



U.S. House of Representatives  
Permanent Select Committee on  
INTELLIGENCE

**Section 702 is a key FISA authority set to expire at the end of 2017. It's critical that we get the facts that respond to the real problems on how this invasive surveillance law works, and how it affects Americans' privacy rights. We can reform Section 702 in a manner that better protects privacy, and preserves the law's national security value.**

**FISA Section 702 Debate**  
**(Actually) Setting the Record Straight**

**ALLEGATION:** Section 702 enables the intelligence agencies to conduct warrantless searches of Americans' communications.

**Warrantless searches are an entirely different concern than warrantless targeting. The NSA and FBI can deliberately seek out Americans' communications collected from Sec 702, and that's the problem**

➤ **TRUTH:** Section 702 is never used by intelligence agencies to target the communications of Americans. Multiple federal courts and the Privacy and Civil Liberties Oversight Board have found Section 702 to be constitutional. And independent reviews by Congressional oversight committees, Inspectors General, federal courts and the President's Privacy and Civil Liberty Oversight Board have revealed no evidence that Section 702 has ever been intentionally used to target Americans. Doing so would be illegal.

**ALLEGATION:** Section 702 allows NSA to collect all of the Internet-based communications flowing to or from the United States.

➤ **TRUTH:** Section 702 collection can only be directed against specific foreign targets outside the United States. It does not allow for bulk collection. **But the NSA does engage in bulk scans of all Internet traffic going into and out of the U.S. In the process it collects tens of thousands of wholly domestic communications**

**ALLEGATION:** The NSA can engage in warrantless spying on Americans under Section 702 because it is simply required to demonstrate that the spying is needed to acquire "foreign intelligence information." This could justify virtually any spying, including spying on communications transmitted by journalists or activists. This isn't primarily a counter-terror authority, but rather a broad spying authority.

➤ **TRUTH:** Section 702 authority has not been used and may not be used to target Americans for surveillance, including the communications of journalists or activists. Doing so would be illegal and no such violations have occurred.

**But because targeting parameters are so broad, Americans - including activists, journalists, and even lawmakers - may often be monitored speaking with Sec 702 targets that are not security threats or wrongdoers**

**ALLEGATION:** The FISA Court does not serve as effective oversight.

➤ **TRUTH:** The FISA court, comprising highly-respected federal judges, approves and supervises Section 702 activity. An independent amicus ensures that significant cases include the benefit of an independent point of view. The FISA Court of Review and the Supreme Court serve as further checks, as do Congressional oversight committees and the Inspectors General.

**ALLEGATION:** Section 702 is being misused to circumvent the 4<sup>th</sup> Amendment and gather evidence of crimes by Americans without a search warrant. **Only FISA Courts; No public court has ever approved Sec 702 backdoor searches or Upstream scanning**

➤ **TRUTH:** The law establishing FISA provides for the circumstances under which information gained through Section 702 may be used. Multiple federal courts have upheld this authority as Constitutional. Section 702 is not used to target Americans for intelligence collection. Even if the FBI has reason to believe that an American has committed a federal crime or is a terrorist, Section 702 may not be used to conduct surveillance against that person. Instead, the government would need to get a probable cause order from a judge. The targets of Section 702 are always foreign persons located overseas. **But communications are collected under Sec 702 without a warrant, and the FBI is then allowed to deliberately seek out Americans' communications that were incidentally collected, without any court approval in the process. A FISA Court Special Advocate said this violates Americans' 4th Amendment rights**

**ALLEGATION:** Section 702 is being used to prosecute Americans. This proves that the NSA is searching and storing the records of Americans.

**The FBI's ability to use Sec 702 applies to ALL crimes, including minor, non-violent offenses, not just terrorism**

➤ **TRUTH:** If evidence of a crime is detected when intelligence analysts are reviewing lawfully collected Section 702 information, that evidence may be used by the FBI to initiate an investigation. This can occur when a known terrorist is found to be communicating with a U.S. person.

It is important to note that when U.S. person communications are incidentally collected, it is not because the American has been targeted for surveillance. Americans are not targeted for collection under Section 702, whether they are at home or traveling abroad. Terrorists or other legitimate foreign intelligence targets are the only lawful targets. **"Legitimate" foreign intelligence targets include anyone whose communications might be relevant to US foreign affairs – activists, academics, journalists, and other innocent foreigners with whom Americans might speak can be targeted under Sec 702**

**But more troubling examples also apply: Americans speaking with a diplomat, activist, protester, or academic could also be swept up in Sec 702 surveillance**

However, there are circumstances in which an American's communications may be collected when intercepting legitimate foreign intelligence communications. For example, a terrorist located overseas could be communicating with someone in the United States. Such a message may be collected because the target (the foreign terrorist) is being lawfully monitored under Section 702. Court-approved minimization procedures set limits on how the government can use this information, and Inspectors General, Congressional oversight committees, and the courts make sure those limits are followed.

Why is it important to allow Section 702 information to be used by law enforcement? The problem of a lack of communication and coordination between U.S. law enforcement and the intelligence community was cited by the 9/11 Commission as a key factor in our government's failure to detect and disrupt the attack.

**ALLEGATION:** Section 702 allows for "back-door" searches of Americans' communications.

**TRUTH:** Section 702 does not allow the government to carry out back-door searches of Americans' communications. When NSA receives information related to terrorist threats, it may use things like a phone number, e-mail address, or name of a U.S. person to look at the databases of communications it already lawfully acquired through Section 702.

**This is false. The FBI is permitted to search for Americans' communications for any law enforcement purpose, and read and use Americans' communications that may contain any evidence of any crime**

The government can only look at this database for information related to foreign intelligence. It cannot look at the database for information about traditional domestic crimes. For example, the government needs this authority to check databases for to see if the Omar Mateen, the Orlando shooter, or his wife had any connection to received direction from ISIS.

This is not the initiation of new surveillance or a new search protected under the Fourth Amendment; it is simply intelligence agencies reviewing the data they have already collected. This is simply a review of lawfully collected communications for connections to terror plotting in America.

**ALLEGATION:** Section 702 is an ineffective tool against terrorism.

➤ **TRUTH:** Section 702 has been instrumental in preventing numerous acts of terrorism. It is a tool that is saving Americans' lives as well as those of our allies.

**Sec 702 has value, but there is no evidence reasonable reforms would inhibit this value or limit its effective national security use**

For instance, in September 2009, Section 702 collection of the e-mail account of an al Qaeda courier in Pakistan intercepted e-mails sent to an unknown individual in the United States. The IC passed the information to FBI, and FBI identified the recipient of the e-mails as Najibullah Zazi, who was located in Denver, Colorado. FBI then began physical surveillance of Zazi and was able to track him as he left Denver to drive to New York, where he and others planned to bomb the New York City subway.

In the words of the Privacy and Civil Liberties Oversight Board, “[w]ithout the initial tip-off about Zazi and his plans, which came about by monitoring an overseas foreigner under Section 702, the subway-bombing plot might have succeeded.”

Members can contact the Intelligence Committee to learn more in a classified setting about how this program is keeping us safe.

**It is vital that Congress meaningfully reform Section 702 to properly protect Americans' privacy and Constitutional rights. We can achieve this goal while preserving the national security value that the law provides. For more information, please contact Jake Laperruque, Senior Counsel, [jlaperruque@constitutionproject.org](mailto:jlaperruque@constitutionproject.org).**