

December 11, 2023

Re: Vote “No” on H.R. 2670, the FY2024 National Defense Authorization Act

Dear Senator:

The American Civil Liberties Union strongly urges you to oppose H.R. 2670, the FY2024 National Defense Authorization Act. Currently this legislation includes an extension of Section 702 of the Foreign Intelligence Surveillance Act through April 19, 2024. **Given the inclusion of this extension, the ACLU urges you to vote “no” on the NDAA and will score both the cloture vote and the vote on final passage.**

There is zero need for a short-term extension of Section 702, as the government is currently conducting this surveillance under a one-year FISA Court authorization that expires on April 11, 2024.¹ Section 404 of the FISA Amendments Act of 2008 states that:

Notwithstanding any other provision of this Act, any amendment made by this Act, or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), any order, authorization, or directive issued or made under title VII of the Foreign Intelligence Surveillance Act of 1978, as amended by section 101(a) and by the FISA Amendments Reauthorization Act of 2017, shall continue in effect until the date of the expiration of such order, authorization, or directive.

During the last reauthorization cycle, the government maintained that Section 404 would allow it to conduct Section 702 surveillance until the one-year authorization expired in April—even if Section 702 expired in December.² Moreover, given the current authorization’s expiration on April 11, the ACLU views the proposed four-month extension as functionally serving as a sixteen-month extension through April 2025. That is because the government is virtually certain to seek a new one-year authorization while the extension is in effect.



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¹ Under Section 702, on an annual basis, the Attorney General and the Director of National Intelligence are required to submit certifications regarding the program to the FISA Court for their approval. If the certifications requirements are met, the FISA Court approves a one-year authorization that allows the program to operate.

² Dustin Volz, *U.S. spy chiefs pressure Congress to renew expiring surveillance law*, REUTERS (Dec. 21, 2017). <https://www.reuters.com/article/usa-congress-shutdown-surveillance-idINKBN1EF2J4/>

However, if the below language capping any new authorization and ensuring that it does not extend beyond April 19, 2024, were included in the NDAA—or alternative language that ensures the same effect—the ACLU would withdraw its opposition to the NDAA.

Notwithstanding Section 404 of the FISA Amendments Act of 2008 or any other provision of law, any order, authorization, or directive issued or made under Title VII of the Foreign Intelligence Surveillance Act that is in existence at the time of the enactment of the National Defense Authorization Act for Fiscal Year 2024, or that is issued or made between the enactment of the National Defense Authorization Act for Fiscal Year 2024 and April 19, 2024, shall expire no later than April 19, 2024.

This language was widely circulated with both House and Senate leadership during conference negotiations and is essential to ensure that the government does not retain the ability to functionally extend Section 702 until April 2025. This program has been abused on a persistent and widespread basis, and the inclusion of a four-month extension with no authorization cap will risk resulting in a sixteen-month extension with zero reform.

Section 702 has been routinely abused in ways that violate Americans' fundamental civil liberties and civil rights, and FBI agents have used the Section 702 databases to conduct millions of invasive searches for Americans' communications, including those of protesters, racial justice activists, 19,000 donors to a congressional campaign, journalists, and even members of Congress. Even after the FBI's recent changes to its internal procedures, the abuses have continued, with agents conducting warrantless searches for the communications of a U.S. senator, a state senator, and a state court judge who contacted the FBI to report civil rights violations by a local police chief.

The ACLU urges you to vote no on the NDAA, unless language limiting the ability of the government to seek an additional year-long authorization during the period of this extension is added to the NDAA. If you have questions, please contact Senior Policy Counsel Kia Hamadanchy at khamadanchy@aclu.org or (734)-649-2929.

Sincerely,



Kia Hamadanchy
Senior Policy Counsel, Democracy & Technology



Chris Anders
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