



*Office of the Assistant Attorney General
Office of the Assistant Director of National Intelligence*

December 4, 2023

The Honorable Mark Warner
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable John Cornyn
United States Senate
Washington, DC 20510

Dear Chairman Warner, Senator Graham, and Senator Cornyn:

This responds to your letter to the Department of Justice (Department) and the Office of the Director of National Intelligence (ODNI), dated October 26, 2023, about the importance of Title VII of the Foreign Intelligence Surveillance Act (FISA), especially Section 702, in keeping our country safe. Nine months ago, the Attorney General and the Director of National Intelligence wrote Congressional leaders, urging Congress to act promptly to reauthorize Section 702 before it expires on December 31, 2023, and pledging to engage with Congress on meaningful reforms. Time is running out, and there remains an acute need to reauthorize this critical authority.

The United States faces a complicated geopolitical environment in which Section 702 is essential. Two major international crises—in Israel and Ukraine—are ongoing, and these coincide with an elevated threat environment at home, especially since HAMAS launched its attacks on October 7. As Federal Bureau of Investigation (FBI) Director Christopher Wray recently testified, “we’ve seen a rogues’ gallery of foreign terrorist organizations call for attacks against Americans and our allies.”¹ Indeed, amidst an already persistent global threat environment, multiple foreign terrorist organizations, representing a diverse ideological spectrum, are seeking to exploit the current Israel-HAMAS conflict for their own ends and in ways that exacerbate the overall threat landscape and raise the specter of increased terrorist

¹ *Worldwide Threats to the Homeland: Hearing Before the H. Comm. on Homeland Security*, 118th Cong. (2023) (statement of Christopher Wray), <https://www.fbi.gov/news/speeches/director-wrays-opening-statement-to-the-house-committee-on-homeland-security-111523>.

violence here at home. Facing these challenges and threats, the United States and our allies must have the tools to disrupt potential attacks.

Section 702 allows the U.S. Government to acquire foreign intelligence information from non-U.S. persons located overseas who operate using U.S. telecommunications and computer networks. Section 702 is unmatched in its ability to provide insights quickly when unexpected challenges arise, and it has delivered valuable intelligence on the full range of national security issues. There is no way to replicate Section 702's speed, reliability, specificity, and insight, and every day it helps protect Americans from a host of new and emerging threats to include weapons of mass destruction, malicious cyber activity, illicit international fentanyl trafficking, hostile state behavior from China and Russia, and more.

Section 702 also is vital for insights into foreign terrorist organizations, including HAMAS. Since its enactment, Section 702 has formed the foundation of our efforts to warn potential victims and thwart planned terrorist attacks—both at home and abroad—and to protect American troops. A few examples of Section 702's role in identifying and countering terrorist threats and other national security challenges is detailed in the enclosure to this letter, which we hope gives you a sense of the breadth and scope of its value.

Particularly amid multiple global crises and a heightened threat environment, failing to reauthorize Section 702, or reauthorizing it with restrictions that significantly reduce its effectiveness, would pose harmful consequences for the national security of the United States and the safety of Americans here and around the world. We cannot state it better than the President's Intelligence Advisory Board: "History may judge the lapse of Section 702 authorities as one of the worst intelligence failures of our time."²

To be clear: any expiration of Section 702, no matter how short, would inject tremendous uncertainty and risk, endangering the IC's ability to gain valuable intelligence. December 31 is a critical deadline. If Title VII of FISA is allowed to lapse, the government's ability to acquire information, even under existing Section 702 directives, may be challenged. This is exactly what happened in 2008 when Congress allowed a lapse in Section 702's predecessor authorities, resulting in the loss of intelligence information. In addition, if Congress allows Title VII to lapse, other provisions imposing court oversight of non-702 intelligence activities would also expire, rolling back statutory protections for U.S. persons.

We recognize Section 702's utility carries with it significant responsibility and the need for accountability. In recent years, the Department has identified and reported compliance issues with the FBI's querying of Section 702 data using U.S. person identifiers. In response, the FBI implemented significant remedial measures, described in the enclosure, which caused a quick

² See President's Intelligence Advisory Board (PIAB) and Intelligence Oversight Board (IOB) Review of FISA Section 702 and Recommendations for Reauthorization at 2, THE WHITE HOUSE (July 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/07/Presidents-Intelligence-Advisory-Board-and-Intelligence-Oversight-Board-Review-of-FISA-Section-702-and-Recommendations-for-Reauthorization.pdf>.

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and dramatic improvement in FBI's compliance. Codifying these reforms would further buttress FBI's compliance with the strict legal regime and regulatory framework that govern Section 702 activities and reduce the risk of the same reoccurrence of errors.

The Administration's longstanding dialogue also continues with you and other key Members regarding meaningful, constructive reforms beyond codification of these remedial measures, which we realize are insufficient to address the full panoply of concerns raised. A number of useful ideas have surfaced in those discussions, even as we continue to oppose certain sweeping proposals, such as requiring a court order before the government may conduct U.S. person queries, or examine results; if they became law, such initiatives would dramatically reduce Section 702's efficacy and raise serious risks. As alluded to previously, the IC uses Section 702 to warn the intended victims of foreign terrorist attacks, malicious cyber activity, and other similar threats. A warrant requirement would severely undercut this critical use of the statute. Fortunately, there are alternatives that would bolster Section 702's privacy and oversight regime without undermining the government's ability to quickly identify and counter national security threats.

We appreciate your partnership in protecting our nation's security and stand ready to provide the information Congress needs as it considers reauthorization of Section 702. In response to concerns identified in your letter, our staffs will work with your offices to schedule a classified briefing with examples in which Section 702 has provided critical information on ongoing conflicts and helped foil terrorist plots.

We look forward to working with you to reauthorize this fundamental national security tool, in a form that fully preserves its efficacy.



Carlos Felipe Uriarte
Assistant Attorney General



Matthew Rhoades
Assistant Director of National Intelligence

cc: The Honorable Kamala Harris, President, U.S. Senate

The Honorable Patty Murray, President Pro Tempore, U.S. Senate

The Honorable Richard J. Durbin, Chair, Committee on the Judiciary,
U.S. Senate

The Honorable Jim Jordan, Chairman, Committee on the Judiciary,
U.S. House of Representatives

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The Honorable Jerrold L. Nadler, Ranking Member, Committee on the Judiciary,
U.S. House of Representatives

The Honorable Marco Rubio, Vice Chairman, Select Committee on Intelligence,
U.S. Senate

The Honorable Michael Turner, Chairman, Permanent Select Committee on
Intelligence, U.S. House of Representatives

The Honorable Jim Himes, Ranking Member, Permanent Select Committee on
Intelligence, U.S. House of Representatives

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Enclosure

Section 702 is a Critical Counterterrorism Authority

We are acutely aware of the elevated threat environment that has arisen since HAMAS launched its attacks on October 7. Since its enactment in 2008, Section 702 has been a critical tool for identifying and thwarting terrorist plotting, as these declassified examples of Section 702's value demonstrate:

- In 2009, Section 702 helped foil an active plot to bomb the New York City subway.
- In 2014, FISA Section 702 prevented attacks by assisting in the removal of an ISIS leader, Hajji Iman.
- In 2020, Section 702-acquired information allowed analysts to identify members of a terrorist cell that was planning an attack on a U.S. facility in a Middle Eastern country. As U.S. intelligence gathering focused on this plot, Section 702 was a critical, unique collection method because of the terrorists' travel through multiple countries. The U.S. government, working with allies in the region, was able to disrupt the attack.
- Section 702 informed planning for the February 2022 U.S. military operation that resulted in the death in Syria of Hajji 'Abdallah, the leader of ISIS. Section 702 collection contributed to the U.S. assessment of his presence in Syria, providing military planners and senior policy makers confidence in their decision to send U.S. troops on the mission.
- Just last year, in July 2022, Section 702 played an important role in the strike against Ayman al-Zawahiri, Osama bin Laden's successor as leader of al-Qa'ida. Section 702 collection provided the IC access to critical information that assisted the United States in finding al-Zawahiri. This information, supplemented by other surveillance, was briefed to the President in order to secure his approval for a missile strike to kill Zawahiri.

Section 702's Utility Beyond Counterterrorism

The United States faces a complex and dynamic geopolitical environment, and the diverse range of issues and threats facing our nation make Section 702's unmatched speed and agility indispensable. Section 702 allows the U.S. Government to acquire foreign intelligence information from not just terrorists, but also weapons proliferators, hackers, and other foreign intelligence targets located overseas. It is thus an essential resource for understanding major events, including the Gaza conflict or Russia's further aggression in Ukraine. Perhaps the best

indication of Section 702's centrality to Intelligence Community's (IC) mission is the fact that, in 2022, nearly 60% of the articles written for the President's Daily Brief contained Section 702 information reported by the National Security Agency (NSA).

Here are a few of the many, many examples of how Section 702 has helped protect U.S. protect U.S. interests and American lives:

- Section 702 has been used to identify and protect against national security threats to the United States and its allies, to include both conventional and cyber threats posed by the People's Republic of China, Russia, Iran, and the Democratic People's Republic of Korea.
- Section 702-acquired information has been used to identify multiple foreign ransomware attacks on U.S. critical infrastructure. This intelligence positioned the U.S. Government to respond to and mitigate these events, and in some instances prevent significant attacks on U.S. networks.
- Section 702 has helped uncover gruesome atrocities committed by Russia in Ukraine—including the murder of non-combatants, the forced relocation of children from Russian-occupied Ukraine to the Russian Federation, and the detention of refugees fleeing violence by Russian personnel. This and other information have helped the U.S. government to galvanize accountability efforts related to Ukraine by confidently and accurately speaking to the international community about Russia's atrocities.
- Section 702-acquired information revealed insights that have informed the U.S. government's understanding of the Chinese origins of a chemical used to synthesize fentanyl; foreign actors' illicit plans to smuggle methamphetamine across the U.S. border; the quantities and potency of drugs, including fentanyl, destined for illegal transfer to the United States, as well as specific smuggling techniques used to avoid detection; and a foreign narcotics trafficker's purchase of a vast quantity of pills for transfer to the United States.

Potential Reforms

Finally, while we urge timely reauthorization, we fully understand that with this extraordinary authority comes significant responsibility and the need for accountability. The Congress and the American people must have confidence in our implementation of the authority to know that we are protecting Americans' civil liberties and privacy and guarding against abuses of any type.

To that end, following the identification and reporting of compliance issues with the FBI's querying of Section 702 data using U.S. person identifiers, the FBI implemented several

reforms which have had dramatic results. These reforms include reconfiguring FBI systems to minimize inadvertent queries, additional pre-approval requirements for both sensitive and batch queries; and case-specific justifications for all U.S. person queries before they can be conducted. The FBI also instituted new, substantially enhanced mandatory training, issued supplemental guidance, and established new accountability procedures for FBI personnel, including their leadership. In its 2023 opinion, the Foreign Intelligence Surveillance Court (FISC) recognized the remedial measures “are having the desired effect.”³ We support codifying these reforms and are committed to working with Congress to explore additional reforms that enhance the privacy, oversight, and transparency functions of Section 702 while ensuring we are able to fully preserve the efficacy of Section 702 for the IC—especially the FBI, which is responsible for defending the homeland.

More sweeping proposals, such as imposing a warrant requirement for all U.S. person queries, present grave concerns. The FISC has repeatedly approved the Section 702 program, including the FBI’s querying procedures, as consistent with the Fourth Amendment. Such a warrant requirement would also contradict the findings of the 9/11 Commission and the Webster Commission’s analysis of the Fort Hood disaster, which argued for removing barriers to the timely review of information already in the government’s lawful possession. Any kind of prior court approval process for querying Section 702 data would dramatically reduce the efficacy of the authority by forcing the government to disregard lawfully acquired threat information when time may be of the essence and potential threats need to be urgently investigated. It is therefore critically important that Section 702 not only be reauthorized, but also that any such reauthorization is done in a way that preserves its operational efficacy. A warrant requirement is not compatible with that essential goal.

As noted above, we believe there are other meaningful, constructive reforms that will bolster the compliance and oversight regime that is already in place, without affecting the operational agility necessary to identify and counter national security threats and are prepared to engage with Congress on such reforms.

³ In re DNI/AG 702(h) Certifications, FISA CT. at 83 (Apr. 11, 2023), https://www.intel.gov/assets/documents/702%20Documents/declassified/2023/FISC_2023_FISA_702_Certifications_Opinion_April11_2023.pdf.