from Section 702, it is clear that Section 702 surveillance would not pass constitutional muster under the standards they articulated.

A detailed analysis of the case law is beyond the scope of this testimony, but the Brennan Center's report, *What Went Wrong With the FISA Court*, engages in such an analysis and explains why the foreign intelligence exception does not justify Section 702 surveillance.<sup>22</sup>

### **C. The Reasonableness Test**

Even if a foreign intelligence exception applies, the surveillance still must be “reasonable” under the Fourth Amendment. The “reasonableness” inquiry entails weighing the government’s interests against the intrusion on privacy.<sup>23</sup>

In undertaking this analysis, courts generally accept that the government’s interest in protecting national security is of the highest order – as it certainly is. But to determine the reasonableness of a surveillance scheme, one must also ask whether it goes further than necessary to accomplish the desired end. For instance, how does it further national security to allow the targeting of foreigners who have no known or suspected affiliation with foreign governments, factions, or terrorist groups? How does it further national security to permit the FBI to search for Americans’ communications to use in prosecutions having nothing to do with national security?<sup>24</sup>

Moreover, in assessing the impact on privacy rights, the FISA Court has focused on the protections offered to Americans by minimization procedures.<sup>25</sup> As discussed below, however, these protections fall short in a number of significant respects. On their face, they allow Americans’ communications to be retained, disseminated, and used in a wide range of circumstances.

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<sup>20</sup> See, e.g., *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008); *In re DNI/AG Certification [REDACTED]*, No. 702(i)-08-01 (FISA Ct. Sept. 4, 2008).

<sup>21</sup> See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *United States v. Butenko*, 494 F.2d 593, 604-05 (3rd Cir. 1974) (en banc); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977).

<sup>22</sup> GOITEIN & PATEL, *supra* note 2, at 11-12, 35-43.

<sup>23</sup> *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013).

<sup>24</sup> See *infra* Part V.

<sup>25</sup> *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1015 (FISA Ct. Rev. 2008).

### III. Risks and Harms of Mass Data Collection

Constitutional concerns aside, the mass collection and storage of communications that include sensitive information about Americans carries with it significant risks and harms, which must be considered in evaluating what the appropriate scope of surveillance should be.

#### A. Risk of Abuse or Mishandling of Data

The substantive legal restrictions on collecting information about Americans are looser than they have been since before 1978. At the same time, the amount of data available to the government and the capacity to store and analyze that data are orders of magnitude greater than they were during the period of J. Edgar Hoover's worst excesses. History teaches us that this combination is an extraordinarily dangerous one.

To date, there is only limited evidence of intentional abuse of Section 702 authorities.<sup>26</sup> There have, however, been multiple significant instances of non-compliance by the NSA with FISA Court orders. Notably, these include cases in which the NSA did not detect the non-compliance for years, and the agency's overseers had no way to uncover the incidents in the meantime. Given that these incidents went unreported for years even when the agency was *not* trying to conceal them, it is not clear how overseers would learn about intentional abuses that agency officials were making every effort to hide. In other words, regardless of whether intentional abuse is happening today, the *potential* for abuse to take place – and to go undiscovered for long periods of time – is clearly present.

Inadvertent failures to adhere to privacy protections are a concern in their own right. On multiple occasions in the past decade, the FISA Court has had occasion to rebuke the NSA for repeated, significant, and sometimes systemic failures to comply with court orders. These failures took place under multiple foreign intelligence collection authorities (including Section 702) and at all points of the programs: collection, dissemination, and retention. It is instructive to review some of the Court's comments in these cases. The following statements are excerpted from four opinions:

- “In summary, since January 15, 2009, it has finally come to light that the FISC’s authorizations of this vast [Section 215 telephony metadata] collection program have been premised on a flawed depiction of how the NSA uses [the] metadata. This misperception by the FISC existed from the inception its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government’s submissions, and despite a government-devised and Court-mandated oversight regime. The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently

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<sup>26</sup> See, e.g., Letter from Dr. George Ellard, Inspector Gen., Nat’l Sec. Agency, to Sen. Charles E. Grassley (Sept. 11, 2013), available at <http://www.privacylives.com/wp-content/uploads/2013/09/09262013-NSA-Surveillance-09-11-13-response-from-IG-to-intentional-misuse-of-NSA-authority.pdf> (detailing 12 instances of intentional abuse of NSA bulk surveillance data, most involving employees searching for information on their romantic partners).

and systemically violated that it can fairly be said that this critical element of the overall [bulk collection] regime has never functioned effectively.”<sup>27</sup>

- “The government has compounded its non-compliance with the Court’s orders by repeatedly submitting inaccurate descriptions . . . to the FISC.”<sup>28</sup>
- “[T]he NSA continues to uncover examples of systematic noncompliance.”<sup>29</sup>
- “Under these circumstances, no one inside or outside of the NSA can represent with adequate certainty whether the NSA is complying with those procedures.”<sup>30</sup>
- “[U]ntil this end-to-end review is completed, the Court sees little reason to believe that the most recent discovery of a systemic, ongoing violation . . . will be the last.”<sup>31</sup>
- “The Court is troubled that the government’s revelations regarding NSA’s acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.”<sup>32</sup>
- “The current application [for pen register/trap and trace data] . . . raises issues that are closely related to serious compliance problems that have characterized the government’s implementation of prior FISA orders.”<sup>33</sup>
- “As far as can be ascertained, the requirement was simply ignored.”<sup>34</sup>
- “Notwithstanding this and many similar prior representations, there in fact had been systematic overcollection since [redacted]. . . . This overcollection . . . had occurred continuously since the initial authorization . . . .”<sup>35</sup>
- “The government has provided no comprehensive explanation of how so substantial an overcollection occurred.”<sup>36</sup>
- “[G]iven the duration of this problem, the oversight measures ostensibly taken since [redacted] to detect overcollection, and the extraordinary fact that the NSA’s end-to-end review overlooked unauthorized acquisitions that were documented in virtually every record of what was acquired, it must be added that those responsible for conducting oversight at NSA failed to do so effectively.”<sup>37</sup>
- “The history of material misstatements in prior applications and non-compliance with prior orders gives the Court pause before approving such an expanded collection. The government’s poor track record with bulk PR/TT acquisition . . . presents threshold concerns about whether implementation will conform with, or exceed, what the government represents and the Court may approve.”<sup>38</sup>
- “As noted above, NSA’s record of compliance with these rules has been poor. Most notably, NSA generally disregarded the special rules for disseminating United States

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<sup>27</sup> *In re* Production of Tangible Things from [Redacted], No. BR 08-13, at 10-11 (FISA Ct. Mar. 2, 2009).

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> [Redacted], 2011 WL 10945618, at \*5 n. 14 (FISA Ct. Oct. 3, 2011).

<sup>33</sup> [Redacted], Docket No. PR/TT [Redacted], at 4 (FISA Ct. [Redacted]) *available at* <https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf>.

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 20.

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.* at 22.

<sup>38</sup> *Id.* at 77.



person information outside of NSA until it was ordered to report such disseminations and certify to the FISC that the required approval had been obtained... The government has provided no meaningful explanation why these violations occurred, but it seems likely that widespread ignorance of the rules was a contributing factor.”<sup>39</sup>

- “Given NSA’s longstanding and pervasive violations of the prior orders in this matter, the Court believes that it would be acting well within its discretion in precluding the government from accessing or using such information.”<sup>40</sup>
- “[The] cases in which the FBI had not established the required review teams seemed to represent a potentially significant rate of non-compliance.”<sup>41</sup>
- “The Court was extremely concerned about these additional instances of non-compliance.”<sup>42</sup>
- “Perhaps more disturbing and disappointing than the NSA’s failure to purge this information for more than four years, was the government’s failure to convey to the Court explicitly during that time that the NSA was continuing to retain this information . . . .”<sup>43</sup>

It is unclear whether these failures occurred because the NSA was not putting sufficient effort into compliance, because the NSA lacked the technical capability to ensure consistent compliance, or some other reason. Whatever the explanation, the fact that the agency’s many failures to honor privacy protections were inadvertent is of limited comfort when the NSA is asking Congress and the American public to entrust it with extensive amounts of private data.

## **B. Chilling Effect**

When Americans are aware that intelligence agencies are collecting large amounts of their data (and not just the data of suspected criminals and terrorists), it creates a measurable chilling effect on free expression and communication. After Edward Snowden’s revelations in June 2013, an analysis of Google Trends data showed a significant five percent drop in U.S.-based searches for government-sensitive terms (e.g., “dirty bomb” or “CIA”). A control list of popular search terms or other types of sensitive terms (such as “abortion”) did not show the same change.<sup>44</sup> In 2013, PEN America surveyed 528 American writers to learn how the disclosures affected their behavior. Twenty-eight percent reported curtailing social media activities; 24 percent avoided certain topics by phone or email; 16 percent chose not to write or speak on a certain topic; and 16 percent avoided Internet searches or website visits on controversial or suspicious topics.<sup>45</sup> These kinds of self-censorship are inimical to the robust exchange of ideas necessary for a healthy democracy.

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<sup>39</sup> *Id.* at 95.

<sup>40</sup> *Id.* at 115.

<sup>41</sup> [Redacted], at 48-49 (FISA Ct. Nov. 6, 2015), available at [www.dni.gov/files/documents/20151106-702Mem\\_Opinion\\_Order\\_for\\_Public\\_Release.pdf&t=MDM3MGZmYjY1ZWQ5YjUyMTQ5ZjQ1ZTA0ZDExNjY2NWU0ZTE1ZWJINSxaRjRyYiRaQg%3D%3D](http://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf&t=MDM3MGZmYjY1ZWQ5YjUyMTQ5ZjQ1ZTA0ZDExNjY2NWU0ZTE1ZWJINSxaRjRyYiRaQg%3D%3D).

<sup>42</sup> *Id.* at 50.

<sup>43</sup> *Id.* at 58.

<sup>44</sup> Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavior* (Apr. 29, 2015), available at <http://dx.doi.org/10.2139/ssrn.2412564>.

<sup>45</sup> Lee Rainie & Mary Madden, *Americans’ Privacy Strategies Post-Snowden*, PEW RESEARCH CTR (Mar. 16, 2015), <http://www.pewinternet.org/2015/03/16/americans-privacy-strategies-post-snowden/>.

### C. Risk of Data Theft

Any massive government database containing sensitive information about Americans also raises concerns about data theft. The disastrous attack on the Office of Personnel Management’s database, in which personal data concerning more than 21 million current and former federal employees was stolen (ostensibly by the Chinese government), illustrated how vulnerable government databases are.<sup>46</sup> More recently, hackers published contact information for 20,000 FBI employees and 10,000 Department of Homeland Security employees that they may have obtained by hacking into a Department of Justice database.<sup>47</sup> The broad scope of Section 702 data makes it an attractive target for hacking, and its inclusion of large amounts of information about presumptively innocent Americans increases the harm that would be caused by such an event.

### D. Economic Consequences

Another important concern is the negative impact of Section 702 collection on the U.S. technology industry. After Snowden’s disclosures revealed the extent of NSA collection, American technology companies reported declining sales overseas and lost business opportunities. In a survey of 300 British and Canadian businesses, 25 percent of respondents indicated they were moving their data outside of the U.S.<sup>48</sup> An August 2013 study by the Information Technology and Innovation Foundation estimated that the revelations could cost the American cloud computing industry \$22 to \$35 billion over the coming years, representing a 10-20% loss of the foreign market share to European or Asian competitors.<sup>49</sup> Another analyst found this estimate to be low, and predicted a loss to U.S. companies as high as \$180 billion.<sup>50</sup>

The economic news went from bad to worse in late 2015, when the Court of Justice of the European Union (CJEU) invalidated the “Safe Harbor” agreement – an agreement between the United States and the European Union (EU), in place since 2000, governing how U.S. companies must handle information transferred from Europe. The court held that EU law requires U.S. companies to give the data a level of protection that is essentially equivalent to the protections under EU law. Citing U.S. authorities’ broad access to data held by U.S. companies under Section 702, the CJEU found that the data was insufficiently protected. Although the U.S. and

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<sup>46</sup> Kaveh Waddell & Dustin Volz, *OPM Announces More Than 21 Million Victims Affected by Second Data Breach*, ATLANTIC (July 9, 2015), <http://www.theatlantic.com/politics/archive/2015/07/opm-announces-more-than-21-million-affected-by-second-data-breach/458475/>.

<sup>47</sup> Mary Kay Mallonée, *Hackers Publish Contact Info of 20,000 FBI Employees*, CNN (Feb. 8, 2016), <http://www.cnn.com/2016/02/08/politics/hackers-fbi-employee-info/>.

<sup>48</sup> DANIELLE KEHL, ET. AL, OPEN TECHNOLOGY INSTITUTE, SURVEILLANCE COSTS: THE NSA’S IMPACT ON THE ECONOMY, INTERNET FREEDOM & CYBERSECURITY 8 (2014), [https://static.newamerica.org/attachments/534-surveillance-costs-the-nsas-impact-on-the-economy-internet-freedom-cybersecurity/Surveillance\\_Costs\\_Final.pdf](https://static.newamerica.org/attachments/534-surveillance-costs-the-nsas-impact-on-the-economy-internet-freedom-cybersecurity/Surveillance_Costs_Final.pdf).

<sup>49</sup> DANIEL CASTRO, INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION, “HOW MUCH WILL PRISM COST THE US CLOUD COMPUTING INDUSTRY?” (Aug. 5, 2013), <http://www.itif.org/publications/how-much-will-prism-cost-us-cloud-computing-industry>.

<sup>50</sup> James Staten, *The Cost of PRISM Will Be Larger Than ITIF Projects*, FORRESTER (Aug. 14, 2013), [http://blogs.forrester.com/james\\_staten/13-08-14-the\\_cost\\_of\\_prism\\_will\\_be\\_larger\\_than\\_itif\\_projects](http://blogs.forrester.com/james_staten/13-08-14-the_cost_of_prism_will_be_larger_than_itif_projects).

the European Commission have devised a new agreement, known as the “Privacy Shield,” a group of European Data Protection Commissioners have expressed concern over its adequacy.<sup>51</sup>

In the absence of Section 702 reform, it appears likely that the Privacy Shield will ultimately be invalidated by the CJEU or potentially even by the European Commission itself (which can suspend the agreement unilaterally). Experts believe this would deal a massive economic blow to U.S. companies and could undermine the very structure of the Internet, which requires free data flow across borders. In the meantime, the legal limbo in which U.S. companies find themselves constrains their ability to pursue business opportunities in Europe.

### **E. Potential National Security Harms**

Last but clearly not least, there is a risk to national security in acquiring too much data. While computers can glean relationships and flag anomalies, they cannot replace human analysis, and human beings have limited capacity. When they are presented with an excess of data, real threats can get lost in the noise. This is not merely a theoretical concern. After the intelligence community failed to intercept the so-called “underwear bomber” (the suicide bomber who nearly brought down a plane to Detroit on Christmas Day 2009), an official White House review observed that a significant amount of critical information was available to the intelligence agencies but was “embedded in a large volume of other data.”<sup>52</sup> Similarly, the independent investigation of the FBI’s role in the shootings by U.S. Army Major Nidal Hasan at Fort Hood concluded that the “crushing volume” of information was one of the factors that hampered accurate analysis prior to the attack.<sup>53</sup>

Whatever threat information may exist amidst the 250 million Internet communications acquired yearly under Section 702, there is surely a large amount of chaff. Because this may make it more difficult to find the threats, it is important for lawmakers to examine whether the current scope of Section 702 collection may be too broad from a security standpoint as well as a privacy one.

## **IV. Minimization and Its Loopholes**

Legal and policy defenses of Section 702 surveillance rely heavily on the existence of minimization procedures to mitigate the effects of “incidental” collection. The concept behind minimization is fairly simple: The interception of Americans’ communications when targeting

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<sup>51</sup> ARTICLE 29 DATA PROTECTION WORKING PARTY, OPINION 01/2016 ON THE EU – U.S. PRIVACY SHIELD DRAFT ADEQUACY DECISION (Apr. 13, 2016), available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238_en.pdf); see also Rob Price, *European Privacy Watchdogs Have ‘Concerns’ About a Key New Transatlantic Data Transfer Agreement*, BUSINESS INSIDER (Apr. 13, 2006), <http://www.businessinsider.com/article-29-working-party-verdict-on-privacy-shield-data-transfer-mechanism-2016-4?r=UK&IR=T>.

<sup>52</sup> THE WHITE HOUSE, SUMMARY OF THE WHITE HOUSE REVIEW OF THE DECEMBER 25, 2009 ATTEMPTED TERRORIST ATTACK 3, available at [http://www.whitehouse.gov/sites/default/files/summary\\_of\\_wh\\_review\\_12-25-09.pdf](http://www.whitehouse.gov/sites/default/files/summary_of_wh_review_12-25-09.pdf).

<sup>53</sup> *Lessons from Fort Hood: Improving Our Ability to Connect the Dots: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Security*, 112th Cong. 2 (2012) (statement of Douglas E. Winter, Deputy Chair, William H. Webster Commission on the Fed. Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood, Texas on November 5, 2009).

foreigners is inevitable, but because such interception ordinarily would require a warrant or individual FISA order, incidentally collected U.S. person information generally should not be kept, shared, or used, subject to narrow exceptions.

The statutory language, however, is much more complex. It requires the government to adopt minimization procedures, which it defines as procedures “that are reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.” The statute also prohibits disseminating non-foreign intelligence information in a way that identifies U.S. persons unless their identity is necessary to understand foreign intelligence information or assess its importance. The one caveat is that the procedures must “allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.”<sup>54</sup>

The lack of specificity in this definition, and the tension between its general rule and its caveat, has allowed the government to craft rules that are permissive and contain multiple exceptions. To begin with, the NSA may share raw data with the FBI and CIA.<sup>55</sup> All three agencies generally may keep unreviewed raw data – including data about U.S. persons – for five years after the certification expires;<sup>56</sup> they also can seek extensions from a high-level official,<sup>57</sup> and the 5-year limit does not apply to encrypted communications (which are becoming increasingly common among ordinary users of mobile devices) or communications “reasonably believed to contain secret meaning.”<sup>58</sup> The agencies may keep indefinitely any U.S. person information that has foreign intelligence value or is evidence of a crime.<sup>59</sup>

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<sup>54</sup> 50 U.S.C. § 1801(h).

<sup>55</sup> ERIC H. HOLDER, JR. U.S. DEP’T OF JUSTICE, MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED § 6(c) (2014) [hereinafter NSA 702 MINIMIZATION PROCEDURES], available at <https://www.dni.gov/files/documents/ppd-28/2014%20NSA%20702%20Minimization%20Procedures.pdf>.

<sup>56</sup> *Id.* at § 3(c)(1) (2014) (although the retention period for communications obtained through upstream collection is two years, as specified in section 3(c)(2)); ERIC H. HOLDER, JR. U.S. DEP’T OF JUSTICE, MINIMIZATION PROCEDURES USED BY THE FEDERAL BUREAU OF INVESTIGATION IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED § III.G.1.a (2014) [hereinafter FBI 702 MINIMIZATION PROCEDURES], available at <https://www.dni.gov/files/documents/ppd-28/2014%20FBI%20702%20Minimization%20Procedures.pdf>; ERIC H. HOLDER, JR. U.S. DEP’T OF JUSTICE, MINIMIZATION PROCEDURES USED BY THE CENTRAL INTELLIGENCE AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED § 2 (2014) [hereinafter CIA 702 MINIMIZATION PROCEDURES], available at <https://www.dni.gov/files/documents/ppd-28/2014%20CIA%20702%20Minimization%20Procedures.pdf>.

<sup>57</sup> PCLOB 702 REPORT, *supra* note 5, at 60.

<sup>58</sup> NSA 702 MINIMIZATION PROCEDURES, *supra* note 55, at § 6(a)(1)(a); CIA 702 MINIMIZATION PROCEDURES, *supra* note 56, at § 3.c.

<sup>59</sup> NSA 702 MINIMIZATION PROCEDURES, *supra* note 55, at § 6(a); FBI 702 MINIMIZATION PROCEDURES, *supra* note 56, at § III.G; CIA 702 MINIMIZATION PROCEDURES, *supra* note 56, at §§ 3.a, 7.d.

If the NSA discovers U.S. person data that has no foreign intelligence value and contains no evidence of a crime, the agency is supposed to purge the data.<sup>60</sup> The NSA, however, interprets this requirement to apply only if the NSA analyst determines “not only that a communication is not currently of foreign intelligence value to him or her, but also would not be of foreign intelligence value to any other present or future foreign intelligence need.”<sup>61</sup> This is an impossibly high bar, and so, “in practice, this requirement rarely results in actual purging of data.”<sup>62</sup>

The FBI and the CIA have no affirmative requirement to purge irrelevant U.S. person data on detection, relying instead on age-off requirements. Moreover, if the FBI reviews information containing U.S. person information and makes *no determination* regarding whether it is foreign intelligence information or evidence of a crime, the 5-year limit evaporates, and the FBI may keep the data for a longer period of time that remains classified.<sup>63</sup>

If any of the three agencies – all of which have access to raw data – disseminate information to other agencies, they must first obscure the identity of the U.S. person; but once again, there are several exceptions to this rule. For instance, the agencies need not obscure the U.S. person’s identity if it is necessary to understand or assess foreign intelligence or if the communication contains evidence of a crime.<sup>64</sup>

In short, the NSA routinely shares raw Section 702 data with the FBI and CIA; and the agencies’ minimization procedures suggest that U.S. person information is almost always kept for at least five years and, in many circumstances, much longer. The sharing and retention of U.S. person information are not unrestricted, but it is a stretch to say that they are “minimized” under any common sense understanding of the term.

## V. Back Door Searches

Perhaps the most problematic aspect of the minimization procedures is that they allow all three agencies to query Section 702 data using U.S. person identifiers, with the express goal of retrieving and analyzing Americans’ communications.<sup>65</sup>

If the government wishes to obtain an American’s communications for foreign intelligence purposes, it must secure an individual court order from the FISA Court after demonstrating that the target is an agent of a foreign power. If the government wishes to obtain an American’s communications for law enforcement purposes, it must get a warrant from a neutral magistrate. To ensure that Section 702 is not used to avoid these requirements, the statute contains a prohibition on “reverse targeting” – i.e., targeting a foreigner overseas when the government’s intent is to target “a particular, known person reasonably believed to be in the

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<sup>60</sup> NSA 702 MINIMIZATION PROCEDURES, *supra* note 55, at §§ 3(b)(1), 3(c).

<sup>61</sup> PCLOB 702 REPORT, *supra* note 5, at 62.

<sup>62</sup> *Id.*

<sup>63</sup> FBI 702 MINIMIZATION PROCEDURES, *supra* note 56, at § III.G.1.b.

<sup>64</sup> *Id.* at § 5.A-B; NSA 702 MINIMIZATION PROCEDURES, *supra* note 55, at § 6(b); CIA 702 MINIMIZATION PROCEDURES, *supra* note 56, at §§ 5, 7.d.

<sup>65</sup> NSA 702 MINIMIZATION PROCEDURES, *supra* note 55, at § 3(b)(5); FBI 702 MINIMIZATION PROCEDURES, *supra* note 56, at § III.D; CIA 702 MINIMIZATION PROCEDURES, *supra* note 56, at § 4.

United States.” Before conducting Section 702 surveillance, the government must certify that it does *not* intend to target specific, known Americans.

And yet, immediately upon obtaining the data, all three agencies may sort through it looking for the communications of “particular, known” Americans – the very people in whom the government just disclaimed any interest. Worse, even though the FBI would be required to obtain a warrant in order to access Americans’ communications absent a significant foreign intelligence purpose, the FBI may search the Section 702 data for Americans’ communications to use in criminal proceedings having no foreign intelligence dimensions whatsoever.<sup>66</sup> This is a bait and switch that is utterly inconsistent with the spirit, if not the letter, of the prohibition on reverse targeting. It also creates a massive end run around the Fourth Amendment’s warrant requirement.

Some have defended these “back door searches,” claiming that as long as information is lawfully acquired, agencies may use the information for any legitimate government purpose. Whatever truth that may have in other contexts, it is manifestly not correct in the case of Section 702. Congress required agencies to “minimize” information about U.S. persons; the very meaning of “minimization” is that agencies may *not* use the information for any purpose they wish.

Moreover, as a constitutional matter, Judge Bates of the FISA Court has made clear that “the procedures governing retention, use, and dissemination bear on the reasonableness under the Fourth Amendment of a program for collecting foreign intelligence information.”<sup>67</sup> In cases involving the foreign intelligence exception to the warrant requirement, the reasonableness of a surveillance scheme turns on weighing the government’s national security interest against the privacy intrusion. While the surveillance scheme should be evaluated as a whole, it is difficult to see how any scheme could pass the reasonableness test if a significant component of the scheme were not justified by any national security interest.<sup>68</sup>

Compounding the constitutional harm, the government has not fully and consistently complied with its statutory and constitutional obligation to notify criminal defendants when it uses evidence “obtained or derived from” Section 702 surveillance. Before 2013, the government interpreted “obtained or derived from” so narrowly that it notified no one. In the three years since the government’s approach reportedly changed,<sup>69</sup> the government has notified only seven defendants, even though the Privacy and Civil Liberties Oversight Board (PCLOB) reports that the FBI searches Section 702 every time it conducts a national security investigation<sup>70</sup> and there

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<sup>66</sup> ROBERT S. LITT, ODNI, PRIVACY, TECHNOLOGY AND NATIONAL SECURITY: AN OVERVIEW OF INTELLIGENCE COLLECTION (July 18, 2013), <https://www.dni.gov/index.php/newsroom/speeches-and-interviews/195-speeches-interviews-2013/896-privacy,-technology-and-national-security-an-overview-of-intelligence-collection>.

<sup>67</sup> [Redacted], 2011 WL 10945618, at \*27 (FISA Ct. Oct. 3, 2011).

<sup>68</sup> This is one of several errors, in my view, in the recent FISA Court decision upholding the constitutionality of back door searches. See Elizabeth Goitein, *The FBI’s Warrantless Surveillance Back Door Just Opened a Little Wider*, JUST SEC. (Apr. 21, 2016), <https://www.justsecurity.org/30699/fbis-warrantless-surveillance-door-opened-wider/>.

<sup>69</sup> For more background, see Patrick C. Toomey, *Why Aren’t Criminal Defendants Getting Notice of Section 702 Surveillance — Again?*, JUST SEC. (Dec. 11, 2015), <https://www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again>.

<sup>70</sup> PCLOB 702 REPORT, *supra* note 5, at 59.

have several hundred terrorism and national security convictions during this time.<sup>71</sup> There is reason for concern that the government is avoiding its notification requirements by engaging in “parallel construction” – i.e., recreating the Section 702 evidence using less controversial means.<sup>72</sup> Attorneys have asked the Department of Justice to share its policies for determining when information is considered to be “derived from” Section 702, but the Department refuses to provide them.

Importantly, opposition to warrantless searches for U.S. person information is not a call to re-build the barriers to cooperation among agencies often attributed to “the wall.” Threat information, including threat information that focuses on U.S. persons, can and should be shared among agencies when identified, and the agencies should work together as necessary in addressing the threat. What the Fourth Amendment cannot tolerate is the government collecting information without a warrant with the intent of mining it for use in ordinary criminal cases against Americans. That is why President Obama’s Review Group on Intelligence and Communications Technologies – a five-person panel including a former acting director of the CIA (Michael J. Morell) and chief counterterrorism advisor to President George W. Bush (Richard A. Clarke) – unanimously recommended closing the “back door search” loophole by prohibiting searches for Americans’ communications without a warrant.<sup>73</sup>

## **VI. Foreign Nationals and Human Rights Risks**

Section 702 surveillance also raises concerns about the privacy and human rights of foreign nationals who are not foreign powers, agents of foreign powers, or affiliated with terrorism. While the Fourth Amendment may not extend rights to these individuals, the right to privacy is a fundamental human right recognized under international law – including treaties, such as the International Covenant on Civil and Political Rights, that the U.S. has signed. In Presidential Policy Directive 28 (PPD-28), President Obama acknowledged that “all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and . . . all persons have legitimate privacy interests in the handling of their personal information.”<sup>74</sup>

PPD-28 requires agencies to extend certain privacy protections to foreign nationals when conducting electronic surveillance. Most notably, personal information of non-U.S. persons may be retained or disseminated only if retention and sharing would be permitted for “comparable information concerning U.S. persons.”<sup>75</sup> This is a significant change. However, it does not

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<sup>71</sup> DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT FISCAL YEAR 2015 at 14; DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT FISCAL YEAR 2014 at 12; DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT FISCAL YEAR 2013 at 60.

<sup>72</sup> See Toomey, *supra* note 69; John Shiffman and Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013, 3:25 PM), <http://www.reuters.com/article/us-dea-sod-idUSBRE97409R20130805#X7BeCQsB0GrEDTJX.97>.

<sup>73</sup> See PRESIDENT’S REVIEW GRP. ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, LIBERTY AND SECURITY IN A CHANGING WORLD 29 (2013), available at [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

<sup>74</sup> EXEC. OFFICE OF THE PRESIDENT, PRESIDENTIAL POLICY DIRECTIVE/PPD-28 (2014), available at [http://www.lawfareblog.com/wp-content/uploads/2014/01/2014sigint.mem\\_ppd\\_rel\\_.pdf](http://www.lawfareblog.com/wp-content/uploads/2014/01/2014sigint.mem_ppd_rel_.pdf).

<sup>75</sup> *Id.* at § 4(a)(i).

prevent the acquisition of information about foreign nationals who pose no threat to the United States. Moreover, as noted above, the limits on retention and sharing of U.S. person information are not particularly strict, and it remains to be seen whether and how the agencies incorporated PPD-28's requirement of "comparability" in their 2015 minimization procedures (which have not been declassified).

A particular concern relates to the sharing of Section 702 information with foreign governments. Agencies have significant leeway to share foreign intelligence information, as long as the sharing is consistent with U.S. law, clearly in the national interest, and "intended for a specific purpose and generally limited in duration."<sup>76</sup> Although the agency should have "confidence" that the information "is not likely to be used by the recipient in an unlawful manner or in a manner harmful to U.S. interests,"<sup>77</sup> there is no express requirement or mechanism to ensure that governments with poor or spotty human rights records will not use the information to facilitate human rights violations – for instance, to harass or persecute journalists, political dissidents, human rights activists, and other vulnerable groups whose communications may have been caught up in the Section 702 collection.<sup>78</sup>

## VII. Must We Leave Section 702 in Its Current Form?

Having discussed the concerns surrounding Section 702 surveillance, it is important to address the arguments that have been put forward for its necessity. These arguments have varying degrees of merit, but none of them forecloses the possibility of reforms.

### A. Restoring FISA's Original Intent?

Executive branch officials have argued that Section 702 was necessary to restore the original intent behind FISA, which was being subverted by changes in communications technology. These officials note that FISA in 1978 required the government to obtain an individual court order when collecting any communications involving Americans that traveled by wire, but required an individual court order to obtain satellite communications only when all of the communicants were inside the U.S. Asserting that "'wire' technology was the norm for domestic calls,"<sup>79</sup> while "almost all transoceanic communications into and out of the United States were carried by satellite, which qualified as 'radio' (vs. 'wire') communications,"<sup>80</sup> they infer that Congress intended to require the government to obtain an order when acquiring purely

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<sup>76</sup> OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, FOREIGN DISCLOSURE AND RELEASE OF CLASSIFIED NATIONAL INTELLIGENCE, ICD 403 § E(1) (Mar. 13, 2013), *available at* <http://www.dni.gov/files/documents/ICD/ICD403.pdf>.

<sup>77</sup> OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, CRITERIA FOR FOREIGN DISCLOSURE AND RELEASE OF CLASSIFIED NATIONAL INTELLIGENCE, ICPG 403.1 § (D)(2) (Mar. 13, 2013), *available at* <http://www.dni.gov/files/documents/ICPG/ICPG403-1.pdf>.

<sup>78</sup> *See* AMOS TOH, FAIZA PATEL & ELIZABETH GOITEIN, BRENNAN CTR FOR JUSTICE, OVERSEAS SURVEILLANCE IN AN INTERCONNECTED WORLD 28-31 (2016), [http://www.brennancenter.org/sites/default/files/publications/Overseas\\_Surveillance\\_in\\_an\\_Interconnected\\_World.pdf](http://www.brennancenter.org/sites/default/files/publications/Overseas_Surveillance_in_an_Interconnected_World.pdf).

<sup>79</sup> Statement of Kenneth L. Wainstein, Partner, Cadwalader, Wickersham & Taft LLP, before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary at 4 (May 31, 2012).

<sup>80</sup> Statement of Kenneth L. Wainstein, Assistant Attorney General, National Security Division, Department of Justice, before the House Permanent Select Committee on Intelligence at 4 (Sept. 6, 2007).



domestic communications, but not when obtaining communications between foreign targets and Americans. This intent was undermined when fiber-optic cables later became the standard method of transmission for international calls.

The problem with this theory is two-fold. First, it would have been quite simple for Congress to state that FISA orders were required for purely domestic communications and not for international ones. Instead, Congress produced an elaborate, multi-part definition of “electronic surveillance” that relied on particular technologies rather than the domestic versus international nature of the communication. Second, it is not correct that “almost all” international communications were carried by satellite; the available evidence indicates that one third to one half of international communications were carried by wire.<sup>81</sup>

A more plausible explanation for the original FISA’s complex scheme – one with much stronger support in the legislative history – was put forward by David Kris, a former head of the Justice Department’s National Security Division. Mr. Kris concluded that Congress intended to require a court order for international wire communications obtained in the U.S., and that the purpose behind its definitional acrobatics was to leave legislation covering surveillance conducted outside the U.S. and NSA satellite surveillance for another day.<sup>82</sup> Although Congress never followed up, the legislative history of FISA made clear that the gaps in the statute’s coverage of NSA’s operations “should not be viewed as congressional authorization for such activities as they affect the privacy interests of Americans.”<sup>83</sup>

A related argument in support of Section 702 is that certain purely foreign-to-foreign communications, which Congress never intended to regulate, now travel through the United States in ways that bring them within FISA’s scope. In practice, this appears to be a fairly discrete (albeit thorny) problem that applies to one category of communication: e-mails between foreigners that are stored on U.S. servers.<sup>84</sup> Section 702, however, goes far beyond what would be necessary to solve that problem. Moreover, there is a flip side to this issue: changes in technology have also caused certain purely domestic communications to travel *outside* the U.S. in ways that *remove* them from FISA’s scope. Purely domestic communications once traveled on copper wires inside the U.S., and FISA thus required a court order to obtain them. Today, digital data may be routed anywhere in the world – and U.S. Internet Service Providers may store domestic communications on overseas servers – rendering these communications vulnerable to

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<sup>81</sup> David Kris, *Modernizing the Foreign Intelligence Surveillance Act 3* (Brookings Inst., Working Paper, 2007), available at [http://www.brookings.edu/~media/research/files/papers/2007/11/15%20nationalsecurity%20kris/1115\\_nationalsecurity\\_kris.pdf](http://www.brookings.edu/~media/research/files/papers/2007/11/15%20nationalsecurity%20kris/1115_nationalsecurity_kris.pdf).

<sup>82</sup> *Id.* at 13-23.

<sup>83</sup> S. REP. NO. 95-701, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 4004.

<sup>84</sup> FISA regulates three basic types of surveillance: wiretapping, the interception of radio communications, and the “monitoring” of information through other electronic means — which, in 1978, referred primarily to bugging. Although e-mails may be captured in transit by wiretapping or (for e-mails sent wirelessly) interception of radio signals, once they are stored on a server, their acquisition is considered “monitoring.” Because FISA regulates “monitoring” within the U.S. regardless of the nationality of the target, stored foreign-to-foreign e-mails come within its ambit. DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS 2d §§ 7.27, 16.6 (2012).

surveillance under Executive Order 12333, which has far fewer safeguards.<sup>85</sup> Any legislation that attempts to solve the former problem should address the latter one as well.

## **B. Thwarting Terrorist Plots**

Executive officials have stated, and the PCLOB and the president's Review Group on Intelligence and Communications Technologies have found, that Section 702 surveillance played a role in detecting and thwarting a number of terrorist plots. That is, after all, the most important function the statute is intended to serve; if it did *not* accomplish this goal, it presumably should go the way of the now-discontinued Section 215 bulk collection program, which, by most reliable reports, added little counterterrorism value.

Whether Section 702 is useful is thus a question of critical importance. It is not, however, the only question that must be answered. There is also the question of whether effective surveillance could be conducted in a manner that entails less intrusion on the privacy of law-abiding Americans and foreigners. Indeed, in the few cases that have been made public – including those of Najibullah Zazi, Khalid Ouazzani, David Headley, Agron Hasbajrami, and Jamshid Muhtorov – it appears that the targets of the Section 702 surveillance were known or suspected to have terrorist affiliations.<sup>86</sup> These cases therefore do not support, for example, the idea that the NSA needs the ability to target any foreigner overseas.

We must also ask whether the costs to our liberties are too high. It is commonly said that if terrorists succeed in undermining our values, they win. But while this notion is often invoked, it is also often forgotten. The United States was founded on a set of core principles, and none of these was more important than the right of the citizens to be free from undue intrusions by the government on their privacy.<sup>87</sup> Our Constitution promises us that law-abiding citizens will be left alone. It is incumbent upon us as a nation to find ways of addressing the terrorist threat that do not betray this promise.

## **VIII. Who Decides? – The Need for Transparency**

Within constitutional bounds set by our nation's courts, it is up to the American people – speaking through their representatives in Congress – to decide how much surveillance is too much. But they cannot do this without sufficient information.

While a significant amount of information about Section 702 has been declassified in recent years, critical information remains unavailable. For instance, the certifications setting forth the categories of foreign intelligence the government seeks to collect – but not the

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<sup>85</sup> GOITEIN & PATEL, *supra* note 2, at 19-20; TOH ET AL., *supra* note 78, at 8-10.

<sup>86</sup> See 2009 Subway Plot, NEW AMERICA, <http://securitydata.newamerica.net/extremists/terror-plot.html?id=1543>; 2009 New York Stock Exchange Plot, NEW AMERICA, <http://securitydata.newamerica.net/extremists/terror-plot.html?id=1542>; 2009 Jyllands Posten Plot, NEW AMERICA, <http://securitydata.newamerica.net/extremists/terror-plot.html?id=1583>; 2011 Agron Hasbajrami, NEW AMERICA, <http://securitydata.newamerica.net/extremists/terror-plot.html?id=1616>; 2012 Islamic Jihad Union Support Network, NEW AMERICA, <http://securitydata.newamerica.net/extremists/terror-plot.html?id=1575>.

<sup>87</sup> Michael W. Price, *Rethinking Privacy: Fourth Amendment "Papers" and the Third-Party Doctrine*, 8 J. NAT' L SECURITY L. & POL'Y 247, 250-64 (2015).

individual targets – have not been released, even in redacted form. Unlike the NSA and the CIA, the FBI does not track or report how many times it uses U.S. person identifiers to query databases containing Section 702 data. The list of crimes for which Section 702 data may be used as evidence has not been disclosed. Nor have the policies governing when evidence used in legal proceedings is considered to be “derived from” Section 702 surveillance. The length of time that the FBI may retain data that has been reviewed but whose value has not been determined remains secret.

Perhaps most strikingly, despite multiple requests from lawmakers dating back several years, the NSA has yet to disclose an estimate of how many Americans’ communications are collected under Section 702. The NSA has previously stated that generating an estimate would itself violate Americans’ privacy, ostensibly because it might involve reviewing communications that would otherwise not be reviewed. In October of last year, a coalition of more than thirty advocacy groups – including many of the nation’s most prominent privacy organizations – sent a letter to the Director of National Intelligence urging that the NSA go forward with producing an estimate.<sup>88</sup> The letter noted that, as long as proper safeguards were in place, the result would be a net gain for privacy. Recently, a bipartisan group of fourteen House Judiciary Committee members sent the DNI a letter making the same request.<sup>89</sup>

This basic information is necessary for Americans to evaluate the impact of Section 702 on their privacy. It is also necessary because most Americans are not lawyers, and when they hear that a surveillance program is “targeted” only at foreigners overseas and that any acquisition of Americans’ communications is “incidental,” they may reasonably assume that there is very little collection of their own calls and e-mails. An estimate of how many communications involving Americans are collected would help to pierce the legalese and give Americans a truer sense of what the program entails.

In short, Section 702 is a public statute that is subject to the democratic process, and the democratic process cannot work when Americans and lawmakers lack critical information. More transparency is urgently needed so that the country can begin an informed public debate about the future of foreign intelligence surveillance.

Thank you again for this opportunity to testify.

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<sup>88</sup> Letter from Brennan Ctr for Justice, et. al, to James Clapper, Dir. Nat’l Intelligence (Oct. 29, 2015), *available at* [https://www.brennancenter.org/sites/default/files/analysis/Coalition\\_Letter\\_DNI\\_Clapper\\_102915.pdf](https://www.brennancenter.org/sites/default/files/analysis/Coalition_Letter_DNI_Clapper_102915.pdf).

<sup>89</sup> Letter from Rep. John Conyers, Jr., et. al, to James Clapper, Dir. Nat’l Intelligence (Apr. 22, 2016), *available at* [https://www.brennancenter.org/sites/default/files/legal-work/Letter\\_to\\_Director\\_Clapper\\_4\\_22.pdf](https://www.brennancenter.org/sites/default/files/legal-work/Letter_to_Director_Clapper_4_22.pdf).