

July 26, 2021

The Honorable Nancy Pelosi
Speaker
United States House of Representatives

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives

The Honorable Steny Hoyer
Majority Leader
United States House of Representatives

The Honorable Steve Scalise
Minority Whip
United States House of Representatives

The Honorable Jim McGovern
Chairman of the Committee on Rules
United States House of Representatives

The Honorable Tom Cole
Ranking Member of the Committee on Rules
United States House of Representatives

RE: Civil Liberties Groups Urge Members to Support the Lofgren-Massie Amendment to H.R. 4505, the Commerce, Justice, Science, and Related Agencies Appropriations Act

Dear Speaker Pelosi, Majority Leader Hoyer, Chairman McGovern, Republican Leader McCarthy, Republican Whip Scalise, Ranking Member Cole, and all members of the House of Representatives:

We write to urge your support for an amendment that Representatives Lofgren, Jayapal, Massie, and Davidson have offered to H.R. 4505, the Commerce, Justice, Science, and Related Agencies Appropriations Act for FY 2022. This amendment would prohibit the use of funds for the warrantless search of United States persons' communications acquired under Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA), the controversial foreign intelligence authority that acquires an untold number of Americans' Fourth Amendment-protected information.

Ending this unconstitutional practice is imperative to ensure that foreign intelligence surveillance does not swallow Americans' privacy rights. In previous years, this amendment garnered the broad, bipartisan support of a majority of members of the House of Representatives.¹ Recently released opinions by the Foreign Intelligence Surveillance Court (FISC) underscore the need for a warrant requirement to protect the privacy of those whose communications are "incidentally" collected.² According to one opinion, the FBI, over the course of one year, conducted *three million queries* of a single database containing Section 702 communications, most of which presumably were U.S. person queries in light of the FBI's primarily domestic mission. Although Congress has required the FBI to obtain a FISC order for a small subset of these queries, the FISC found that the FBI has literally never complied with this statutory requirement and has violated it on at least dozens of occasions.

Moreover, the FBI's own court-approved procedures place some limits on queries, yet several recent FISC decisions found that FBI agents simply ignore those rules in a shocking number of cases, conducting queries

¹ See e.g. H. Amdt. 1204 to H.R. 5293 (2016) (126 Democratic members and 72 Republican members voted in support); H. Amdt. 503 to H.R. 2685 (2015) (146 Democratic members and 109 Republican members voted in support); H. Amdt. 935 to H.R. 4870 (2014) (158 Democratic members and 135 Republican members voted in support).

² Elizabeth Goitein, *How the FBI Violated the Privacy Rights of Tens of Thousands of Americans*, Brennan Center for Justice (2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-fbi-violated-privacy-rights-tens-thousands-americans>.

when they have no reason to believe it would return foreign intelligence or evidence of a crime.³ Agents queried Section 702 data to find the communications of people who came to the FBI to perform repairs; victims who reported crimes; and business, religious, and community leaders applying to participate in the FBI's "Citizens Academy." In a move that has disturbing echoes of the NSA's bulk collection of Americans' phone records, agents have also conducted so-called "batch queries," such as one that swept in the 70,000 people who have authorized access to FBI facilities.

Criticizing the FBI's failures to respect the rules set by Congress and the FISC, Judge James Boasberg wrote that "It should be unnecessary to state that government officials are not free to decide for themselves whether or to what extent they should comply with court orders."⁴ We agree, and it is time for Congress to act by passing the Lofgren-Massie amendment.

Today, this amendment enjoys overwhelming, bipartisan support, both from the public and from the undersigned groups. In addition to supporting these necessary steps forward by voting in favor of this amendment to H.R. 4505, we also respectfully ask that you work to ensure it is included in any legislation sent to the President.

We welcome the opportunity to discuss this with you further. Please don't hesitate to reach out to Bob Goodlatte, Senior Policy Adviser for The Project for Privacy and Surveillance Accountability and former Chairman of the House Committee on the Judiciary, at rwg@bobgoodlatte.com, or Sean Vitka, Senior Policy Counsel for Demand Progress, at sean@demandprogress.org.

Sincerely,

American Civil Liberties Union
Americans for Prosperity
Asian American Federal Employees for
Nondiscrimination
Brennan Center for Justice at NYU School of Law
Campaign for Liberty
Center for Democracy & Technology
Center for Security, Race and Rights
Constitutional Alliance
Due Process Institute
Defending Rights & Dissent
Demand Progress
Electronic Frontier Foundation
Fight for the Future
Free Press Action
Freedom of the Press Foundation

FreedomWorks
Government Information Watch
National Association of Criminal Defense Lawyers
National Coalition Against Censorship
New America's Open Technology Institute
OCA - Asian Pacific American Advocates, Greater
Chicago Chapter
The Project for Privacy and Surveillance
Accountability
Presente.org
Project On Government Oversight
Restore The Fourth
RootsAction.org
Secure Justice
S.T.O.P. - The Surveillance Technology Oversight
Project

CC: Members of the House of Representatives

³ Ellen Nakashima, FBI and NSA violated surveillance law or privacy rules, a federal judges found, Washington Post (2020), https://www.washingtonpost.com/national-security/fbi-and-nsa-violated-surveillance-law-or-privacy-rules-a-federal-judge-found/2020/09/04/b215cf88-ee3-11ea-b4bc-3a2098fc73d4_story.html.

⁴ *In re Government's Ex Parte Submission of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications*, FISA Ct. (2019), available at https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2019_702_Cert_FISC_Opinion_06Dec19_OCR.pdf.