Privacy and Civil Liberties Oversight Board

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Thank you to the Board for the opportunity to share EFF's views on Section 702. We want to especially thank the Board for its past work on 702, which was critical to the public coming to a better understanding of the scope and application of Section 702 surveillance.

To that end, we hope that the Board can continue its role in shedding much needed light on this large and expensive program, including not only explaining how 702 is being used in practice and how U.S. persons and non-U.S. persons are impacted by it, but especially in articulating the severe, if not fatal, barriers to accountability and oversight of the programs operating under 702 today.

We believe that an independent, complete explanation of section 702 in practice, and a clear explanation of the actual lack of availability of oversight and accountability, is crucial to Congressional consideration of whether to renew 702 and, if it is to be renewed, any changes to it. Without that, there is a very real risk that renewal will be based largely on one-sided, limited disclosures of information from the obviously self-interested IC. Past experience has demonstrated that these disclosures do not reflect a complete view of the surveillance, much less reflect the public interest implicated the surveillance. Protecting that public interest is a role that the PCLOB must affirmatively champion.

Additionally, while there is much to say about the problems of Section 702, itself, we urge the Board to also consider how governmental secrecy now renders moot many of the accountability and oversight mechanisms for national security surveillance that exist on paper in FISA as well as in the U.S. constitution.

As this Board is well aware, one of EFF's highest priorities for nearly two decades is ensuring that individuals can seek judicial accountability for violations of their constitutional and statutory rights committed through the government's warrantless foreign intelligence surveillance inside the United States.

EFF's work on this issue predates the passage of Section 702 itself. Our 2006 lawsuit, *Hepting v. AT&T*, relied on first-hand evidence from whistleblower Mark Klein to show that the telecommunications companies were copying the contents of Internet traffic at the behest of the NSA. Congress essentially mooted this lawsuit in 2008 by granting the companies retroactive immunity as part of the FISA Amendments Act, which also instituted Section 702. Not to be deterred, and at the suggestion of key members of Congress, EFF again sued on behalf of AT&T customers, this time seeking to hold the government itself accountable. That lawsuit, *Jewel v. NSA*, powered on for 14 years, bolstered by the Snowden revelations and the flood of additional public information about the so-called Upstream program, some of which the PCLOB helped bring forward.

The *Jewel* lawsuit came to an end last year, not because the judiciary disagreed with our arguments about the unconstitutionality or illegality of the government's surveillance, but

because the courts validated the government's claims that a program known and debated across the world is somehow too secret to be challenged in open court by ordinary members of the public impacted by it. Specifically, the Supreme Court refused to grant certiorari and reconsider a Ninth Circuit decision (and an underlying district court ruling) that held that the common law state secrets privilege blocked our clients' efforts to prove that their data was intercepted, such that they had standing to sue. (ACLU and Wikimedia are currently seeking Supreme Court review of similar rulings from the Fourth Circuit).

As *Jewel* illustrates, the judiciary has used secrecy to create a broad national-security exception to the Constitution and law that allows all Americans to be spied upon by their government while denying them any viable means of challenging that spying. This exception rests on a pair of misinterpretations of common law and statutory procedures for dealing with supposedly secret evidence. First, courts have allowed the government to invoke the state secrets privilege in Section 702 cases, despite Congress' express creation of a statutory method for a federal court to secretly review evidence of claimed illegal surveillance, 50 U.S.C. § 1806(f). Second, they have expanded the scope of that privilege to effectively allow the government to claim secrecy over widely known facts, and end litigation involving these facts, based on little more than its own say-so.

With the upcoming sunset of Section 702, Congress can correct these mistakes, reaffirm its intention to create actual, usable accountability measures for the inevitable circumstances when individuals are wrongly surveilled, and reopen the courthouse doors to individuals trying to protect their rights.

First, Congress can expressly override the Supreme Court's mistaken statutory interpretation of FISA Section 1806 in *FBI v. Fazaga*, 142 S. Ct. 1051 (2022). Contrary to the Court's holding in *Fazaga*, Congress clearly intended for individuals to be able to seek redress when they were wrongfully surveilled and, to do that, intended Section 1806(f) to displace the state secrets privilege in lawsuits in which evidence relating to electronic surveillance is relevant. The Supreme Court's ruling essentially makes FISA's promise of individual redress for violations of surveillance law a dead letter. The Board should recommend that Congress reaffirm the rightful interpretation of the statute and correct the Supreme Court's mistake.

Second, even when the state secrets privilege can apply, Congress can make clear that the invocation of secrecy is not a get-out-of-jail-free card for the government. As far back as 2009, Congress debated the State Secrets Protection Act, H.R. 984, 110th Cong. (2009), which would have created procedures for courts to securely review evidence that the government claims is secret, and prevent cases from being dismissed based on state secrecy until plaintiffs have had an opportunity to discover all non-privileged evidence. The Board should recommend that Congress revive these reforms and consider including them if it seeks to renew Section 702.

Third, Congress can address the problem of over classification, and the continuing reluctance of the agencies conducting 702 surveillance, to declassify critical information that litigants and the public need to evaluate and understand the scope of the surveillance, what problems have occurred and the difficulties of achieving real accountability, and whether the tremendous costs associated with mass surveillance are worthwhile. This problem has separation of powers implications as well, as in the *Al Haramain* case where a federal judge ordered that information be released to cleared counsel and the government still refused to provide it claiming a lack of a ”need to know” under the classification rules. This strategy helped create the circumstances in which that litigation was dismissed, again despite clear evidence indicating the fact of surveillance. Of course, control over clearances also impedes Congressional oversight.

In short, current practices result in filtered, constrained and narrowed oversight up and down the line, and have effectively blocked individuals from seeking judicial accountability that Congress intended.

These are just a small subsection of the needed reforms to ensure accountability and oversight of Section 702. In their written submissions to the Board this past fall, other organizations such as the ACLU and Brennan Center highlighted many other important issues and needed reforms. This includes significant suggestions for declassification and public reporting about 702 surveillance in actuality. We urge the Board to take the steps that each of them recommends.

I welcome this discussion and look forward to the Board’s report.