



VOTE NO on S. 139 Cloture:

Section 702 Bill is Surveillance Expansion and No Meaningful Reform

On Tuesday evening, the Senate is scheduled to vote for cloture on a bill that would reauthorize and expand Section 702 of the Foreign Intelligence Surveillance Act, which is set to expire on January 19, 2018. The bill to be voted on is a modified version of the Senate Intelligence Committee's bill, the FISA Amendments Reauthorization Act of 2017 ([S. 139](#)). The bill was marked up in secret in the Senate. Though it was marked up in public in the House Intelligence Committee, there was no substantive debate on the bill, and it was reported out of Committee on a party line vote, with [at least four members voting "no"](#) because of privacy concerns. If the cloture vote succeeds, this controversial and dangerous bill will be voted on without any public debate or opportunity for amendment in the Senate. [OTI and a coalition of dozens of leading privacy groups strongly oppose the bill, and we urge you to vote "NO" on cloture so that the Senate may consider and vote upon necessary amendments.](#)

Although its proponents seek to sell the bill as a reform measure, it contains no meaningful reforms to Section 702, and in several respects, it expands surveillance authorities and codifies the worst intelligence community practices rather than reforming them. As a result, this bill is worse than a clean reauthorization with a sunset. The FISA Amendments Reauthorization Act:

- **Codifies and could be interpreted to expand "abouts" collection.** "Abouts" collection is part of upstream surveillance where the government collects not only communications that are "to" and "from" a target, but also those that are "about" a target. This type of collection results in the collection of [substantial quantities of Americans' communications](#). The FISA Court has found that this type of collection raises serious constitutional concerns because it is so privacy-invasive and has forced the government to [shut it down twice](#), most recently because the government consistently failed to comply with mandatory minimization procedures to protect Americans' privacy. There is a risk that the bill could be read to permit unintentional "abouts" collection, and to permit the collection of communications that merely reference targets, but do not contain selectors (ex. email addresses and phone numbers) of surveillance targets under Section 702. **This would represent a drastic expansion of the most concerning form of Section 702 surveillance.**
- **Codifies backdoor searches for Americans' communications.** The bill would write into statute the current practice whereby the FBI, NSA, CIA, and NCTC warrantlessly – and for the FBI, routinely – search for and access the contents and metadata associated with Americans' communications that have been collected incidentally through Section 702 surveillance. This bill pretends to address this problem by requiring the FBI to obtain a warrant before accessing communications when conducting a search related to a "predicated" investigation (i.e. once there's already a factual basis for the investigation). However, the FBI would still be free to conduct unlimited warrantless searches before the "predicated" investigation stage, such as before and during assessments, which require no factual basis whatsoever that the American was engaged in any wrongdoing. By the time an investigation is predicated, the FBI will have already warrantlessly searched all of an investigative target's communications that were swept up in Section 702 surveillance. The warrant requirement is also further weakened by sweeping exceptions. No warrant is required for predicated investigations related to foreign intelligence; national security; or if, irrespective of imminence, a threat to life or serious bodily harm could be mitigated. **This warrant requirement is the definition of a fig leaf – it is intended to cover up the government's warrantless searches of Americans' communications; not stop them.**

S. 139 makes no meaningful reforms to Section 702 and codifies "abouts" collection. It would be worse than a clean reauthorization of Section 702 with a sunset. Absent substantial improvement through the amendment process, members should vote "NO" on the bill and demand a vote on a real reform measure.

OTI urges you to vote "NO" on cloture to permit voting on critical amendments.