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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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April 22, 2016

Honorable James R. Clapper
Director, Office of the Director of National Intelligence
Washington, DC 20511

Dear Director Clapper:

As you know, the House Committee on the Judiciary has renewed its oversight of surveillance programs conducted under Section 702 of the Foreign Intelligence Surveillance Act.

In order that we may properly evaluate these programs, we write to ask that you provide us with a public estimate of the number of communications or transactions involving United States persons subject to Section 702 surveillance on an annual basis.

We note that we are not the first to ask you for this basic information. Since at least 2011, Senators Ron Wyden and Mark Udall have "sought repeatedly to gain an understanding of how many Americans have had their phone calls or emails collected and reviewed under this statute, but [they] have not been able to obtain even a rough estimate of this number."¹

In its July 2014 report, the Privacy and Civil Liberties Oversight Board recommended that the National Security Agency annually count certain communications acquired under Section 702: "(1) the number of telephone communications acquired in which one caller is located in the United States; (2) the number of Internet communications acquired through upstream collection that originate or terminate in the United States; [and] (3) the number of communications of or concerning U.S. persons that the NSA positively identifies as such in the routine course of its work."² These recommendations have still not been implemented.³

¹ S. Rep. 112-174 (2012), at 10.

² Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (June 2, 2014), at 146.

³ Privacy and Civil Liberties Oversight Board, *Recommendations Assessment Report* (Feb. 5, 2016), at 5.

In October 2015, a coalition of more than 30 civil liberties organizations—representing a wide range of political viewpoints—wrote to you for similar information about the impact of Section 702 surveillance on United States persons.⁴ Unsatisfied with a largely unresponsive reply from your Civil Liberties Protection Office, the groups wrote to you again in January 2016.⁵ We understand that representatives from ODNI and NSA recently met with the groups to discuss this request. We also understand that, to date, there is no specific plan or timeline to provide the requested information.

At the core of each of these requests lies the concern that Section 702 surveillance programs may not adequately protect Americans' privacy or civil liberties. The leadership of the Intelligence Community has repeatedly assured us that collection of domestic communications under this authority is merely "incidental," and that the government complies with the law's requirement to "minimize the acquisition" of U.S. person information. Even a rough estimate of the number of U.S. persons impacted by these programs will help us to evaluate these claims.

Given your office's reluctance to provide this information in the past, we want to address two additional matters at the outset.

First, we understand that an exact count of how many United States persons have been swept up into Section 702 surveillance efforts may not be feasible. The leadership of the intelligence community has long held this view, and the Inspector General for the National Security Agency—who is an administrative appointee, and not an independent inspector general—has deferred to your office on this issue.⁶ We understand that limited resources and technical barriers may prevent you from making an exact count.

We are not asking you for an *exact* count. Today, our request is simply for a rough estimate.

You have already demonstrated that such an estimate is feasible. An October 3, 2011 opinion of the Foreign Intelligence Surveillance Court reports that the NSA, in an effort to address the court's concerns about the collection of domestic communications under certain applications of Section 702, "conducted a manual review of a random sample consisting of 50,440 Internet

⁴ Letter from Advocacy for Principled Action in Government, *et al.*, to Director James R. Clapper, Office of the Director of National Intelligence (Oct. 29, 2015).

⁵ Letter from Advocacy for Principled Action in Government, *et al.*, to Director James R. Clapper, Office of the Director of National Intelligence (Jan. 13, 2016).

⁶ *See, e.g.*, Letter from I. Charles McCoullough, III, Inspector General of the Intelligence Community, to Sen. Ron Wyden and Sen. Mark Udall (June 15, 2012).

transactions taken from the more than 13.25 million Internet transactions acquired through NSA's upstream collection during a six month period."⁷ In that case, the court found:

NSA knows with certainty that the upstream collection . . . results in the acquisition of wholly domestic communications.

By expanding its Section 702 acquisitions to include the acquisition of Internet transactions through its upstream collection, NSA has, as a practical matter, circumvented the spirit of [the statute] with regard to that collection.⁸

That case looked at a particular problem with "upstream" collection. A similar but broader analysis may be necessary here. We are willing to work with your office to determine the exact methodology for such a survey. We acknowledge that this estimate will be an imperfect substitute for a more precise accounting—but surely the American public is entitled to *some* idea of how many of our communications are swept up by these programs.

Second, we understand that producing an estimate might require reviewing actual communications acquired under Section 702, which could itself raise privacy concerns. On this point, we refer you to the judgment of the many civil liberties organizations that support conducting "a one-time, limited sampling of these communications," if necessary. They believe it would be "a net gain for privacy if conducted under appropriate safeguards and conditions."⁹ We agree, and we are willing to work with your office to implement those safeguards if necessary. This, too, is a problem we can solve.

In the House of Representatives, it will fall first to our Committee to determine whether Congress should extend Section 702 beyond its scheduled sunset on December 31, 2017. You have willingly shared information with us about the important and actionable intelligence obtained under these surveillance programs. Now we require your assistance in making a determination that the privacy protections in place are functioning as designed.

We ask that you respond with your plan to provide us with this information as soon as possible, but no later than Friday, May 6, 2016. If you have any questions, please contact Aaron Hiller with the Democratic Staff of the House Committee on the Judiciary at 202-225-6906.

Thank you for your prompt attention to this matter.

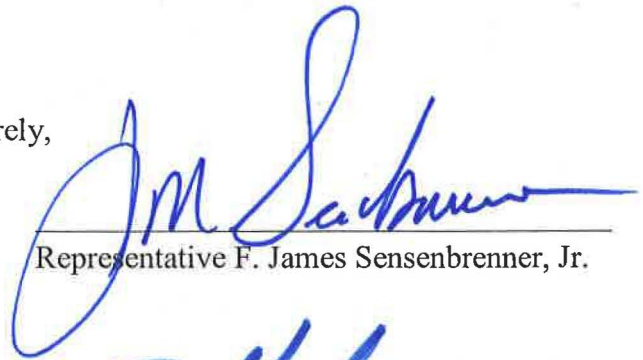
⁷ *Memorandum Opinion*, Foreign Intelligence Surveillance Ct. (Oct. 3, 2011), at 33-34.

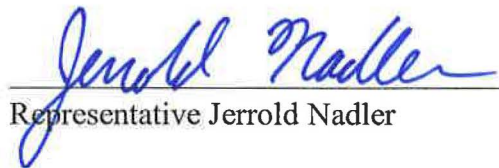
⁸ *Id.* at 48.


⁹ Letter from Advocacy for Principled Action in Government, *et al.*, to Director James R. Clapper, Office of the Director of National Intelligence (Oct. 29, 2015).

Sincerely,

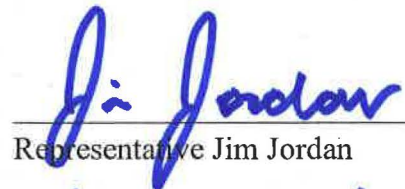

Representative John Conyers, Jr.


Representative F. James Sensenbrenner, Jr.

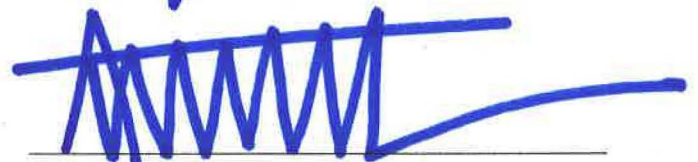

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