

October 20, 2017

Dear Chairman Burr and Ranking Member Warner:

We, the undersigned civil liberties and government transparency organizations, write regarding the press reports that the Senate Select Committee on Intelligence (SSCI) will hold a closed markup on draft legislation to reauthorize Section 702 of the FISA Amendments Act next week.<sup>1</sup> Specifically, **we urge you to hold the markup in an open session. Should you decide to hold some or all of the markup in a closed session, we urge you to follow committee and Senate rules that require a public vote before doing so.**

To the greatest degree possible, the consideration of legislation pertaining to Section 702—which, although it authorizes surveillance of foreign persons overseas, significantly affects the privacy of U.S. persons' communications—should take place in public. When Congress legislates, by default the process should be open to the public so that constituents can understand the issues at hand, participate in the process, and hold their elected officials accountable.

Senate and SSCI rules are structured to reflect the viewpoint that openness should prevail. SSCI committee rule of procedure 2.1 declares “meeting of the Committee shall be open to the public except as provided in paragraph 5(b) of Rule XXVI of the Standing Rules of the Senate.”<sup>2</sup> Senate Rule XXVI states “[e]very meeting of a committee ... shall be open to the public,” except in certain enumerated circumstances, and only after a public motion and second to go into closed session on the basis of those exceptions *and a record vote in open session* by a majority of members of the committee.”<sup>3</sup> Although we recognize that SSCI’s jurisdiction includes considering matters involving classified information, the Committee’s consideration of Section 702 can be accomplished based upon unclassified information already available to the public. To the extent that discussion of classified information is necessary, only those small portions of the markup need to be held in a closed setting.

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<sup>1</sup> While SSCI has not given public notice of the markup on its website, Chairman Burr was quoted in Politico Pro on a date. See “Senate Intelligence plans markup of surveillance renewal bill next week,” by Martin Matishak (10/17/2017), available to subscribers only at <https://www.politicopro.com/cybersecurity/story/2017/10/senate-intelligence-plans-markup-of-surveillance-renewal-bill-next-week-163508>.

<sup>2</sup> <https://www.intelligence.senate.gov/about/rules-procedure>.

<sup>3</sup> <https://www.rules.senate.gov/public/index.cfm?p=RuleXXVI>. The full text is reproduced in the appendix to this letter.

Section 702 reauthorization and reform is a matter of public debate in Congress, and a great deal of information about the operation of the program has been declassified. SSCI held an open hearing on this topic June 7, 2017,<sup>4</sup> the Senate Judiciary Committee held an open hearing on June 27, 2017,<sup>5</sup> and the House Judiciary Committee held an open hearing on March 1, 2017.<sup>6</sup> Additionally, the House Judiciary Committee is expected to hold an open markup on Section 702 legislation in the near future. It is therefore highly unlikely that it would be necessary to discuss classified information in the course of the Committee's markup.

This issue is too important and has too great an impact on Americans' privacy for SSCI to debate it behind closed doors. The American people have a right to know the arguments that their Senators make for and against legislation. Should some members of SSCI move to deliberate on certain aspects in closed session, we expect the committee will follow Senate procedures, require a vote in open session, and close the debate only to the extent provided for by Senate rules.

Sincerely yours,

American Civil Liberties Union	National Security Counselors
American Library Association	New America's Open Technology Institute
Campaign for Liberty	OpenTheGovernment
Center for Democracy and Technology	PEN America
Defending Rights & Dissent	Project On Government Oversight
Demand Progress Action	Public Citizen
Electronic Frontier Foundation	Restore The Fourth
Electronic Privacy Information Center (EPIC)	RootsAction.org
Free Press Action Fund	TechFreedom
FreedomWorks	The Constitution Project
Government Information Watch	Yemen Peace Project
National Security Archive	

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<sup>4</sup> "FISA legislation," available at <https://www.intelligence.senate.gov/hearings/open-hearing-fisa-legislation-0>.

<sup>5</sup> "The FISA Amendments Act: Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties," available at <https://www.judiciary.senate.gov/meetings/the-fisa-amendments-act-reauthorizing-americas-vital-national-security-authority-and-protecting-privacy-and-civil-liberties>.

<sup>6</sup> "Section 702 of the Foreign Surveillance Act," available at <https://judiciary.house.gov/hearing/section-702-fisa-amendments-act/>.

## Appendix

### **Senate Rule XXVI 5(b) (emphasis added)**

(b) **Each meeting of a committee**, or any subcommittee thereof, including meetings to conduct hearings, **shall be open to the public, except** that a meeting or series of meetings by a committee or a subcommittee thereof on the same subject for a period of no more than fourteen calendar days may be closed to the public **on a motion made and seconded to go into closed session to discuss only whether the matters enumerated in clauses (1) through (6) would require the meeting to be closed, followed immediately by a record vote in open session by a majority of the members of the committee** or subcommittee when it is determined that the matters to be discussed or the testimony to be taken at such meeting or meetings

(1) will disclose matters necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement;

(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, other than through an application by such person for a specific Government financial or other benefit, and is required to be kept secret in order to prevent undue injury to the competitive position of such person; or

(6) may divulge matters required to be kept confidential under other provisions of law or Government regulations.

(c) Whenever any hearing conducted by any such committee or subcommittee is open to the public, that hearing may be broadcast by radio or television, or both, under such rules as the committee or subcommittee may adopt.

### **Senate Select Committee on Intelligence Rule of Procedure 2.1**

2.1. Meetings of the Committee shall be open to the public except as provided in paragraph 5(b) of Rule XXVI of the Standing Rules of the Senate.