

April 11, 2024

Re: H.R. 7888, the Reforming Intelligence and Securing America Act

Dear Representative:

As currently drafted the American Civil Liberties Union (ACLU) urges you to oppose H.R. 7888, the Reforming Intelligence and Securing America Act (RISAA) as currently drafted. In its current form the bill does not address the myriad of issues with Section 702 of the Foreign Intelligence Surveillance Act (FISA). The changes in the underlying legislation specifically exclude most known abuses of Section 702 and have already been shown to be ineffective. **If the amendment that closes the backdoor search loophole by requiring the government to obtain a warrant before searching the Section 702 database for Americans' communications is not adopted, the ACLU urges you to oppose final passage and will score the vote. If the warrant amendment is adopted the ACLU will not oppose final passage.**



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The primary purported reform contained in RISAA is a prohibition on queries that are queries that are “solely designed to find and extract evidence of criminal activity.” This prohibition applies to queries that are designed only to return evidence for criminal investigations and excludes queries that are designed in whole or in part to return foreign intelligence information.

According to the Office of the Director of National Intelligence, of the 204,000 US person queries conducted by the FBI between December 2021 and November 2022, there only 16 cases in which the FBI ran “evidence-of-a-crime-only” queries that resulted in Section 702 data being returned and accessed. And of those 16, only 2 would be prohibited under the exception for queries conducted to produce or preserve information in litigation, meaning that these restrictions would apply to less than one-hundredth of one percent of the FBI’s US person queries. Indeed, the most egregious abuses of Section 702, including queries of Black Lives Matter protestors, 19,000 donors to a congressional campaign, and members of Congress, were conducted in whole or in part for foreign intelligence purposes.

The bill additionally codifies changes that the FBI has already implemented but which have already shown to be insufficient. According to the government’s own data, violations are still occurring at a rate of more than 4,000 a year and include abuses such as recent searches a US senator, a state senator, and a state court judge who contacted the FBI to report civil rights violations by a local police chief. As has been shown time and time again since Section 702 was first passed into law, the FBI, CIA, and NSA cannot be trusted to police themselves.

The legislation also creates a consent requirement for Section 702 searches for members of Congress. Specifically, the FBI would not be allowed to supplement the contents of a defensive briefing for a member of Congress by conducting a Section 702 query without the consent of that member of Congress. This consent requirement applies only to members of Congress and would not apply to any other American. In effect, members of who vote in favor of this legislation are voting to provide themselves with special privacy rights that do not apply for other Americans. The ACLU does not oppose consent requirements for Section 702 searches done for cybersecurity or defensive purposes.

However, this requirement should apply to all Americans and not just members of Congress.

Finally, RISAA weakens accountability and oversight by the FISA Court amici, whose ability under this legislation to raise civil liberties issues would be limited. As drafted, the amicus provisions limit the pool of eligible amici in certain cases, heavily weighing the pool towards former members of the intelligence community. They further restrict the arguments that amici can make by limiting them to only addressing issues raised by the Foreign Intelligence Surveillance Court (FISC).

The ACLU urges that you support the following amendments that will be offered on the floor:

Biggs-Jayapal-Jordan-Nadler Amendment to close the backdoor search loophole

The ACLU urges you to vote yes on the Biggs-Jayapal-Jordan-Nadler Amendment which would prohibit warrantless searches of US person communications in the Section 702 database. While the original intended purpose of Section 702 is for the government to obtain “foreign intelligence,” in practice, intelligence agencies frequently use it as domestic surveillance tool. In the last year alone, the FBI conducted over 200,000 warrantless “backdoor” searches of Americans’ communications. These backdoor searches allow law enforcement to access constitutionally protected communications that would otherwise be off-limits without a warrant. Moreover, a recent report from the Privacy and Civil Liberties Oversight Board further found little justification for the close to 5 million U.S. person queries conducted by the FBI from 2019 to 2022.

This amendment would ensure that US person searches conducted under Section 702 would require the government to obtain a warrant, with exceptions built in for emergencies, consent, and certain queries relating to cybersecurity. **We urge members to vote YES on this amendment and will score this vote.**

Cline Amendment to permanently end “abouts” collection

The ACLU urges you to vote yes on the Cline Amendment which would prohibit the government from restarting its “abouts” collection, which the government shut down years ago due to persistent overcollection of Americans’ communications. This collection refers to communications that are neither to nor from a target of surveillance, but which mention information associated with the target. This practice led to the collection of large amounts of purely domestic communications. While NSA ended this practice in 2017, they retain the ability to restart in the future. This amendment would prohibit them from doing so. **We urge members to vote YES on this amendment and will score this vote.**

The ACLU further urges you to reject amendments that would unacceptably and unnecessarily expand surveillance under Section 702. This includes the following amendments:

Turner-Himes Amendment to expand domestic surveillance

The ACLU urges you to vote no on Turner-Himes Amendment which would expand the definition of “electronic communication service provider” that would dramatically expand warrantless FISA surveillance. Currently under Section 702, only entities that provide communication services like email, calls, and text messaging can be compelled to disclose these communications. According to one of the FISA court amici, this change permits the government to compel the assistance of a wide range of additional entities that could include data centers and buildings owned by commercial landlords.¹ It could also include individuals with access to these facilities and equipment.

In practice this means that owners of commercial buildings or facilities that maintain internet services could be subject to Section 702 and would be forced to turn over the communications of their tenants (if one side is foreign). And this is despite exceptions in the language that make clear that such surveillance cannot be conducted with the assistance of public accommodation facilities, dwellings, community facilities, or food service establishments. **We urge members to vote NO on this amendment and will score this vote.**

Crenshaw Amendment to expand the definition of foreign intelligence

The ACLU urges you to vote no on the Crenshaw Amendment which expands the definition of foreign intelligence. The definition of foreign intelligence under FISA is already extremely broad and applies to any information that “relates to the defense, security, or foreign affairs” of the United States. This amendment would add a new definition involving any information related to, “international production, distribution, or financing of illicit synthetic drugs, opioids, cocaine, or other drugs driving overdose deaths, or precursors of any aforementioned.” Under the operation of Section 702 at current, information about drugs like fentanyl already qualifies under the existing definition of foreign intelligence and that administration has pointed to its use of Section 702 to collect intelligence about fentanyl trafficking as a reason to reauthorize the program. This means the expanded definition is either unnecessary or the government plans to use it for a reason that has not been provided. **We urge members to vote NO on this amendment and will score this vote.**

Waltz Amendment to expand surveillance by allowing Section 702 to expand vetting of non-US person traveling to the United States

The ACLU urges you to vote no on the Waltz Amendment which would expand surveillance by allowing Section 702 to expand vetting of non-US person traveling to the United States. These searches would occur absent any suspicion and even if there was zero reason for any concern. Innocent individuals would be subjected to invasive procedures when it comes to their sensitive data and communications. People should be able to visit the U.S. without opening their private communications to U.S. government scrutiny and there are plenty of vetting mechanisms already in place for vetting travelers to the United States who do not pose a threat to national security or public safety.

In addition to people outside the country the amendment could potentially apply to large numbers of visa holders who are longtime U.S. residents but are continually required to

¹ <https://www.zwillgen.com/law-enforcement/fisa-702-reauthorization-amendments-second-time-not-charm/>.

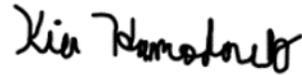
seek travel authorization, such as when they leave the country on business or personal travel and seek to return to the United States. Individuals currently in the United States could potentially additionally be considered being “processed for travel to the US” when they have a pending visa application, request for advance parole, or another similar situation. **We urge members to vote NO on this amendment and will score this vote.**

The House should only support legislation reauthorizing Section 702 that contains fundamental reforms, including a warrant requirement for US person queries. If you have questions, please contact Senior Policy Counsel Kia Hamadanchy at khamadanchy@aclu.org or (734)-649-2929.

Sincerely,



Christopher Anders
Director, Democracy & Technology



Kia Hamadanchy
Senior Policy Counsel