January 13, 2016

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

## Dear Director Clapper:

We received your office's December 23, 2015 response, signed by Civil Liberties Protection Officer Alexander W. Joel, to our October 29, 2015 letter, which requested that you provide basic information about how Section 702 of the Foreign Intelligence Surveillance Act (FISA) affects Americans and other U.S. residents. We continue to believe that the information requested in our October 29 letter is essential to providing Congress and the American people with crucial facts about Section 702 – especially

whether alternative approaches might address our concerns in cases whereyour office as that there are challenges to providing the requested information. However, to the extent the initial information provided in the letter is indicative of what we may hope to learn at the meeting, we are concerned that this engagement may not meaningfully respond to our recadvance the public discussion. We write to identify the areas where the initial responses contained in the December 23 letter miss the mark, in order to facilitate a more robust distin person.

## 1. Estimate of How Many Communications Involving U.S. Residents Are Subject Surveillance

Our first request was for an estimate of how many communications involving U.S. person collected under Section 702. We noted that, in response to previous requests for the same information by members of Congress, your office has stated that such a count would be to resource-intensive and would itself violate Americans' privacy. Our letter provided a detaresponse to these arguments, including a proposal for ascertaining this information while minimizing privacy intrusions.

Instead of responding to this proposal, the December 23 letter quotes the PCLOB's descr of the government's arguments – the very ones we addressed in our letter. It then sets for PCLOB's five recommendations for data the NSA should provide regarding the acquisiti use of communications involving U.S. persons published nearly a year ago, and that to our knowledge the Intelligence Community has not yet released any new information publicly as result. Our October 29 letter acknowledged the PCLOB's recommendations but explained why additional data on Section 702 is needed and how it can feasibly be obtained.

Moreover, while the more limited data disclosures recommended by the PCLOB would certainly shed important light on how Section 702 affects Americans, the December 23 letter indicates that only the fourth recommendation is "in the process of implement[ation]." For the first three recommendations, the NSA "has been reviewing how to implement" them, and for the fifth, the data – which the NSA already tracks – is being "review[ed] for potential inclusion in public reporting." Four of the PCLOB's five recommendations are thus still under review fully eighteen months after the PCLOB issued its report.

provide little concrete information. Moreover, other agencies, such as the Treasury Department, must have their own interpretations regarding when they must provide notice of Section 702 surveillance, yet no information on these interpretations has been made publicly available or is provided in the December 23 letter.

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We recognize that it may be both advantageous and necessary to engage in further dialogue regarding our requests in the October 29 letter. We welcome an in-person exchange between Intelligence Community officials and our organizations. However, for such a meeting to be productive, it is critical that officials be willing and prepared to respond to the specific proposals in our letter and, if

finding alternative methods of obtaining this information? (We ask that the relevant FBI official(s) attend the meeting to assist in answering these questions.)

• What policies or guidelines, if any, exist to help determine when evidence has been "obtained or derived from" FISA collection such that FISA's notification requirement is triggered? Why have such policies or guidelines not been made public? (We ask that relevant officials from the Department of Justice be present at the meeting, as well as relevant officials from other agencies, such as the Treasury Department, that rely on Section 702-derived evidence in legal proceedings.)

The above questions provide a sense of the level of specificity and substance at which we hope to engage. We look forward to a productive discussion.

## Sincerely,

Advocacy for Principled Action in Government

American-Arab Anti-Discrimination Committee

American Civil Liberties Union

American Library Association

Bill of Rights Defense Committee

Brennan Center for Justice

Center for Democracy & Technology

The Constitution Project

Constitutional Alliance

**Defending Dissent Foundation** 

**Demand Progress** 

DownsizeDC.org, Inc.

Electronic Frontier Foundation

Electronic Privacy Information Center (EPIC)

Fight for the Future

Free Press

Government Accountability Project

Liberty Coalition

National Association of Criminal Defense Lawyers

**National Security Counselors** 

New America's Open Technology Institute

Niskanen Center

OpenTheGovernment.org

PEN American Center

Project On Government Oversight

R Street

Restore the Fourth

The Sunlight Foundation

**TechFreedom** 

World Privacy Forum

X-Lab