

May 17, 2016

Chairman Chuck Grassley
Judiciary Committee
United States Senate

Ranking Member Patrick Leahy
Judiciary Committee
United States Senate

Dear Chairman Grassley and Ranking Member Leahy,

The undersigned civil society organizations write to rebut a statement that was made at the Senate Judiciary Committee hearing on May 10, 2016, titled “Oversight and Reauthorization of the FISA Amendments Act: The Balance between National Security, Privacy and Civil Liberties.”¹ At that hearing, Rachel Brand, a member of the Privacy and Civil Liberties Oversight Board, testified that a warrantless search of information collected under Section 702 of FISA using a U.S. person identifier is more protective of privacy than a search conducted pursuant to a warrant based on probable cause.

As experts in privacy, civil liberties, and human rights, we strongly disagree with Ms. Brand’s statement. It is not only more privacy protective for law enforcement to demonstrate probable cause and obtain a warrant before searching Section 702 databases using U.S. person identifiers – it is also required by the Fourth Amendment. As Elizabeth Goitein, Co-Director of the Liberty & National Security Program at the Brennan Center for Justice, testified at that same hearing, “What the Fourth Amendment cannot tolerate is the government collecting information [and] communications without a warrant with the intent of mining it for use in criminal cases against Americans.”² The privacy community unanimously agrees with Ms. Goitein’s assessment.

Ms. Brand’s reasoning is that the government would have to engage in investigatory activities to collect the information necessary to obtain a probable cause warrant, which would be more intrusive than searching data already collected. This is incorrect for at least two reasons.

First, and perhaps most obviously, the FBI is currently free to search databases containing Section 702 data when merely conducting assessments, which do not require any factual basis to suspect criminal activity. Similarly, the NSA and CIA may search Section 702 data for Americans’ communications without reason to believe the American is acting as an

¹ *Oversight and Reauthorization of the FISA Amendments Act: The Balance Between National Security, Privacy, and Civil Liberties*, 114th Cong. (2016) available at: <http://www.judiciary.senate.gov/meetings/oversight-and-reauthorization-of-the-fisa-amendments-act-the-balance-between-national-security-privacy-and-civil-liberties>.

² *Id.*

agent of a foreign power. If required to obtain a probable cause warrant to conduct searches, the agencies would inevitably narrow their focus to those cases in which there was reason to suspect wrongdoing or significant relation to a foreign power, which would considerably reduce the number of searches. It is likely that in many of these cases, the government would already have sufficient information to assemble a warrant application.

Second, whatever additional investigative activity might be needed to “build” probable cause, it would almost by definition be less intrusive than a search of Americans’ communications. Searches of phone calls and e-mails are among the most intrusive techniques available to law enforcement, which is why a warrant is required to perform them. Although the communications in this case have already been collected, querying them for information about U.S. persons adds another, deeply invasive privacy intrusion. By contrast, the activities the government might engage in to “build” probable cause would be those that do not themselves require a warrant precisely because they generally involve less severe intrusions on privacy.

In short, Americans’ privacy interests would be better served if the federal government were only permitted to search Americans’ communications after obtaining a warrant based on a probable cause finding of a serious crime or a probable cause finding that the target is an agent of a foreign power.

Thank you for your consideration.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)

American Civil Liberties Union

American Library Association

Center for Democracy & Technology

Color of Change

Constitution Project

Council on American-Islamic Relations

Data Foundry, Inc.

Demand Progress

Fight for the Future

Free Press Action Fund

Golden Frog, GmbH

Hackers/Founders

National Association of Criminal Defense Lawyers

New America's Open Technology Institute

Niskanen Center

OpenTheGovernment.org

R Street

Restore the Fourth

TechFreedom

Venture Politics