GlobalResearch
Center for Research on Globalization

# Hearings in Secret: Congress, FISA and Warrantless Surveillance

By Dr. Binoy Kampmark
Global Research, January 29, 2016
Region: USA
Theme: Intelligence, Police State & Civil Rights

*It should seem axiomatic to Congressional credibility that the people's representatives should have hearings about the Republic's affairs in the open. If they are put there by citizens to represent citizens, the all seeing eye of the sovereign public should be present to oversee their performance.*

*Not so, it seems, regarding certain areas of policy deliberation. On the subject of gathering intelligence, the shroud of secrecy comes down heavily, ensuring that deliberations are away from public scrutiny and critique.*

This issue is of particular interest given the hearings the House Judiciary Committee will hold next week on two of the NSA's programs that featured in the range of disclosures by Edward Snowden in June 2013. Their names have been assimilated into the argot of popular discussion: Upstream, and in particular, PRISM.

Keeping such hearings secret has angered a range of institutes and organisations who wish to keep an eye on how discussions will unfold. These are critical, given that s. 702, in its legal force, lapses next year. Will this provision be allowed to disappear into oblivion?

On Wednesday, the 26 organisations, including the heavy hitting American Civil Liberties Union and the persistently present Human Rights Watch, waded in with an angry note to Chairman Robert W. Goodlatte and Ranking Member John Conyers.

The undersigned groups were initially appreciative about the decision to hold hearings on Section 702 of the Foreign Intelligence Surveillance Act, believing "that robust congressional oversight of the implementation of this statute, which is used to acquire the communications of Americans and people around the world alike without a warrant, is critical."[1] Surprise, however, was expressed at holding the hearing "in a classified format, outside the public view."

Holding such a hearing in secret "neither fully satisfies the promise to hold hearings nor permits the public debate that this nation deserves. Rather, it continues the excessive secrecy that has contributed to the surveillance abuses we have seen in recent years and to their adverse effects upon our civil liberties and economic growth."

Hearings on FISA – notably the FISA Amendments Act of 2008 – have been held in open session on no less than six occasions since its creation. Implementing the statute has been a point of open discussion, with the Privacy and Civil Liberties Oversight Board publishing an unclassified report on the subject. Not even that has prevented the slide into an ever intrusive, and unaccountable state of surveillance.

Section 702 remains one of the most troubling sections in the intelligence armoury, largely because it is used as the legitimising basis for such programs as PRISM. The Office of the Director of National Intelligence insists on a rather bland reading of the provision, suggesting that it facilitates "the acquisition of foreign intelligence information concerning non-US persons located outside the United States, creating a new, more streamlined procedure to collect the communications of foreign terrorists."[2]

Such a reading seems discriminating and strategic, picking targets accurately. Targeting cannot take place without an appropriate, documented, foreign intelligence purpose, and the foreign target must reasonably be believed to be outside the United States. The provision supposedly does not apply to US citizens.

In practice, it has given the NSA an elastic reach, prompted as much by laziness as executive greed for identifying a whole spectrum of potential threats. It has also been helped by a compliant FISA Court reluctant to interfere with the wisdom of such collecting, and the nature of technology that makes distinctions between US and non-US citizens redundant.

The court's role is also limited to approving various "targeting" procedures and "minimization" procedures – collection in principle does not require individual judicial orders.[3] Even with these lax provisions, the court has periodically noted the problems of accidental capture of data, something which bypasses judicial scrutiny to enable searching by NSA operatives.

A glance at what the programs actually do should serve to dispel any notions about proportionality and discrimination. Technology, in this specific sense, makes a mockery of sober legal limits. Section 702 is a hoovering provision, gathering up millions of online messages and voice communications across a range of platforms, including Skype and Facebook. PRISM gathers its trove from the technology giants: Yahoo, Apple and Google, while Upstream "siphons it off from major internet cables owned by the big telecom companies."[4]

As Rep. Zoe Lofgren, D-Calif., noted in a statement to *The Intercept*, "Reports indicate that FISA Section 702 authority has been used by the NSA to search Americans' photographs, emails, and other communications without warrant or probable cause."[5]

The principle outlined in the collectively signed letter – that congressional hearings "should be conducted in accordance with this country's highest principles of transparency and openness" is sound enough. But the practice of the republic has followed different rationales and principles, deliberating about the effects of s. 702 without actually altering it dramatically. Transparent governance has become the rhetoric of false practice, and NSA programs such as PRISM and Upstream its scolding and repudiating children.

***Dr. Binoy Kampmark*** *was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. Email: bkampmark@gmail.com*

**Notes:**

[1] http://www.openthegovernment.org/sites/default/files/Letter%20for%20the%20Judiciary%20Committee%20on%20Section%20702%20Hearing.pdf

[2] http://icontherecord.tumblr.com/topics/section-702
[3] http://icontherecord.tumblr.com/topics/section-702
[ 4 ]
https://theintercept.com/2016/01/28/congressional-hearings-on-surveillance-programs-to-kick-off-in-secret/

[5]
https://theintercept.com/2016/01/28/congressional-hearings-on-surveillance-programs-to-kick-off-in-secret/



---



*Articles by:* **Dr. Binoy Kampmark**