

**Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on “Oversight and Reauthorization of the FISA Amendments Act:
The Balance between National Security, Privacy and Civil Liberties”
May 10, 2016**

One year ago this week, the House of Representatives overwhelmingly passed the USA FREEDOM Act. Several weeks later the Senate followed suit with broad bipartisan support – including a strong majority of the members of this Committee. That legislation marked the first major overhaul of the government’s surveillance authorities in decades. Following revelations about dragnet surveillance programs, Vermonters and Americans across the country demanded limits on executive power. They demanded accountability and reform, and Congress responded.

Today, the Senate Judiciary Committee will examine the FISA Amendments Act, often referred to as Section 702. This law expires at the end of 2017. I am glad the Committee is getting an early start on this process to consider significant reforms. I hope we can avoid the needless expiration of authorities we saw last year when Republican leadership refused to bring up the USA FREEDOM Act. I also am glad that this hearing is being held in the open, so that the American people can be a part of this conversation.

When Congress last reauthorized the FISA Amendments Act in 2012, this type of public discussion was not possible. Almost everything about its implementation remained classified. Since then, the Obama administration has declassified much about the government’s use of this law. The Privacy and Civil Liberties Oversight Board issued a valuable report explaining how it works. The transparency reforms put in place through the USA FREEDOM Act also are informing our efforts. FISC opinions have been declassified, new transparency reports have been issued, and the FISA Court appointed an amicus to aid in consideration of the government’s most recent Section 702 application.

But we have much more work to do. We are still missing important facts about Section 702 implementation. And additional reforms are needed to protect Americans’ privacy, and restore global trust in the U.S. technology industry.

Section 702 is an important tool for our national security agencies. It is also extremely broad, allowing the government to collect communications without individualized warrants. Although Section 702 is aimed at surveillance of foreigners outside the United States, it sweeps up a sizeable amount of information about innocent Americans who are communicating with those foreigners. This authority requires strong oversight, transparency, and safeguards to protect the American people. In 2008 and again in 2012, I opposed the FISA Amendments Act because it lacked those safeguards.

Despite these concerns about Americans’ communications being swept up, we still do not know how much of our data is collected under this authority. I understand the Intelligence Community is finally developing a methodology to estimate that figure. That effort is long overdue, and it will be critical as we consider the reauthorization of this law. It is all the more significant because both intelligence and law enforcement agencies search this data for information about

Americans – without individualized judicial approval. Recent data released by the Director of National Intelligence suggests that the number of these warrantless, “back-door” searches of 702 databases has doubled since 2013. These “back-door” searches raise serious constitutional questions, particularly since the FBI can use them to investigate crimes having nothing to do with national security.

In addition, the government has repeatedly failed to comply with FISA court orders, including an incident that resulted in the NSA’s collection of tens of thousands of entirely domestic emails of innocent Americans. The FISA Court reprimanded the government for “substantial misrepresentations” regarding operation of the 702 programs. These failures are troubling, especially because of the significant amount of data collected, stored, and analyzed by these programs. Concerns also have been raised about so-called “about” collection under Section 702, which can result in NSA collecting entirely domestic communications.

I ask consent to enter in the record written testimony from several organizations raising additional concerns, including Third Way and the Electronic Frontier Foundation.

I know we will hear today about the importance of this authority to our national security. That is a conversation we should have. But we also must ensure that surveillance programs operated under Section 702 respect Americans’ civil liberties and align with our constitutional values. I look forward to hearing from our witnesses.

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