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June 23, 2017

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

RE: Hearing on "The FISA Amendments Act: Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties"

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you regarding the hearing on "The FISA Amendments Act: Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties."[1]

The Electronic Privacy Information Center ("EPIC") testified before the House Judiciary Committee during the 2012 FISA reauthorization hearings.[2] At the time, EPIC urged the Committee to adopt stronger public reporting requirements. We noted, prior to the disclosures of Edward Snowden, that the scope of surveillance by the Intelligence Community was likely far greater than was known to the public or even to the Congressional oversight committees.

EPIC writes now to restate our earlier views that routine public reporting on the use of Section 702 authority should be strengthened. Public dissemination of a comprehensive, annual FISA report, similar to reports for other forms of electronic surveillance, would improve Congressional and public oversight of the Government's information gathering activities. In addition, Congress should require publication of decisions of the Foreign Intelligence Surveillance Court ("FISC"). At present, the FISA grants broad surveillance authority with little to no public oversight. To reauthorize the expansive provisions of Title VII of the FAA without improved transparency and oversight would be a mistake.

EPIC also urges that the Privacy and Civil Liberties Oversight Board (PCLOB) be restored to full strength. PCLOB, established by the Implementing Recommendations of the 9/11 Commission Act,[3] currently has no Chair and only one out of its four Board members. A full strength, independent PCLOB is critically necessary for oversight of government surveillance

[1] *The FISA Amendments Act: Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties,* 115th Cong. (2017), S. Comm. on the Judiciary, https://www.judiciary.senate.gov/meetings/the-fisa-amendments-act-reauthorizing-americas-vital-national-security-authority-and-protecting-privacy-and-civil-liberties (June 27, 2017).
[2] *See* Testimony of EPIC President Marc Rotenberg, *The FISA Amendments Act of 2008*, Hearing before the House Committee on the Judiciary, U.S. House of Representatives, May 31, 2012, https://epic.org/privacy/testimony/EPIC-FISA-Amd-Act-Testimony-HJC.pdf.
[3] Pub. L. 110-53.

programs. As former PCLOB member Judge Patricia Wald recently stated when receiving the EPIC Champion of Freedom Award:

> [A]n agency dedicated to protecting privacy and civil liberties inside the intelligence community with access to classified material is a uniquely valuable asset in the ever difficult search for the right balance between national security and democratic values. The need for that kind of insider watch only intensifies as our foes, foreign and domestic, accelerate their efforts to undermine both our national security and the essence of our democracy. Legitimate concerns in keeping the intel community's own integrity intact in no way detract from the parallel necessity of preserving statutory and constitutional rights of our citizens including their right to be reasonably informed of basic information on the fundamental structures of how the intelligent agencies operate, without disclosure of critical sources or methods.[4]

PCLOB has important unfinished work that cannot be completed until the Board is restored to quorum status. In 2014, PCLOB announced that that it would issue a public report examining surveillance conducted under Executive Order 12333[5] and the implications for privacy and civil liberties.[6] More recently, the board announced an anticipated publication date of the report scheduled for the end of 2016.[7] In her remarks at the EPIC dinner, Judge Wald noted that before she left PCLOB in January 2017 there had been "dozens of drafts of a proposed 12333 report circulated to the Board".[8] EPIC recently filed a FOIA request with PCLOB for the complete EO 1233 report. That request is still pending.

The Need for Improved Reporting on FISA

For over twenty years, EPIC has reviewed the annual reports produced by the Administrative Office of the US Courts on the use of federal wiretap authority as well as the letter provided each year by the Attorney General to the Congress regarding the use of the FISA authority.[9] EPIC routinely posts these reports when they are made available and notes any significant changes or developments.[10]

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[4] Prepared Remarks of Judge Patricia Wald, *EPIC Champions of Freedom Awards Dinner* (June 5, 2017), *available at* https://epic.org/june5/Wald%20Remarks-EPIC-June5.pdf.

[5] Executive Order 12333 (EO 12333) sets out the President's rules and orders governing activities of the U.S. Intelligence Community. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), as amended by Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003), Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008), reprinted as amended in 50 U.S.C. § 401 (2011).

[6] Privacy and Civil Liberties Oversight Bd., *PCLOB Announces Its Short Term Agenda* (July 23, 2014), https://www.pclob.gov/newsroom/20140807.html.

[7] Privacy and Civil Liberties Oversight Bd., *Semi-Annual Report: October 2015-March 2016* (2016), https://www.pclob.gov/library/Semi_Annual_Report_August_2016.pdf.

[8] Remarks of Judge Patricia Wald at 2, *supra* note 4.

[9] *See, e.g.,* Administrative Office of the US Courts, *Wiretap Report 2015*, http://www.uscourts.gov/statistics-reports/wiretap-report-2015; Letter from Assistant Attorney General

The annual report prepared by the Administrative Office of the U.S. Courts provides a basis to evaluate the effectiveness of wiretap authority, to measure the cost, and even to determine the percentage of communications captured that were relevant to an investigation. These reporting requirements ensure that law enforcement resources are appropriately and efficiently used while safeguarding important constitutional privacy interests.

By way of contrast, the Attorney General's annual FISA report provides virtually no meaningful information about the use of FISA authority other than the applications made by the government to the Foreign Intelligence Surveillance Court.[11] There is no information about cost, purposes, effectiveness, or even the number of non-incriminating communications of US persons that are collected by the government. Moreover, as the FAA allows programmatic surveillance without judicially-approved targets, and it is almost impossible to assess the impact of such surveillance on individuals. While we acknowledge Congress's 2006 amendment to the FISA reporting requirements that now requires disclosure of the numbers of National Security Letter requests made by the FBI concerning US persons, this information alone, without more, does not provide an adequate basis to evaluate these programs. By way of contrast, the reports prepared by the Department of Justice Inspector General concerning the misuse of NSL authority provide a great deal of information, but these reports are not prepared annually. So while FISA and NSL authorities remain in place, there is little information available to Congress or the public about how these authorities are used and what impact that has on the privacy of individuals.

EPIC recognizes that section 702 contains internal auditing and reporting requirements. The Attorney General and DNI assess compliance with targeting and minimization procedures every six months, and provide reports to the FISC, congressional intelligence committees, and the Committees on the Judiciary.[12] The inspector general of each agency authorized to acquire foreign intelligence information pursuant to FISA must submit similar semiannual assessments. The head of each authorized agency must also conduct an annual review of FISA-authorized "acquisitions" and account for their impacts on domestic targets and American citizens.[13] Yet none of this information is made available to the public, and there is not sufficient public oversight. There is simply no meaningful public record created for the use of these expansive electronic surveillance authorities.

Similar internal auditing procedures have failed in the past, and Congress should establish more robust public reporting requirements and oversight procedures.

Peter Kadzik to Charles Grassley, Chairman, U.S. Senate Committee on the Judiciary, et al., Apr. 28, 2016 ("2015 FISA Annual Report to Congress"), https://fas.org/irp/agency/doj/fisa/2015rept.pdf.

[10] *See Title III Wiretap Orders: 1968-2015*, EPIC, http://epic.org/privacy/wiretap/stats/wiretap_stats.html; *Foreign Intelligence Surveillance Act*, EPIC, http://epic.org/privacy/terrorism/fisa/; *Foreign Intelligence Surveillance Court (FISC)*, EPIC, https://epic.org/privacy/terrorism/fisa/fisc.html.

[11] It is clear from the Attorney General's annual reports that FISC applications are routinely approved with very rare exceptions. *See Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 140 (2d Cir. 2011) ("Empirical evidence supports this expectation: in 2008, the government sought 2,082 surveillance orders, and the FISC approved 2,081 of them."). Of the Government's 1,499 requests to the FISC for surveillance authority in 2015, none were denied in whole or in part. *See* 2011 FISA Annual Report to Congress, *supra*, note 3.

[12] 50 U.S.C. § 1881a(l)(1).

[13] 50 U.S.C. § 1881a(l)(2).

The use of aggregate statistical reports has provided much needed public accountability of federal wiretap practices. These reports allow Congress and interested groups to evaluate the effectiveness of Government programs and to ensure that important civil rights are protected. Such reports do not reveal sensitive information about particular investigations, but rather provide aggregate data about the Government's surveillance activities. That is the approach that should be followed now for FISA.

Transparency is Necessary for Adequate Oversight

As EPIC explained in our testimony in 2012, over classification thwarts effective government oversight. Declassification is an especially important priority with respect to legal opinions issued by the Foreign Intelligence Surveillance Court (FISC), often referred to as a "secret court."[14] Congress recognized in the USA FREEDOM Act that FISC opinions contain important interpretations of law relevant to the privacy of individuals and the oversight of government surveillance programs. The law now requires the Director of National Intelligence, in consultation with the Attorney General, to:

> conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 601(e)) that includes a significant construction or interpretation of any provision of law […] and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion.[15]

Though this provision has improved transparency by requiring the declassification of new FISC opinions, many older opinions remain unnecessarily classified. Retroactive declassification of FISC opinions should be prioritized to ensure public oversight of the broad surveillance authority held by the court. Public oversight helps ensure that law enforcement resources are appropriately and efficiently used while safeguarding important constitutional privacy interests.

Section 702 and the Privacy of Non-U.S. Persons

EPIC recently made submissions to the Irish High Court in the case *Data Protection Commissioner v. Facebook*, a case concerning privacy protections for transatlantic data transfers.[16]

The *DPC v. Facebook* case follows a landmark decision of the European Court of Justice which found that there were insufficient legal protections for the transfer of European consumer data to the United States, largely due to the surveillance authority granted to the U.S. government

[14] *See* Testimony of EPIC President Marc Rotenberg, *supra* note 2.
[15] 50 U.S.C. § 1872.
[16] Amended Outline Submissions of Behalf of the Amicus Curiae (EPIC), *Data Protection Comm'r v. Facebook,* 2016/4809 P*, available at* https://epic.org/privacy/intl/schrems/02272017-EPIC-Amended-Submissions.pdf.

under Section 702.[17] Mr. Schrems, an Austrian privacy advocate who brought the original case, has again challenged Facebook's business practices.[18] Other similar suits have been brought in the EU challenging the Privacy Shield agreement. Section 702 is the central focus of all of these legal challenges.

Section 702 authorizes bulk surveillance on the communications of non-U.S. persons, including EU citizens, by the U.S. government. Without reforms by Congress, Privacy Shield and other transatlantic data transfer mechanisms could very well be invalidated by the European Court of Justice.

Considering the interests of US citizens, our foreign allies, and commercial trade, there is a clear need to improve the privacy protections and the means of public reporting in Section 702.

Conclusion

There is still too little known about the operation Section 702 to determine whether it is effective and whether the privacy interests of Americans are adequately protected. Before renewing the Act, EPIC's urge the committee to carefully investigate the program and to improve oversight by (1) establishing new public reporting requirements, and (2) strengthening the authority of the FISA Court to review and limit the government's use of FISA authorities.

EPIC asks that this Statement be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ *Marc Rotenberg*
Marc Rotenberg
EPIC President

/s/ *Caitriona Fitzgerald*
Caitriona Fitzgerald
EPIC Policy Director

[17] Judgment of Oct. 6, 2015, *Schrems v. Data Protection Comm'r,* Case C-362/14, EU:C:2015:650, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=EN.
[18] *Data Protection Comm'r v. Facebook,* 2016/4809 P (H. Ct.) (Ir.)