

June 12, 2017

Dear Director Coats,

The undersigned organizations write to express our dismay at your decision to abandon the effort to estimate the number of Americans whose communications are incidentally collected pursuant to Section 702 of the Foreign Intelligence Surveillance Act. We ask that you reconsider.

When you announced your decision, you failed to explain why you suddenly concluded that providing such information would be “infeasible,” despite months of briefings to civil society and Congressional staff on methodologies that suggest that just the opposite is true. In making this choice, you are renegeing on a commitment that your predecessor, Director James Clapper, made to civil society organizations and members of Congress, and that you assumed when you testified at your nomination hearing: “I’m going to do everything I can to work with Admiral Rogers in NSA to get you that number.”¹

This debate began in 2011 when Senator Wyden first asked Director Clapper to provide an estimate.² In 2012, the Inspector General of the Intelligence Community claimed that such an estimate would not be possible because the process of establishing the estimate would violate the privacy of U.S. persons, and require too many resources.³ In October 2015, however, a bipartisan coalition of 32 organizations dedicated to preserving privacy and civil liberties wrote Director Clapper about this “significant and conspicuous knowledge gap [concerning] the impact of Section 702 surveillance on Americans.”⁴ The letter made clear that the privacy community is supportive of conducting an estimate, and it addressed how the estimate could be performed in a manner that would protect civil liberties.

We still roundly reject the notion that an estimate, even by orders of magnitude, is infeasible.

¹ Open Hearing: Nomination of Daniel Coats to be Director of National Intelligence, Sen. Select Comm. on Intelligence, 115th Cong. (2017). <https://www.intelligence.senate.gov/hearings/open-hearing-nomination-daniel-coats-be-director-national-intelligence>

² Letter from Sen. Ron Wyden and Sen. Mark Udall, U.S. Senate, to Dir. James Clapper, U.S. Gov’t, (July 14, 2011) <https://www.wyden.senate.gov/download/?id=351e298f-134c-4a24-9128-e61f5aa54727&download=1>.

³ Letter from Inspector Gen. I. Charles McCullough, III, U.S. Gov’t, to Sen. Ron Wyden and Sen. Mark Udall, U.S. Senate, (June 15, 2012). https://www.wired.com/images_blogs/dangerroom/2012/06/IC-IG-Letter.pdf; Senator Wyden, joined by 12 Republican and Democratic Senators, responded to the Inspector General by writing Director Clapper again to ask for an estimate, noting that “if generating a precise estimate would require an inordinate amount of labor, we would be willing to accept an imprecise one.” The Senators stressed that the number of Americans whose phone calls or emails have been collected is not “trivial or unimportant” information, and asked the Director to, at least, “estimate the order of magnitude of this number”, asking if it was “closer to 100, 100,000, or 100 million.” Letter from Sen. Wyden et al., U.S. Senate, to Dir. James Clapper, U.S. Gov’t, (July 26, 2016).

<https://www.wyden.senate.gov/download/?id=0C962BEA-1385-42B2-A6E4-B70779448EEB&download=1>

⁴ Letter from the Brennan Center for Justice, et. al, to Dir. James Clapper, U.S. Gov’t, (Oct. 29, 2015). https://www.brennancenter.org/sites/default/files/analysis/Coalition_Letter_DNI_Clapper_102915.pdf

First, the NSA previously undertook an effort to provide the Foreign Intelligence Surveillance Court (FISC) with a similar estimate, and “there is no evidence that this undertaking impeded any NSA operations.”⁵ There, in order to address the FISC’s concerns about the number of wholly domestic communications that were being collected under Section 702, the NSA “conducted a manual review of a random sample consisting of 50,440 Internet transactions taken from the more than 13.25 million Internet transactions acquired through the NSA’s upstream collection during a six month period.”⁶

Second, as privacy experts we have consistently rejected the spurious claim that estimating or sampling the Section 702 dataset is itself an insurmountable privacy violation. As we stated in 2015, one possible technique could include examining “routing information – the IP address for Internet communications and the country code for telephone communications – that provide a rough, albeit imperfect, indication of the communicants’ U.S.-person status.”⁷ According to the Privacy and Civil Liberties Board, the NSA uses IP addresses, in combination with other techniques, to filter out wholly domestic communications when conducting Upstream surveillance of Internet transactions. The FISC found that such filtering was constitutionally required, and the NSA apparently considers this method of identifying the location of communicants sufficient for purposes of complying with the Constitution and with the FISC’s orders.

To the extent routing information might not work for some kinds of communications, we also emphasized in the 2015 letter that “[i]n light of the overriding need for Americans to know how this massive surveillance program affects them, the undersigned groups, including many organizations whose missions are centrally focused on protecting privacy, believe that a one-time, limited sampling of these communications would be a net gain for privacy” as long as adequate safeguards (which we outlined in the letter) were adopted.⁸

The civil liberties community is not alone in this position. The Privacy and Civil Liberties Oversight Board -- which was fully briefed on the Section 702 programs -- suggested the NSA “count and disclose the number of telephone communications acquired in which one caller is located in the United States, as well as the number of Internet communications acquired through upstream surveillance that originate or terminate in the United States.”⁹

More recently, members of the House Judiciary Committee have written to you and former Director Clapper three times to obtain an estimate. Chairman Goodlatte and Ranking Member

⁵ *Id.*

⁶ United States Foreign Intelligence Surveillance Court, *Memorandum Opinion*, (Oct. 2, 2011). https://www.eff.org/files/filenode/fisc_opinion_-_unconstitutional_surveillance_0.pdf.

⁷ *Supra* note 4.

⁸ *Id.* After receiving a reply from ODNI that was not responsive to our requests, we wrote a second letter, reiterating our concerns and our inquiries. See Letter from the Brennan Center for Justice, et. al, to Dir. of National Intelligence, U.S. Gov’t, (Jan. 13, 2016). <https://www.brennancenter.org/analysis/letter-director-national-intelligence>. For the ODNI response, see Letter from Alex Joel, ODNI, to Elizabeth Goitein, Brennan Center for Justice, (Dec. 23, 2015). https://www.scribd.com/document/295340256/ODNI-Reply-to-NGO-Letter-Regarding-702-Transparency#from_embed.

⁹ *Id.*

Conyers' most recent letter memorialized representations they say were made by NSA and ODNI in briefings for the House Judiciary Committee on the progress of fulfilling their commitment to provide an estimate, including discussions of the methodologies that would be used. Those commitments included an assurance that “[t]he ODNI and the NSA will provide us with the estimate ‘early enough to inform the debate’ about Section 702,” and that both the estimate and a description of the methodology used would be provided “in a form that could be shared with the public.”¹⁰ Before he retired, NSA Deputy Director Richard Ledgett also confirmed that an estimate would be made public by the end of 2017.¹¹

Despite the progress that has been made, you relied entirely on the Inspector General's specious reasoning from 2012 in your explanation for why you are abandoning this commitment. Your actions are at odds with the Principles of Intelligence Transparency adopted in 2015, which, among other things, promised to provide “timely transparency on matters of public interest.”¹² Before he left office, Director Clapper wrote of the important role that transparency plays in the intelligence community's ability to do its job, stressing that “responsible transparency is becoming increasingly inseparable from public trust, and consequently, from mission success...Transparency is difficult, but also, in my view, essential.”¹³

Your refusal to provide this estimate leaves congressional overseers and the public back where we started in 2011: in the dark, and with justifiable and significant concerns about the effect of Section 702 surveillance on Americans' privacy and civil liberties. This omission is particularly striking given that Section 702 is set to expire at the end of the year, and the White House is urging Congress to make the authority permanent. Your decision diminishes public trust in the work the intelligence community undertakes and in its ability to adequately protect Americans' privacy and civil rights, and as a result, will undermine mission success. We urge you to reconsider.

Sincerely,

Access Now
Advocacy for Principled Action in Government
American-Arab Anti-Discrimination Committee
American Civil Liberties Union
American Library Association

¹⁰ See Press Release, Bob Goodlatte, Chairman, House of Representative Judiciary Committee Goodlatte & Conyers Seek Answers on Americans Swept Up Under Foreign Intelligence Programs, (Apr. 7, 2017). <https://judiciary.house.gov/press-release/goodlatte-conyers-seek-answers-americans-swept-foreign-intelligence-programs/>

¹¹ Warren Strobel et al., *Top NSA Official Says Telephone Surveillance Should Have Been Disclosed*, Reuters, (Mar. 21, 2017 8:55pm EDT), <http://www.reuters.com/article/us-usa-intelligence-nsa-idUSKBN16T034>.

¹² *Principles of Intelligence Transparency for the Intelligence Community*, Office of the Director of National Intelligence, (Oct. 27, 2015). <https://www.dni.gov/index.php/ic-legal-reference-book/the-principles-of-intelligence-transparency-for-the-ic>.

¹³ *DNI Clapper's Introduction to the 3rd Annual SIGINT Progress Report*, IC on the Record, (Jan. 18, 2017). <https://icontherecord.tumblr.com/ppd-28/2017/introduction>.

Brennan Center for Justice
Center for Democracy & Technology
Competitive Enterprise Institute
The Constitution Project
Constitutional Alliance
Defending Rights & Dissent
Demand Progress
Electronic Frontier Foundation
Electronic Privacy Information Center (EPIC)
Engine
Free Press
Fight for the Future
FreedomWorks
Government Accountability Project
Human Rights Watch
Liberty Coalition
National Association of Criminal Defense Lawyers
National Security Counselors
New America's Open Technology Institute
Niskanen Center
OpenTheGovernment.org
PEN America
Project on Government Oversight
R Street
Restore The Fourth
Sunlight Foundation
TechFreedom
World Privacy Forum