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To the Board:

Thank you for the opportunity to share my views on this new and important federal law: Section 702 of the Foreign Intelligence Surveillance Act.[1]

In my brief submission, I would like to remind the Board of two often overlooked points of constitutional law that should frame our understanding of the U.S. government's surveillance under Section 702.

First, it is important to remember that Section 702, and even FISA itself, must be interpreted and understood against the background of the President's broad, inherent executive power under the Constitution to conduct electronic surveillance of foreign governments and agents, especially overseas.

Second, although we often speak loosely of the Fourth Amendment's limitations on this presidential foreign surveillance power, courts have repeatedly upheld wide-ranging warrantless U.S. government surveillance overseas, even of U.S. citizens.

These two constitutional observations should frame any legal assessment of Section 702 and FISA in general. Seen in this light, Section 702 is not an ineffectual attempt to regulate lawless executive conduct that should be subjected to the Constitution's limitations, as some critics would have it. In actuality, Section 702 almost certainly imposes more limitations that are required by the Constitution and may even encroach on the president's exclusive foreign affairs powers to conduct foreign intelligence activities.

Although I am generally supportive of a powerful executive under the Constitution in the conduct of foreign affairs, I believe that Section 702's restrictions on executive power are an acceptable price to pay to get Congress, the courts, and the executive branch to cooperate together in the conduct of a crucial foreign affairs policy. In fact, I would go so far as to say that section 702 is exactly the kind of political compromise that we often claim we want our government to make. We should support this kind of national security policy compromise rather than denounce it.

[1] 50 U.S.C. §1881a

As to my first point:

U.S. presidents have long exercised a power under the Constitution to gather foreign intelligence.[2] This power flows from the President's chief role in the conduct of diplomacy, military activities, and foreign affairs generally. Almost every court to consider the question has concluded that the president possesses an inherent constitutional authority to conduct foreign surveillance.[3]

Prior to the enactment of FISA in 1978, the executive branch claimed (and the courts did not dispute) that it possessed a constitutional power to conduct surveillance for foreign intelligence purposes, even inside the United States, and usually without a warrant. Prior to the enactment of Section 702 in 2008, the executive branch also claimed a constitutional power to conduct warrantless surveillance in foreign countries for foreign intelligence purposes, whether or not that surveillance included a U.S. citizen who was physically overseas.

Both the original FISA and Section 702, therefore, should be understood as imposing new and significant limits on this inherent executive power under the Constitution. After Section 702, for instance, the U.S. government cannot "intentionally target any U.S. person" reasonably believed to be overseas. But it seems likely that such targeting, without a warrant, was permitted prior to 2005 and probably prior to 1978.

Imposing these limits does not necessarily encroach on exclusive executive powers, but they certainly could be argued to do so.[4] Critics of Section 702 should keep this in mind. As the Foreign Intelligence Court of Review put it in 2002, "We take for granted that the President does have that [foreign surveillance] authority and, assuming that is so, FISA could not encroach on the President's constitutional power. "[5]

Given this history, I would ask this Board keep in mind that Section 702 and FISA place more constraints on the executive branch's conduct of overseas foreign intelligence gathering than has ever been imposed in the past. You might conclude that we need even more constraints, but we should not kid ourselves that existing constraints, or even more constraints proposed by my fellow panelists, are consistent with historical practice and tradition.

As to my second point:

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[2] United States v. United States Dist. Ct., 444 F.2d 651, 669-71 (6th Cir. 1971) (describing warrantless wiretaps by Presidents Roosevelt, Truman and Johnson).
[3] See, e.g., In re Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002); United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).

[4] See, e.g., Robert F. Turner, FISA v. the Constitution, Congress can't usurp the President's Power to spy on America's enemies, Wall St. J., Dec. 28, 2005.
[5] In re Sealed Case, 310 F.3d at 742.

I do not believe the Fourth Amendment imposes limitations on foreign intelligence are as strict as those imposed by Section 702. There are two reasons why I believe this. First, it is very clear that the Fourth Amendment does not apply to non-US citizens when they are outside the territory of the United States. The Supreme Court confirmed this point in the 1990 decision *United States v. Verdugo-Urquidez* and has shown no signs of reconsidering that holding.[6] In that case, the Court reasoned the Fourth Amendment's text and history supported its applicability to non-citizens only when those non-citizens were in the territory of the United States. [7] But the limited applicability of the Fourth Amendment to overseas searches is well-established.

Second, it is highly unlikely that the Fourth Amendment's warrant requirement applies to the surveillance of U.S. citizens when they are outside of the United States, especially when the surveillance is conducted for foreign intelligence purposes. No court in the U.S. has held that a warrant is required for a search of a U.S. citizen when they are overseas if that search was conducted for foreign intelligence purposes. Some, like the Second Circuit, have held that no warrant is ever required for overseas searches while others have relied on a broad "foreign intelligence" exception to the Warrant requirement.[8] Indeed, as the court observed in *U.S. v. Bin Laden*, no court prior to FISA ever required a warrant for a foreign intelligence search *within* the U.S.[9] It seems even less likely that a court would require a warrant for searches outside the United States.

To the extent that the reasonableness requirement applies, courts have generally interpreted it very generously in favor of the government when conducting overseas searches. Courts have allowed warrantless searches of US citizens' homes and extended wiretaps of their telephone conversations overseas.[10] They have allowed these searches even though the fruit of those searches was eventually used as part of a subsequent criminal prosecution.[11]

In other words, prior to Section 702 and its predecessors, the U.S. government almost certainly was permitted to conduct surveillance of the overseas activities of U.S. citizens, including their electronic communications with foreign nationals, without a warrant. Such searches only had to meet the Fourth Amendment's reasonableness requirements, which were not very hard to meet, as long as there was a foreign intelligence basis for the search.[12]

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[6] United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)
[7] *Id*. at 265.
[8] In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 169–71 (2d Cir. 2008), cert. denied, 130 S. Ct. 1050, 175 L. Ed. 2d 928 (2010); see also U.S. v. Barona, 56 F.3d 1087 (9th Cir. 1995) (foreign searches "neither been historically subject to the warrant procedure, nor could they be as a practical matter").
[9] U.S. v. Bin Laden, 126 F. Supp. 2d 264, 271–77 (S.D. N.Y. 2000), aff'd, 552 F.3d 157 (2d Cir. 2008), cert. denied, 130 S. Ct. 1050, 175 L. Ed. 2d 928 (2010).
[10] In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004 (Foreign Intel. Surv. Ct. Rev. 2008). The court's decision was issued in 2008, but not released until 2009.
[11] In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 169–71 (2d Cir. 2008), cert. denied, 130 S. Ct. 1050, 175 L. Ed. 2d 928 (2010);
[12] For a review of pre-FISA executive practice, see L. Rush Atkinson, *The Fourth Amendment's National Security Exception: Its History and Limits*, å66 VAND. L. REV. 1343, 1362 (2013)

Yet under Section 702, the government faces a flat ban on the intentional targeting of "any United States person reasonably believed to be outside the United States." Moreover, the government must annually seek a FISA court order approving for its targeting program and must submit minimization procedures to avoid surveillance of US citizens outside the United States.[13] I support these mechanisms to oversee the government's overseas surveillance, but I do not believe that these oversight mechanisms are required by the Fourth Amendment.

For this reason, I am not troubled by an interpretation of Section 702 to allow the targeting of information "about" U.S. persons as long as the government does not target the person's communications directly. Under my reading of the statute, the intent is to shield US persons' communications from "intentional" targeting. The statute's use of the term "communications" suggests to me a statutory focus on restricting the search of persons' *communications*. Since in my view, the broad targeting of U.S. persons' communications overseas for foreign intelligence purposes is permitted by the Fourth Amendment without a warrant, I don't see any reason to read Section 702 unduly narrowly to avoid a conflict with the Constitution by also excluding targeting of communications "about" a U.S. person. Such targeting seems beyond the scope of Section 702's restrictions, and hence reserved to the executive branch under its pre-existing constitutional powers to conduct foreign surveillance.

In conclusion, I believe that Section 702 is should be understood as a sensible compromise between privacy interests and the continuing need to conduct aggressive foreign intelligence gathering. With the PAA and now Section 702, Congress has given its blessing to broad-based overseas surveillance that was already occurring pursuant to the President's inherent constitutional powers. Congress has imposed limitations on those activities that go beyond what the Fourth Amendment requires, but that seems a small price to pay to minimize privacy intrusions into Americans' overseas communications. The courts are involved to provide oversight, but not the type of oversight that would extend them beyond their abilities or expertise. This is the type of political compromise and cooperation between different parties and branches of the government that we should applaud rather than condemn.

Sincerely,

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[13] 50 U.S.C. §1881a