

United States Senate

WASHINGTON, DC 20510

November 5, 2012

The Honorable James R. Clapper, Jr.
Director of National Intelligence
Washington, DC 20511

Dear Director Clapper:

As Congress prepares to vote on a long-term extension of the surveillance law known as the FISA Amendments Act of 2008, we believe that it is important for both Congress and the public to have as much information as possible about this law's impact on the privacy of American citizens, so that members of Congress can consider whether the law should be reformed, or renewed without changes. We recently sent you a letter, along with nine other senators, asking questions about the privacy impact of the FISA Amendments Act, and we have received your response. We appreciate that you have generally been responsive to previous questions from us on this topic, but we were disappointed by your reply to our most recent set of questions.

Our letter asked four questions about the impact of the FISA Amendments Act on the privacy of American citizens, and asked you to provide an unclassified response. Your reply stated that you could not provide a "meaningful and accurate" response to our questions in an unclassified format, but that you would answer the questions in the classified attachment that accompanied your reply. However, the classified attachment only answered two of our four questions, and it is not clear to us why you chose to classify these answers.¹ We repeat these questions here, and ask that you please respond to all of them with unclassified answers as soon as possible.

First, we asked if any entities have made any estimates – even imprecise estimates – about how many US communications have been collected under section 702 of the FISA statute (which is the central provision of the FISA Amendments Act). You did not answer this question. Please provide an answer. We would expect this answer to be unclassified, but if you disagree please provide your reasons for keeping this answer secret.

Second, we asked if it was possible to estimate the order of magnitude of this number. (For example, is the number of US communications collected under section 702 closer to 100, or 100,000, or 100 million?) You did not answer this question directly, however the Director of the NSA has made public statements that appear to estimate this order of magnitude. Specifically, the NSA Director has said that "the story that [the NSA] has millions or hundreds of millions of dossiers on people is absolutely false." Please explain whether this statement should be understood to mean that the number of US communications collected under section 702 is less than "millions or hundreds of millions." Since the NSA Director made this statement publicly, we would expect this answer to be unclassified as well.

Third, we asked if any wholly domestic American communications had been collected under section 702 authorities. Your response was classified. We do not understand how simply stating

¹ We note that classifying these answers does not just keep them secret from the public. Most members of Congress – including eleven of the thirteen senators that signed our letter – do not have any staff who are cleared to read your attachment, which will make it extremely difficult for most members to review and understand these answers.

whether any wholly domestic communications have been collected under section 702 authorities would have any impact at all on US national security interests. If you believe that it would, please explain why. And if you agree that it would not, please provide an unclassified answer to this question.

Fourth, we noted that the FISA Amendments Act does not prohibit searching through communications collected under section 702 to find the communications of particular Americans, and asked if the US government has ever attempted to search for the communications of a specific American in this way without a warrant or emergency authorization. Your response was classified. We do not understand how providing a 'yes' or 'no' answer to this question would impact US national security interests in any way, and we ask that you provide an unclassified response.

We recognize that you are not comfortable with our description of such queries as "back-door searches" or with our statement that these queries are permitted because of a loophole in section 702, but in our judgment these terms are entirely appropriate. We are confident that most members of Congress did not believe that they were authorizing these searches when they voted for the FISA Amendments Act in 2008, but you have not denied that section 702 gives the NSA the authority to conduct these searches, and it is a matter of public record that the intelligence community has sought to preserve this authority. If it is not classified that you have this authority, and it is not classified that you would like to keep it, we do not understand why you cannot simply say whether it has ever been used.

In our judgment, this lack of transparency limits the ability of Congress and the public to have an informed debate about the impact of this law on Americans' privacy. To be clear, we do not believe that the government should be able to deliberately search for and read an American's emails without getting a warrant or emergency authorization on that American. We respect that you may have a different view, but we do not believe that it is appropriate for intelligence community officials to withhold information from the public unless they can articulate why doing so is necessary to protect the national security of the United States, which you have not done in this case.

Thank you for your attention to this matter. Since the Senate will debate this issue during the November/December 2012 session, please provide your response by November 16. If you have any questions concerning this request, please have your staff contact John Dickas of Senator Wyden's staff or Jennifer Barrett of Senator Udall's staff at (202) 224-1700. We look forward to your prompt reply.

Sincerely,

A handwritten signature in black ink, appearing to be "Mark Udall", written over a horizontal line.A handwritten signature in black ink, appearing to be "Mark Udall", written over a horizontal line.

Tom Udare

Jeffrey A. Markley