

Section 702 of the Foreign Intelligence Surveillance Act: Illegal and Unconstitutional

The Foreign Intelligence Surveillance Act (FISA) was passed in 1978 after the [Church Committee](#), a special investigative committee, uncovered illegal and unconstitutional spying of Americans by the NSA, the CIA, the FBI, and the IRS. Congress in FISA created a secret court called the Foreign Intelligence Surveillance Court (FISC, or FISA Court) to oversee the targeted spying on *specific and identified* agents of foreign powers. But after 9/11, President Bush bypassed the FISA Court and began illegally spying on domestic communications en masse. Journalists and whistleblowers exposed the illegal surveillance a few years later, but Congress failed to stop it. Instead, it passed the 2008 FISA Amendments Act (FISA AA) to justify more spying. In particular, Section 702 is used for mass collection of emails, phone calls and other communications *to or from Americans* as well as foreigners.

The Use of Section 702 is Illegal and Unconstitutional

Section 702 prohibits *intentionally* targeting Americans. Nevertheless, the NSA routinely (“incidentally”) acquires innocent Americans’ communications without a probable cause warrant. In fact, FISA Court judges never learn about, let alone approve, the targets of surveillance under Section 702, and they rely entirely on certifications from the executive branch that downplay the nature of incidental surveillance of Americans. Then, rather than “minimize” the sharing and retention of Americans’ data, as Congress required, the NSA routinely shares such data with the FBI, CIA, and National Counterterrorism Center, and all agencies retain it for at least five years. Since Section 702 was last reauthorized in 2018, it has only become clearer that this provision is a rich source of warrantless government access to Americans’ phone calls, texts, and emails.

Rampant Violations of the Law and the Constitution

As early as 2011, the FISA Court held that the NSA’s collection of Internet communications violated the Fourth Amendment because, despite targeting foreign communications, the agency was still collecting approximately 56,000 American emails a year. And yet, this collection continued. In 2021 alone, the FBI conducted up to 3.4 million warrantless searches of Section 702 data to find Americans’ communications. Congress and the FISA Court have imposed modest limitations on these “backdoor searches,” but according to several recent FISA Court opinions, the FBI has engaged in “widespread violations” of even these minimal privacy protections.

Lack of Accountability in the Courts

FISA has long contained procedures for private parties to sue over surveillance that violates their rights, including a mechanism for considering classified evidence while preserving national security. But in lawsuit after lawsuit the executive branch has sought to avoid these procedures, and the judiciary, including the Supreme Court, has adopted cramped readings of the law that create a de facto national security exception to the Constitution.

Mass Spying Must Stop

Section 702 has become something Congress never intended: a domestic spying tool. Congress should consider ending the program entirely, but certainly not reauthorize Section 702 without critical reforms, including true accountability and oversight of classified information..

Want more information? Please contact Director of Federal Affairs India McKinney at india@eff.org.



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