

Dear Representative:

The undersigned groups write to express our strong opposition to H.R. 4478, as amended by the manager's amendment introduced by Representative Nunes, which is scheduled to be considered at 4 p.m. today. We urge you to vote "no" on this bill.

Some have suggested this bill is reform—but it is just the opposite. This bill fails to meaningfully address the litany of abuses that have occurred under Section 702, risks codifying current illegal practices, and could be read as expanding surveillance under Section 702. As such, we believe it is markedly worse than the current Section 702 statute. Given the enormous privacy interests at stake, we are astounded that this bill is being rushed to the House floor with virtually no debate and with little opportunity for members to even fully vet final text.

Among other things, we anticipate the government will argue that this bill:

- **Codifies "about" collection:** The government has wrongly interpreted Section 702 to allow it to collect information that is not "to" or "from" a target, but is merely "about" a target, *including wholly domestic communications*. Provisions in the bill purport to reform this illegal practice, but in reality they are a step in the wrong direction. In April of this year, the NSA halted "about" collection following the agency's failure over a period of over five years to comply with court-imposed privacy protections. Instead of prohibiting this collection, the bill could be used by the government to restart it with the approval of the FISA Court, an authority the government already claims. Once intentional "about" collection is re-approved by the Court, the bill would impose a one-month time period in which Congress could pass a law preventing it from re-starting—a time period so short that it would virtually ensure Congress' approval through inaction.

- **Permits expanded "about" collection:** When the government was conducting "about" collection, it acquired communications that were neither "to" or "from" a target but reference certain "selectors" used by Section 702 targets, such as a telephone number or email address. The government was not authorized to use selectors that were merely key words (e.g. "attack") or names of individuals.¹ The bill contains language suggesting that "about" collection that merely references the name of a person is permissible. This could be read as expanding the government's existing interpretation of Section 702 to permit "about" collection of communications based on key words or other generic references, sweeping in even more irrelevant communications.

- **Codifies "backdoor" searches:** Despite the fact that Section 702 prohibits the targeting of U.S. citizens and residents, the government routinely conducts warrantless searches of Section 702 databases looking for information about Americans. These

¹ Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, pp. 32 (June 2, 2014).
<https://www.pclob.gov/library/702-Report.pdf>

searches (commonly referred to as “backdoor” searches) mean that Section 702 is a surveillance tool used against Americans. Outside of the FISA Court, the legality of these searches has not been fully examined by courts. Instead of reforming this practice—as the House has voted to do on two separate occasions—the bill contains no requirement that the government obtain a warrant of any kind before accessing Americans’ content or metadata. It merely gives the government the *option* to apply for a warrant—an option the government is free to decline. We anticipate that the government will argue that language in the bill codifies the government’s current illegal practice of performing backdoor searches.

- **Permits Section 702 information to be used in criminal cases without a warrant:** The bill explicitly allows the government to use Americans’ information accessed without a court order in criminal prosecutions involving specified domestic crimes and in cases where the Attorney General makes an unreviewable determination that a criminal proceeding is merely “related to” national security, a category so broad it could be interpreted to encompass a wide array of domestic crimes. Given the breadth of this definition, we anticipate that these provisions will place no meaningful limit on the ability of the government to use Section 702 information obtained and accessed without a warrant in a broad swath of criminal cases.

We note that the Administration has already suggested that there is no urgency to extend this authority at the end of the year. The Administration has taken the position that intelligence agencies can continue current surveillance under Section 702 until April 2018, even if the law were to expire.

Given the important interests at stake, we urge you to oppose H.R. 4478, including as amended by Representative Nunes’ manager’s amendment.

If you have questions, please contact Neema Singh Guliani, Legislative Counsel with the ACLU at 202-675-2322 or nguliani@aclu.org.

Sincerely,

American Civil Liberties Union
Access Now
Restore The Fourth
The Electronic Frontier Foundation
Constitutional Alliance
FreedomWorks
American-Arab Anti-Discrimination Committee
OpenTheGovernment
Wikimedia Foundation, Inc.
TechFreedom
The Constitution Project at POGO
Government Information Watch
Center for Democracy and Technology

R Street Institute
Brennan Center for Justice at NYU School of Law
American Library Association
New America's Open Technology Institute
Demand Progress Action
Japanese American Citizens League
NACDL
PEN America
Friends Committee on National Legislation
National Coalition Against Censorship
NAACP
Free Press Action Fund
Defending Rights & Dissent
Freedom of the Press Foundation
Sunlight Foundation
National Association of Social Workers
Center for Security, Race, and Rights, Rutgers Law School
South Asian Americans Leading Together (SAALT)