

# THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

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## Report Fails to Recommend Closing "Backdoor" on Foreign Surveillance Program, TCP Urges Congress to Act

*TCP's Sloan "concerned the government will continue to use 702 program as a way around constitutionally guaranteed protections"*

WASHINGTON, D.C. -- Virginia Sloan, president of The Constitution Project, a bipartisan legal watchdog group, offered the following comments on today's release of a report from the Privacy and Civil Liberties Oversight Board on section 702 of the Foreign Intelligence Surveillance Act, which authorizes collection and analysis of online and telephone communications conducted overseas:

"The report will help the public better understand one of the government's key surveillance programs, which is an important contribution. But the Board's recommendations must be strengthened. For example, we need to tighten the laws regarding access by the intelligence community and law enforcement to private information about American citizens and permanent residents swept up in the legitimate exercise of foreign surveillance. Until Congress specifically closes the door on the backdoor search loophole, we are concerned the government will continue to use this program as a way around constitutionally guaranteed protections against unreasonable searches. The House has already acted on this vital safeguard. It is up to the Senate to follow suit."

Under the law, the government can target "non-U.S. persons reasonably believed to be located abroad," but it explicitly prohibits the National Security Agency from intentionally collecting data anyone located in the U.S. Ordinarily, the Fourth Amendment requires an individualized warrant before the government can engage in surveillance on American soil. However, the current law does not prohibit the agency from querying databases for U.S. communications gathered incidentally or inadvertently under the foreign surveillance program. Government officials have recently reported that the CIA, FBI and NSA do, in fact, conduct warrantless searches of records of U.S. persons based on such collections.

On June 19, by a 293-123 vote, the [U.S. House adopted](#) an amendment offered by Reps. James Sensenbrenner (R-Wisc.), Thomas Massie (R-Ky.), Zoe Lofgren (D-Calif.), and others to the Department of Defense funding bill that would close the warrantless "backdoor search" loophole by requiring a government agency to obtain permission from a court before examining communications of U.S. persons obtained under section 702. The Senate has yet to act on it.

The five-member federal privacy board split on the desirability of requiring the government to obtain a warrant before querying the database for non-foreign intelligence purposes. In all, the PCLOB offered 10 recommendations to increase transparency in the operation of programs under the law and to better protect civil liberties.

In its 2012 [Report on the FISA Amendments Act of 2008](#), TCP's Liberty and Security Committee recommended a number of changes to the operation of national security programs under section 702 to better ensure it does not violate the Constitution. Those recommendations formed the basis for [comments that TCP filed with the PCLOB](#) in advance of its 702 report. TCP's comments called for reforms to the collection, retention, search and use of 702 data and information well beyond those recommended by the PCLOB today.

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### [About The Constitution Project](#)

*Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project (TCP) brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time. TCP seeks to reform the nation's broken criminal justice system and to strengthen the rule of law through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.*