Confessions of a National Security Lawyer

[redacted]*

(~~S//NF~~) When I first began working at [redacted] I worried that [redacted] I need not have feared. In fact, it is a blessing [redacted] It means that [redacted] continue to "protect the American people."[1] And as anyone who has worked with Congress before can tell you, that sort of thing is quite manageable.

(~~TS//NF~~) Of course, there is still the issue of [redacted] Hopefully, a gentle nudge in the right direction is all that is needed [redacted] —they have the somewhat maddening habit of [redacted] Fortunately, [redacted] Anyone's spirit can be broken, eventually.[2]

(~~U//FOUO~~) In many ways, that has been the secret to our [redacted]. Even [redacted] who have shown a remarkable interest in using [redacted] to [redacted] can be [redacted] using [redacted] to obfuscate and delay. Indeed, some of our brightest minds have dedicated themselves to [redacted]. And given the extraordinary deference we are granted by the courts,[3] it is [redacted]

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* (~~S//NF~~) Attorney Advisor, [redacted]. The views expressed are those of the author, and do not reflect the official policy or position of DHS or the U.S. Government. [redacted] cannot attest to the substantive or technical accuracy of the information.

[1] (~~S//NF~~) [redacted]

[2] (~~TS//NF~~) *See* [redacted]

[3] (~~U//FOUO~~) *E.g.*, [redacted] *v. Att'y Gen.*, [redacted] (finding that [redacted]).

(~~TS//NF~~) Consequently, practice has been to This has the benefit of being while avoiding concerns. While there are always downsides (in this instance, :), the benefits obtained by far outweigh them, as has been the determination, following a robust process consisting of of

(~~TS//NF~~) For example, several years ago, I had the opportunity to (the existence of which, of course, is supposed to be a secret). Fortunately, , so they Among other salutary effects, this degree of openness has greatly increased public trust and confidence in

(~~S//NF~~) In recent years, a particular point of contention has been whether when making a involves At least three competing viewpoints have emerged; as yet, none has garnered more than plurality support among First, some in the national security community advocate for should almost never Others seek a more graduated approach that elevates only after Still others claim that in most circumstances, and that to the maximum extent possible. Fortunately, none of the three approaches is mutually exclusive, meaning that when it is a relatively simple matter to

(~~TS//NF~~) [USPER4]

[4] (~~TS//NF~~)

(~~TS//NF~~) when it is appropriate to We concluded that in most instances, , particularly when our clients That said, our recommendations were necessarily tempered by our recognition that —especially in where the acceptable failure rate is . We have found that the best way to balance these concerns is through a robust masking regime, which allows and to benefit from fulsome intelligence while making it virtually to identify individual subjects without an appropriate need-to-know.[5]

(~~TS//NF~~) I can recall that asked whether While it was certainly an interesting idea, in implementation it proved to be We discovered that works best in partnership with civil rights, civil liberties, and privacy protections, such as Indeed, oversight and transparency have been foundational elements of the entire project.

(~~U//FOUO~~) Such are the daily struggles and triumphs of the dedicated men and women who commit themselves, each and every day, to safeguarding the American people—and to doing so in a manner that safeguards fundamental democratic values such as privacy and administrative transparency. In the wise words [USPER6], "[i]t's not nearly as bad as you think . . . ."[6]

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[5] (~~S//NF~~) *See generally* , *A Theory of Law*, 16 GREEN BAG 2D 111 (2012) (explaining that , like the national security client, is always).

[6] (~~U//FOUO~~) *See* , ("It's not nearly as bad as you think, and it's worse than you can possible imagine.").

Afterward: Reflections on *Confessions*

NOAH C. CHAUVIN*

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I originally wrote *Confessions of a National Security Lawyer* as an April Fools' prank during my tenure as an attorney in the Intelligence Law Division at the Department of Homeland Security. I assumed—correctly, as it transpired—that my connections on LinkedIn and Twitter (as it was then called) would be drawn in by the article's provocative title, only to be confronted with a couple of pages of heavily redacted nonsense. Gotcha! If it was commentary, it was intended to be gentle. While I occasionally had questions about why certain information I encountered in the course of my duties was classified or otherwise protected from public disclosure, I generally accepted that there were good reasons to keep many of the details about our nation's national security apparatus secret.

In the intervening years, my views have shifted. I now see the overclassification issues *Confessions* satirizes as a significant impediment to the democratic accountability of our intelligence agencies. Some examples of how government officials appear to have abused classification in the context of spying performed pursuant to Section 702 of the Foreign Intelligence Surveillance Act help to illustrate this point.

I. BACKGROUND

Section 702 was enacted as part of the FISA Amendments Act of 2008.[7] It allows intelligence agencies to collect the electronic communications of non-"United States persons" located abroad without a warrant.[8] But while this surveillance must target non-U.S. persons, it "inevitably" captures U.S. persons' communications as well.[9] The reason for this is straightforward: U.S. persons

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[7] Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2435 (2008) (codified in relevant part at 50 U.S.C. § 1881a).

[8] 50 U.S.C. § 1881a(b). The statute defines a U.S. person as a citizen, lawful permanent resident, group of citizens or lawful permanent residents, or a U.S.-based corporation that is not owned or controlled by a foreign power. *Id.* § 1801(i).

[9] PRIV. & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 82 (2014), https://irp.fas.org/offdocs/pclob-702.pdf [https://perma.cc/G2H3-XRXA].

sometimes call, text, email, or use other means to contact a target of Section 702 surveillance, and it is impossible (and, from a national security perspective, undesirable) to filter out the U.S. person's end of the conversation.[10] Once the government has collected communications under Section 702, rules approved by the Foreign Intelligence Surveillance Court (FISC) allow it to search through them without a warrant whenever it reasonably believes the search will return foreign intelligence information—even when it is intentionally searching for U.S. persons.[11]

Controversially, the government performs tens of thousands of these warrantless "backdoor searches" for U.S. persons every year.[12] This number of searches, combined with an error rate of between 2 and 4%, means that intelligence agencies annually perform thousands of searches for Americans' private information that do not satisfy the FISC-approved querying standard.[13] Known abuses include baseless searches for the communications of members of Congress, political donors, and protesters.[14] And while national security officials argue that warrantless backdoor searches are critical to safeguarding

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[10] *See id.*; Alex Joel & Robert S. Litt, *Expanding the Reverse Targeting Prohibition: A Backdoor Repeal of 702?*, LAWFARE (Dec. 11, 2023), https://www.lawfaremedia.org/article/expanding-the-reverse-targeting-prohibition-a-back-door-repeal-of-702 [https://perma.cc/3J5A-D5PK].

[11] FBI's Section 702 Querying Procedures § IV.A.1 (Oct. 18, 2021), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_FBI_Querying_Procedures.pdf [https://perma.cc/V22E-JM7U]; CIA's Section 702 Querying Procedures § IV.A (Oct. 18, 2021), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_CIA_Querying_Procedures.pdf [https://perma.cc/AE98-7VHV]; NSA's Section 702 Querying Procedures – Amended § IV.A (Mar. 18, 2022), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_NSA_Querying_Procedures-Amended.pdf [https://perma.cc/U27P-NNL4]; NCTC's Section 702 Querying Procedures § IV.A (Oct. 18, 2021), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_NCTC_Querying_Procedures.pdf [https://perma.cc/L7FK-WDXN]; and cf. Reforming Intelligence and Securing America Act, Pub. L. No. 118–49, 138 Stat. 866–67 (prohibiting the FBI from performing U.S. person queries intended solely to uncover evidence of a crime unrelated to national security).

[12] *E.g.*, OFF. OF DIR. OF NAT'L INTEL., ANNUAL STATISTICAL TRANSPARENCY REPORT 25 (2024), https://www.dni.gov/files/CLPT/documents/2024_ASTR_for_CY2023.pdf [https://perma.cc/6LBE-U4QB].

[13] The FISC reports an error rate of approximately 2%, *In re* Certifications, Docket Nos. 702(j)-23-01, 702(j)-23-02, 702(j)-23-03, at 85 (FISA Ct. Apr. 11, 2023), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2023/FISC_2023_FISA_702_Certifications_Opinion_April11_2023.pdf [https://perma.cc/49L2-VBSA], whereas an FBI auditing office reports an error rate of approximately 4%, FBI OFF. OF INTERNAL AUDITING, FISA QUERY AUDIT 6 (2023), https://www.fbi.gov/file-repository/fisa-query-audit-051023.pdf/view [https://perma.cc/TH24-VQ27].

[14] For a more fulsome aggregation of known abuses, see Noah C. Chauvin, *The Warrant Exception That Isn't: FISA Section 702, "Defensive" Searches, and the Fourth Amendment*, 74 AM. U. L. REV. 563, 574–76 (2025).

Americans from foreign threats,[15] privacy advocates and some scholars charge that they are an unnecessary infringement of Americans' privacy rights.[16]

One of the significant challenges in assessing the merits of these arguments is that there is so little public information about how the government uses Section 702.[17] While intelligence agencies have provided some examples of how the authority has helped them to combat foreign threats, they have given almost no detail.[18] When supporters of the Section 702 program tout it as the federal government's "most regulated" and transparent surveillance program,[19] then, they are damning the intelligence community with faint praise.

But having this cake, surveillance hawks want to eat it, too. During a recent debate in Congress over whether to reform Section 702, one anonymous congressional staffer complained that civil liberties groups pushing changes intended to prevent surveillance abuses were "operating off of . . . second-, third- or fourth-degree information that can get lost in translation."[20] Biden administration officials took it further, with one telling reporters that discussion

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[15] *See, e.g.*, Chris Fonzone et al., Senate Judiciary Committee Statement for the Record at 12 (June 13, 2023), https://www.judiciary.senate.gov/imo/media/doc/2023-06-13%20-%20Joint%20statement%20-%20ODNI,%20NSA,%20CIA,%20FBI,%20DOJ%20(1).pdf [https://perma.cc/CD22-6K9W].

[16] *E.g.*, Chauvin, *supra* note 14, at 603–14.

[17] Moreover, what information is made available is often contradictory. For example, in 2023, two executive branch oversight bodies released reports on Section 702. But whereas the President's Intelligence Advisory Board, a White House office, assessed that "U.S. person queries are necessary in order to identify foreign threats to the homeland," PRESIDENT'S INTEL. ADVISORY BD. & INTEL. OVERSIGHT BD., REVIEW OF FISA SECTION 702 AND RECOMMENDATIONS FOR REAUTHORIZATION 5 (2023), the independent Privacy and Civil Liberties Oversight Board concluded that "[t]he FBI in particular struggled to provide . . . affirmative examples of the unique value of U.S. person queries of Section 702 information in criminal investigations, and to date, the government has been unable to identify a single criminal prosecution arising from U.S. person queries," PRIV. & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 168 (2023).

[18] Reflecting on transparency issues with respect to how the government uses Section 702, Professors Barry Friedman and Danielle Keats Citron observed that "[i]t . . . appears the Intelligence Community regularly cherry-picks details of the use of 702 it chooses to declassify, in order to show 702's importance, rather than finding some way to describe systematically what 702 accomplishes and does not through querying of Americans' data." Barry Friedman & Danielle Keats Citron, *Indiscriminate Data Surveillance*, 110 VA. L. REV. 1351, 1406 (2024).

[19] George Croner, *The FISA Section 702 Debate Intensifies*, LAWFARE (May 15, 2023), https://www.lawfaremedia.org/article/the-fisa-section-702-debate-intensifies1 [https://perma.cc/H7V8-DYWG].

[20] John Sakellariadis, *'A Marriage of Convenience': Why the Pushback Against a Key Spy Program Could Cave In On Progressives*, POLITICO (Aug. 23, 2023), https://www.politico.com/news/2023/08/23/pushback-against-a-key-spy-program-could-cave-in-on-progressives-00112430 [https://perma.cc/2WMZ-XXEX].

about Section 702 "happens best often in private . . . rather than in public."[21] In other words, only government officials, with their secret information about how Section 702 is used, are qualified to opine on the future of the program.

What this position elides is that the public's knowledge about how Section 702 is used—and when we obtain it—is entirely dependent on government classification decisions. As the Brennan Center for Justice's Liza Goitein has put it, the information civil society groups have about Section 702 "comes from the government itself, along with other official sources such as FISA court opinions."[22] To the extent officials believe the public is underinformed about the surveillance performed under Section 702, it is because they have failed to provide us with adequate information about it.

To be sure, there are legitimate needs to keep some information about foreign intelligence surveillance secret. But open government is a fundamental tenet of liberal democracy, and federal agencies have an obligation to make public as much information as they can about surveillance programs—something the intelligence community itself recognizes in its transparency principles.[23] Troublingly, the government's decisions about what to declassify and when to do so often appear to be motivated not by national security concerns but rather by a knee-jerk secrecy instinct or a desire to avoid embarrassment. This problem manifests in two ways: Overclassification of information describing how the government uses Section 702 and the artificially slow release of damaging information.

II. OVERCLASSIFICATION PROBLEMS

Classification is governed largely by a series of executive orders, the most recent of which was issued by then-President Barack Obama in 2009.[24] The order allows for information to be classified if its public release would be damaging to national security, with varying levels of classification (and increasingly strict handling procedures) based on the degree of harm such release would cause. The order also provides that "[n]o information may remain classified indefinitely,"[25] and gives deadlines by which information must be made public.

While classification is supposed to be discrete and limited, our national security and intelligence agencies have long been plagued by overclassification. Indeed, former national security officials have estimated that somewhere

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[21] Martin Matishak, *Biden Administration Officials Tout Colonial Pipeline Case In Pushing for Section 702 Renewal*, RECORD (June 13, 2023), https://therecord.media/colonial-pipeline-hack-section-702-surveillance-fbi [https://perma.cc/YD5X-PECT].

[22] Sakellariadis, *supra* note 20.

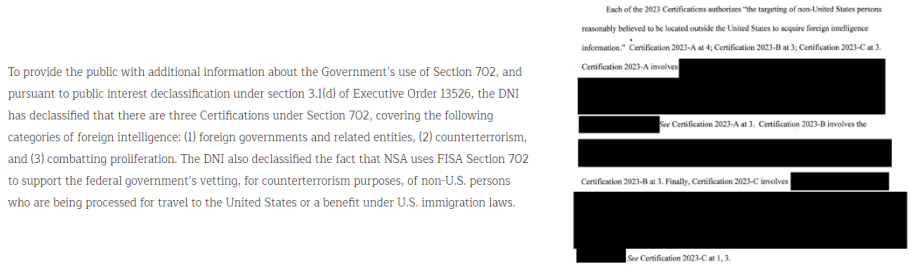
[23] *See Principles of Intelligence Transparency for the Intelligence Community*, OFF. OF DIR. OF NAT'L INTEL., https://www.dni.gov/files/documents/ppd-28/FINAL%20Transparency_poster%20v1.pdf [https://perma.cc/5X6M-K9NZ].

[24] *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2009).

[25] *Id.* at § 1.5(d).

between 50–90% of classified information should not be.[26] This phenomenon has been on clear display in documents related to Section 702.[27]

For example, in its press release announcing the declassification of an April 2023 FISC opinion regarding Section 702, the Office of the Director of National Intelligence made public for the first time the topics about which it uses the law to obtain information: "foreign governments and related entities," "counterterrorism," and "combatting proliferation."[28] These are banal, general subjects that any reasonably informed person could identify as intelligence priorities. Why this information was ever classified is a mystery. Equally uncertain is how committed the government is to transparency on this issue, because the portions of the April 2023 FISC opinion that identify the topics of the certifications are redacted.[29]



To provide the public with additional information about the Government's use of Section 702, and pursuant to public interest declassification under section 3.1(d) of Executive Order 13526, the DNI has declassified that there are three Certifications under Section 702, covering the following categories of foreign intelligence: (1) foreign governments and related entities, (2) counterterrorism, and (3) combatting proliferation. The DNI also declassified the fact that NSA uses FISA Section 702 to support the federal government's vetting, for counterterrorism purposes, of non-U.S. persons who are being processed for travel to the United States or a benefit under U.S. immigration laws.

Each of the 2023 Certifications authorizes "the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information." Certification 2023-A at 4; Certification 2023-B at 3; Certification 2023-C at 3. Certification 2023-A involves [redacted] *See* Certification 2023-A at 3. Certification 2023-B involves the [redacted] Certification 2023-B at 3. Finally, Certification 2023-C involves [redacted] *See* Certification 2023-C at 1, 3.

Figure One: *ODNI's press release (left) announcing the declassification of an April 2023 FISC opinion regarding Section 702 made public the topics for*

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[26] *See* Testimony of Thomas Blanton, Dir., Nat. Sec. Archive at Geo. Wash. Univ., before the Comm. On Oversight & Gov't Reform, U.S. House of Reps. (Dec. 7, 2016), https://unredacted.com/2016/12/07/national-security-archive-director-tom-blanton-testifies-today-on-arbitrary-and-capricious-classification-system [https://perma.cc/NA5D-KLPC], and *see also* Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 400–01 (2009) (collecting statements on overclassification).

[27] Indeed, the problem has been so pervasive that commentators have observed that "[e]ven where [FISC] decisions have been declassified, they often have significant redactions that prevent a full evaluation of the court's conclusions." Faiza Patel & Raya Koreh, *Amici Curiae in the FISA Courts: A Civil Liberties Impact Assessment*, 76 NYU ANN. SURV. AM. L. 499, 516 (2021).

[28] *Release of Documents Related to the 2023 FISA Section 702 Certifications*, INTEL.GOV (July 21, 2023), https://www.intelligence.gov/ic-on-the-record-database/results/1307-release-of-documents-related-to-the-2023-fisa-section-702-certifications [https://perma.cc/Y9HL-RM5A].

[29] *In re* Certifications, slip op. at 4 (FISA Ct. Apr. 11, 2023), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2023/FISC_2023_FISA_702_Certifications_Opinion_April11_2023.pdf [https://perma.cc/8PPM-VFH3]. The topics of these certifications were also redacted in the FISC's April 2024 certification opinion. *In re* Certifications, slip op. at 6 (FISA Ct. Apr. 4, 2024), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2024/FISC_Memorandum_Opinion_Order_Redacted_April_2024.pdf [https://perma.cc/LPB3-QHB5].

which the government collects information under Section 702; in the publicly released version of the opinion (right), those topics were redacted.

Nor was this instance of overclassification an isolated incident. For example, the FBI's *FISA Query Guidance*, which was originally issued in November 2021 and was publicly released in April of 2023, contained numerous formerly classified items, such as incidents of non-compliance with backdoor search requirements that were publicly disclosed before the guidance was written, information that was freely available on the DOJ's public-facing website, and an admonition for FBI officials to seek legal counsel if they were unsure how to apply Section 702's requirements.[30] Similarly, two court opinions recently declassified by ODNI contain multitudinous redactions, including the dates on which the opinions were originally issued.[31]

(U) ~~(S//NF)~~ In order to ensure full compliance with the requirements of Section 702(f)(2), it is important to be able to identify whether your query to retrieve evidence of a crime only is being conducted in connection with a predicated criminal investigation not related to national security. The phrase "in connection with a predicated criminal investigation … that does not relate to the national security of the United States" includes more than queries of the subject of the predicated criminal investigation and can include queries of individuals who are associates of the subject of the criminal investigation, but who are not subjects themselves. **If you have any concerns that your proposed query might be connected to such a predicated criminal investigation, we recommend you consult with NSCLB or your CDC's office before you conduct the query, and it may be advisable to decide in favor of concluding that Section 702(f)(2) applies.**

Figure Two: *A paragraph in the FBI's* FISA Query Guidance *advising agents to consult counsel prior to performing a search to ensure compliance with legal requirements was classified as "Secret," meaning that the official who made the original classification decision determined that its release could cause "serious damage" to national security.*[32]

The problems with overclassification do not merely interfere with the public's ability to understand how the government uses Section 702: they also limit our ability to understand congressional efforts to regulate those uses. In April of 2024, Congress passed the Reforming Intelligence and Securing America Act, or RISAA, which reauthorized Section 702 (the law periodically sunsets).[33] It also made some changes to the authority, including expanding its

[30] FED. BUREAU OF INVESTIGATION, FBI FISA QUERY GUIDANCE 3, 5, 8 (2021).

[31] *In re* Petition to Set Aside or Modify Directive Issued to [Redacted], slip op. at 1 (FISA Ct. 2023), https://www.intel.gov/assets/documents/702%20Documents/declassified/2023_FISC-R_ECSP_Opinion.pdf [https://perma.cc/8PPM-VFH3], and *In re* Petition to Set Aside or Modify Directive Issued to [Redacted], slip op. at 1 (FISA Ct. 2022), https://www.intel.gov/assets/documents/702%20Documents/declassified/2022-FISC-ECSP-OPINION.pdf [https://perma.cc/5FG3-RQRL].

[32] *See* Exec. Order No. 13,526, 75 Fed. Reg. 707, § 1.2 (Jan. 5, 2009).

[33] Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, 138 Stat. 862 (2024).

definition of "electronic communications service provider" (ECSP), the companies from which the government collects communications under Section 702.[34] This expansion allows the government to compel virtually any business that provides WiFi to its customers, "including laundromats, barber shops, fitness centers, dentist's offices, hardware stores . . . . [and] commercial landlords," to assist it in performing surveillance.[35]

This provision was motivated by opinions from the FISC and FISCR ruling that a business from which intelligence agencies wanted to collect communications was not an ECSP, and therefore could not be compelled to assist the government under Section 702.[36] Members of the House Permanent Select Committee on Intelligence (HPSCI) sought to grant the government the authority to use Section 702 to collect communications from this kind of company.[37] But to avoid revealing what kind of services the company provided (so foreign intelligence targets would not stop using those services), HPSCI's new definition of ECSP was intentionally overinclusive.[38]

Privacy advocates expressed significant concern about this expansive definition. FISC *amicus curiae* Marc Zwillinger warned that the provision "would expand the use of warrantless surveillance under FISA 702," with "a particularly high likelihood that the communications of U.S. citizens and other persons in the U.S. [would] be 'inadvertently' acquired by the government."[39] Senator Ron Wyden called it "one of the most dramatic and terrifying expansions of government surveillance authority in history."[40] Demand Progress's policy director Sean Vitka characterized it as "Stasi-like."[41]

Just as these concerns reached a crescendo, the secrecy that had motivated the overbroad definition became unnecessary, as the *New York Times* reported

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[34] *Id.* § 25.

[35] Elizabeth Goitein, *Is Secret Law the Solution to an Overbroad Surveillance Authority*, JUST SEC. (June 11, 2024), https://www.justsecurity.org/96638/secret-law-overbroad-surveillance-authority [https://perma.cc/FSK2-34VM].

[36] *In re* Petition to Set Aside or Modify Directive Issued to [Redacted], slip op. at 19 (FISA Ct. Rev. 2023); *In re* Petition to Set Aside or Modify Directive Issued to [Redacted], slip op. at 20 (FISA Ct. 2022).

[37] *See* Marc Zwillinger & Steve Lane, *House Intelligence Committee FISA "Reform" Bill Would Greatly Expand the Class of Businesses and Other Entities Required to Assist in FISA 702 Surveillance*, ZWILLGENBLOG (Dec. 8, 2023), https://www.zwillgen.com/law-enforcement/fisa-reform-bill-702-surveillance [https://perma.cc/3RCF-X32K].

[38] *See* Goitein, *supra* note 35.

[39] Marc Zwillinger, Steve Lane & Jacob Sommer, *FISA 702 Reauthorization Amendments: The Second Time Is Not the Charm*, ZWILLGENBLOG (Apr. 9, 2024), https://www.zwillgen.com/law-enforcement/fisa-702-reauthorization-amendments-second-time-not-charm [https://perma.cc/X3RE-Q2WG].

[40] Ron Wyden (@RonWyden), X (Apr. 12, 2024), https://x.com/RonWyden/status/1778864936573100445 [https://perma.cc/56FX-BL6C].

[41] Jake Johnson, *Spying Expansion Could Hand 'Stasi-Like Powers' to Trump, Privacy Advocates Warn*, COMMON DREAMS (Apr. 15, 2024), https://www.commondreams.org/news/spying-expansion-trump [https://perma.cc/W42T-SSA4].

that the company that had been the subject of the FISC and FISCR opinions provided data centers for cloud computing services.[42] Senator Mark Warner, chair of the Senate Select Committee on Intelligence, then confirmed this reporting in remarks on the Senate floor.[43]

While RISAA ultimately passed with the broad ECSP provision included, Senator Warner acknowledged that that portion of the bill "could have been drafted better," and committed to working with his colleagues to fix it in subsequent legislation.[44] But while Senator Warner has attempted to keep this promise, he and others in Congress have been forced to legislate in secret because, despite the purpose of the expanded ECSP definition now being public knowledge, the executive branch has still not declassified the relevant portions of the FISC and FISCR opinions—something it has the power to do.[45] So while Congress may ultimately enact a narrower ECSP definition, the American people will be in no position to assess whether the problems with the broader definition have been ameliorated.

It is manifest that information that is common sense or already public should never have been classified. Likewise, information that has become public should not remain technically classified. That both circumstances have come to pass reflects the same "institutional 'lack of candor'" that infects so much of the government's conduct related to Section 702.[46] Officials default to classifying even banal information if it is vaguely related to foreign intelligence. This instinct is antidemocratic and comes with no concomitant benefit to national

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[42] *See* Charlie Savage, *Secret Rift Over Data Center Fueled Push to Expand Reach of Surveillance Program*, N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/2024/04/16/us/fisa-surveillance-bill-program.html [https://perma.cc/3FSZ-MS8Y].

[43] *See* 170 Cong. Rec. S2836 (daily ed., Apr. 18, 2024) (statement of Sen. Warner).

[44] *Id.* at S2836–S2837.

[45] *See* Goitein, *supra* note 35; Greg Nojeim & Divya Vatsa, *The Secret Law Key That Could Unlock a Pandora's Box of Uncurtailed Government Surveillance*, CTR. FOR DEMOCRACY & TECH. (Aug. 19, 2024), https://cdt.org/insights/the-secret-law-key-that-could-unlock-a-pandoras-box-of-uncurtailed-government-surveillance [https://perma.cc/8U84-9Y4B]. Senator Warner's efforts to narrow this provision as part of the National Defense Authorization Act for fiscal year 2025 were stymied by Republican leadership in the House of Representatives. Charlie Savage, *Republicans Blocking Proposal to Narrow Part of a Surveillance Law*, N.Y. TIMES (Nov. 22, 2024), https://www.nytimes.com/2024/11/22/us/politics/fisa-surveillance-bill-program.html [https://perma.cc/3FSZ-MS8Y], and Dell Cameron, *Congress Again Fails to Limit Scope of Spy Powers in New Defense Bill*, WIRED (Dec. 18, 2024), https://www.wired.com/story/congress-spy-powers-fisa-ndaa-trump-702 [https://perma.cc/ND9G-K93F].

[46] *Redacted*, slip op. at 19 (FISA Ct. Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf [https://perma.cc/QW38-JCAD].

security. In fact, it harms our intelligence agencies by making them seem incompetent or untrustworthy—or both.[47]

III. THE CONTINGENT PACE OF DECLASSIFICATION

The USA FREEDOM Act of 2015 requires the Director of National Intelligence to declassify FISC opinions that include "a significant construction or interpretation of any provision of law."[48] Under this provision, ODNI redacts and then publicly releases the FISA Court's annual approvals of Section 702 surveillance. Historically, the declassification requirement was not subject to any time limit, leaving the DNI with enormous discretion to determine when FISC opinions would be made public.[49] The DNI has voluntarily declassified twelve FISA Court and FISCR opinions regarding Section 702 surveillance since the USA FREEDOM Act was signed into law (others were released because of Freedom of Information Act suits);[50] it has taken the government an average of more than seven months to release each one. (This average time to release does not include two opinions released in August of 2023, the original dates of which, as noted above, the government redacted during the declassification process.)

Opinion	**Date of Release**	**Days Until Release**
In re Certifications, slip op. (FISA Ct. Apr. 4, 2024).	Nov. 12, 2024	222
In Re Petition to Set Aside or Modify Directive Issued to [Redacted], slip op. (FISA Ct. Rev. 2023).	Aug. 23, 2023	Unknown
In Re Petition to Set Aside or Modify Directive Issued to [Redacted], slip op. (FISA Ct. 2022).	Aug. 23, 2023	Unknown
In re Certifications, slip op. (FISA Ct. Apr. 11, 2023).	July 21, 2023	101

[47] Professor Emily Berman has argued, for example, that "[p]ervasive secrecy will . . . increase the likelihood of underenforcing surveillance rules" because "internal executive oversight or oversight by the congressional intelligence committees is no substitute for the disinfectant provided by sunlight." Emily Berman, *Reimagining Surveillance Law*, 2023 U. ILL. L. REV. 1235, 1270 (2023).

[48] USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 402, 129 Stat. 268, 281 (2015) (codified as amended at 50 U.S.C. § 1872).

[49] *See, e.g.*, *id.* (creating the declassification requirement).

[50] *See, e.g.*, *Additional Declassified Documents Relating to Section 702 of FISA*, INTEL.GOV, https://www.intelligence.gov/ic-on-the-record-database/results/34-additional-declassified-documents-relating-to-section-702-of-fisa [https://perma.cc/3L6D-MEWG].

Redacted, slip op. (FISA Ct. Apr. 21, 2022).	May 19, 2023	393
In re Certifications, slip op. (FISA Ct. Sept. 2, 2021).	July 21, 2023	687
Redacted, slip op. (FISA Ct. Nov. 18, 2020).	Apr. 26, 2021	159
Redacted, slip op. (FISA Ct. Dec. 6, 2019).	Sept. 4, 2020	273
Redacted, slip op. (FISA Ct. Sept. 4, 2019).	Oct. 8, 2019	34
In re DNI/AG 702(h) Certifications 2018, slip op. (FISA Ct. Rev. July 12, 2019).	Oct. 8, 2019	88
Redacted, slip op. (FISA Ct. Oct. 18, 2018).	Oct. 8, 2019	355
Redacted, slip op. (FISA Ct. Apr. 26, 2017).	May 10, 2017	14

Table One: *The time to declassification of FISC opinions voluntarily released by ODNI since the USA Freedom Act became law.*

The pace of declassification, however, varies wildly, and appears to be at least loosely correlated to how damaging the revelations in the opinion are to the government. For example, ODNI recently released a redacted version of an April 2023 FISA Court opinion that noted "indications" that internal FBI reforms intended to prevent abuses of Section 702 "are having the desired effect;" it took only 101 days for this opinion to be declassified and released.[51] In contrast, the government took 393 days—more than thirteen months—to release a FISC opinion from April of 2022 that revealed that FBI employees had abused section 702 by performing baseless backdoor searches for the communications of, among others, crime victims, 19,000 donors to a congressional campaign, thousands of alleged participants in the January 6 attack on the Capitol, and 133 racial justice protestors.[52] (A recent report from the Privacy and Civil Liberties Oversight Board revealed that the actual number of racial justice protestors subjected to baseless backdoor searches was 141.)[53] Indeed, the government waited until *after* it had obtained the significantly more positive April 2023 opinion before publicly releasing the April 2022 opinion.

[51] *In re* Certifications, slip op. at 83 (FISA Ct. Apr. 11, 2023), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2023/FISC_2023_FISA_702_Certifications_Opinion_April11_2023.pdf [https://perma.cc/4UEX-8E6W].

[52] *Redacted*, slip op. at 26–29 (FISA Ct. Apr. 21, 2022), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_FISC_Certification_Opinion.pdf [https://perma.cc/4UEX-8E6W].

[53] PRIV. & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 17, at 150–51.

Nor is this the first time the government has delayed declassifying a FISC opinion about Section 702 while it waited for a more favorable decision. In October 2018, the FISC issued a blistering opinion in which it determined that the FBI's proposed querying and minimization procedures violated both Section 702 and the Fourth Amendment.[54] The opinion also detailed significant abuses of backdoor searches, including FBI personnel running searches that were advised against by FBI lawyers and "batch queries" for large numbers of Americans without an individualized articulable basis for searching for each person included in the batch.[55]

The revelations in this opinion were a significant turning point in the public's understanding of how Section 702 is used to surveil Americans and were particularly damaging to the government, because "the opinion provide[d] the first glimpse of just how prevalent the FBI's U.S. person queries really are."[56] It is unsurprising, then, that the government took the unusual step of appealing the FISC's decision to the Foreign Intelligence Surveillance Court of Review (FISCR).[57] Nothing prevented the government from releasing the October 2018 FISC opinion while that appeal was ongoing. But apparently hoping to mitigate the public relations firestorm it rightly predicted would result from the opinion's declassification and release, the government kept it hidden for an entire year, releasing it only after the FISCR had upheld the FISC's decision and the FISC had issued a subsequent opinion approving the FBI's revised querying and minimization procedures.[58]

On at least two occasions, then, the intelligence community appears to have abused the discretion granted to it by the USA FREEDOM Act to delay the release of damaging opinions until after it had obtained more favorable rulings. It also did not release FISC opinions it had decided to appeal until after it had obtained a ruling from the FISCR. These delays are not harmless. In its recently released report on Section 702, the PCLOB explained that "significant delays in releasing court opinions to the public prevent adequate transparency surrounding the FISC."[59] This "directly impacts [the] privacy and civil liberties

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[54] *Redacted*, slip op. at 80 (FISA Ct. Oct. 18, 2018), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf [https://perma.cc/AKR7-3QTV].

[55] *Id.* at 80–82.

[56] Elizabeth Goitein, *The FISA Court's Section 702 Opinions, Part II: Improper Queries and Echoes of "Bulk Collection*,*"* JUST SEC. (Oct. 16, 2019), https://www.justsecurity.org/66605/the-fisa-courts-section-702-opinions-part-ii-improper-queries-and-echoes-of-bulk-collection [https://perma.cc/XD5J-JJFF].

[57] *See In re* DNI/AG 702(h) Certifications 2018, slip op. (FISA Ct. Rev. July 12, 2019) (per curiam), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISCR_Opinion_12Jul19.pdf [https://perma.cc/8XAW-ZRRJ].

[58] *Id.* at 43, and *Redacted*, slip op. (FISA Ct. Sept. 4, 2019), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opinion_04Sep19.pdf [https://perma.cc/AKR7-3QTV].

[59] PRIV. & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 17, at 200.

analysis of the Section 702 program," the PCLOB explained, presumably because slow declassification of damaging information raises concerns that the intelligence community could use classification to hide abuses.[60]

IV. ENACTING SOLUTIONS

Intelligence agencies (and their supporters in Congress) cannot fairly claim that the American public lacks the necessary information to opine on Section 702 when their own overclassification of banal information and slow release of embarrassing details warps the surveillance debate. Having willfully blinded the American public, intelligence officials cannot complain that we do not see. Their doing so calls to mind the late Daniel Ellsberg's warning to Henry Kissinger that an official with access to highly classified information can become "something like a moron" if he or she ignores the expertise of those without such access.[61] That outsiders do not have security clearances does not mean our perspective is not worth considering—after all, it is our rights that are at stake.

Thankfully, national security officials do not get to unilaterally set the terms of the debate. Although RISAA was a flawed bill that failed to enact a number of popular reforms intended to prevent future surveillance abuses,[62] one of the positive changes it made was enacting a requirement that the DNI declassify "significant" FISC opinions within 180 days.[63] Closing this loophole in the transparency regime imposed by the USA FREEDOM Act is a significant step forward in preventing the government from manipulating public debate over Section 702 (and other surveillance programs overseen by the FISC) by delaying the release of damaging information. Moving forward, Congress could bolster this requirement by clarifying that opinions regarding the acquisition of sensitive information, such as library circulation records, tax returns, or medical records, or that result from a proceeding in which the FISC appointed an *amicus curiae*, qualify as "significant." And it should consider requiring the government to declassify information about how it uses other foreign

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[60] *Id.*

[61] DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS 238 (2002).

[62] *See, e.g.*, Noah C. Chauvin, *Increasing Congressional Oversight of FISA Section 702 after RISAA*, 92 TENN. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5084391 (manuscript at 3346), and Noah Chauvin, *Too Much Power for Spy Agencies*, BRENNAN CTR. FOR JUST. (Apr. 23, 2024), https://www.brennancenter.org/our-work/analysis-opinion/too-much-power-spy-agencies [https://perma.cc/WZ4W-6C6Q].

[63] *See* 50 U.S.C. § 1872(a). Congress should also clarify that the review window begins when the FISC issues a significant opinion. Under current law, the DNI must complete the declassification review within "180 days after the commencement of such review," but is not told when the review itself must begin. *Id.*

intelligence surveillance programs that impact Americans' privacy, such as collection performed abroad under Executive Order No. 12,333.[64]

The executive branch, too, can help to make intelligence agencies more democratically accountable by reducing instances of overclassification. Because the classification system is largely a creation of executive order, the President has the power to unilaterally enact reforms that could prevent overclassification—a step President Joe Biden reportedly considered,[65] and one that President Donald Trump should take. Liza Goitein, who has studied these issues in depth, has proposed that the President issue an executive order that "narrow[s] the substantive criteria for classification, revamp[s] agency classification guidelines, and create[s] audit systems that identify and hold accountable officials who deliberately or routinely overclassify," and should separately champion government investment in artificial intelligence that can help identify and mark classified information.[66] Reforms such as these could help significantly reduce overclassification. President Trump should implement them.

There are sometimes good reasons to keep sensitive information related to our national security secret. But an informed public is the lifeblood of our republic, and slow declassification and overclassification deprive the people of vital information we need to evaluate the work of our government, to assess whether our interests are adequately protected, and, ultimately, to exercise our sovereign power at the ballot box. The government's longstanding efforts to manipulate what information about Section 702 and other foreign intelligence surveillance programs is available to the public—and when that information is made available—are a direct affront to our sovereignty. We should always have a say in the rules that govern when our government can spy on us. No joke.

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[64] Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *as amended by* Exec. Order No. 13,470, 3 C.F.R. 218 (2008).

[65] Dustin Volz, *Biden Administration Weights Changes to Classification of National Security Secrets*, WALL STREET J. (June 9, 2022), https://www.wsj.com/articles/biden-administration-weighs-changes-to-classification-of-national-security-secrets-11654779600 [https://perma.cc/M6SV-Y2EF].

[66] Elizabeth Goitein, *The Original Sin Is We Classify Too Much*, NATION (Jan. 25, 2023), https://www.thenation.com/article/politics/biden-documents-overclassification [https://perma.cc/B9FB-W8NR].