



May 9, 2017

The Honorable Bob Goodlatte  
Chairman  
House Judiciary Committee  
2309 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John Conyers  
Ranking Member  
House Judiciary Committee  
2426 Rayburn House Office Building  
Washington, D.C. 20515

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee,

Title VII of the FISA Amendments Act (FAA) will expire on December 31, 2017 unless Congress acts to extend the law. Section 702 of the FAA is used to authorize electronic surveillance targeting non-U.S. Persons where the collection takes place within the United States. We have previously written to warn the committee that without significant reform, Section 702 will continue to threaten the free flow of information overseas and negatively impact global data privacy and U.S. economic interests. Surveillance conducted pursuant to Section 702 also threatens the U.S - E.U. Privacy Shield.

However, recent developments at the National Security Agency (NSA) and the FISA Court create an opportunity to enhance legal protections for all people.

As part of the Upstream program conducted under § 702, the NSA has intentionally collected all internet transactions to, from, or “about” a target, thereby acquiring communications from people who are not themselves targeted by a program. Up until last month, the government claimed that distinguishing content from metadata in the upstream scan was not possible.<sup>1</sup> Experts have cast doubt on this claim,<sup>2</sup> and, nonetheless, just because unlawful surveillance may be necessary to conduct lawful surveillance does not mean it should be condoned.

Then, on April 28, 2017, “[a]fter a comprehensive review of mission needs, current technological constraints, United States person privacy interests, and certain difficulties in implementation,” the NSA announced that the agency would cease “about” collection.

After considerable evaluation of the program and available technology, NSA has decided that its Section 702 foreign intelligence surveillance activities will no longer include any upstream internet communications that are solely “about” a foreign intelligence target. Instead, this surveillance will now be limited to only those communications that are directly “to” or “from” a foreign intelligence target. These changes are designed to retain the upstream collection that provides the greatest value to national security while

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<sup>1</sup> <https://www.pclab.gov/library/702-Report.pdf>

<sup>2</sup>

<https://www.justsecurity.org/33044/unprecedented-unlawful-nsas-upstream-surveillance/?source=techstories.org>



reducing the likelihood that NSA will acquire communications of U.S. persons or others who are not in direct contact with one of the Agency's foreign intelligence targets.<sup>3</sup>

This decision is consistent with technological developments, U.S. human rights obligations, and historical practice. In one case, the NSA previously had to limit data it was getting under a surveillance program because the technology at the time was unable to comply with statutory limitations - only after the technology was developed to properly limit collection was the collection allowed.<sup>4</sup>

Having restricted their own surveillance activities, it is now of paramount importance that these changes are enshrined in law. As your Committee considers reform and reauthorization of Title VII of the FISA Amendments Act, we encourage you to make permanent this change in policy via legislative reform. Enacting legislative protections would take a step toward real reform and send a signal that the United States leads the world in the protecting the right to privacy.

Sincerely,

Amie Stepanovich  
U.S. Policy Manager

Nathan White  
Senior Legislative Manager

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<sup>3</sup> <https://www.nsa.gov/news-features/press-room/statements/2017-04-28-702-statement.shtml>

<sup>4</sup> See Power Wars by Charlie Savage, Chapter 5, Section 4.