

Warrantless Surveillance under Section 702 of the FISA Amendments Act: Myths and Facts

+ **Myth:** *Surveillance conducted under Section 702 is aimed at foreigners, and any collection of Americans' communications is accidental.*

+ **Reality:** A June 2015 letter from Director of National Intelligence James R. Clapper confirms that one of the major uses of the Section 702 surveillance programs is to enable the intelligence agencies and the FBI to conduct warrantless searches of Americans' communications with people outside the US.¹

+ **Myth:** *The NSA's Section 702 surveillance programs are targeted.*

+ **Reality:** Through Upstream surveillance, the NSA seizes virtually all Internet-based communications flowing into or out of the United States, and searches the content of those that are text-based, such as e-mails and instant messages.² The Washington Post examined 160,000 e-mails and instant messenger conversations collected under Section 702 between 2009 and 2012, and found that 90 percent of the communications the government had captured and retained were from online accounts not belonging to foreign surveillance targets. Nearly half of the files contained information belonging to US citizens or residents.³ Section 702 has been used to collect information based on non-individualized identifiers such as the IP address of a computer server used by hundreds of people, or malware signatures (unique strings of computer code).⁴

+ **Myth:** *Section 702 surveillance is conducted only to prevent or detect terrorism.*

+ **Reality:** The NSA can engage in warrantless spying under Section 702 as long as "a significant purpose" of the surveillance is to obtain broadly defined "foreign intelligence information." Foreign intelligence is defined to include purposes beyond terrorism, such as information about US foreign affairs that may be transmitted by journalists or activists.⁵

+ **Myth:** *The FISA Court serves as an effective check on the NSA's Section 702 surveillance powers.*

+ **Reality:** The FISA Court approves the NSA's procedures for selecting targets but does not approve the targets themselves. (It also approves "minimization procedures" that permit the retention and sharing of information on Americans that is acquired through this surveillance.)⁶ Additionally, as Court documents confirm, the NSA has misled the Court on multiple occasions about how it conducts surveillance operations.⁷

+ **Myth:** *Evidence collected through warrantless Section 702 surveillance is not used to prosecute and imprison people in the United States.*

+ **Reality:** Based on the public record, there appear to be more than a dozen cases in which evidence obtained through or derived from warrantless Section 702 surveillance has been used in US

¹ Available at <http://www.scribd.com/doc/269070676/Nunes-Clapper-Letter-Re-Massie-Lofgren-June-2015>.

² Charlie Savage, "N.S.A. Said to Search Content of Messages to and From U.S.," *New York Times*, Aug. 8, 2013, <http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html>.

³ Barton Gellman et al., "In NSA-intercepted data, those not targeted far outnumber the foreigners who are," *Washington Post*, July 5, 2014, https://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html.

⁴ *Id.*; Charlie Savage et al., "Hunting for Hackers, N.S.A. Secretly Expands Internet Spying at U.S. Border," *New York Times*, June 4, 2015, <http://www.nytimes.com/2015/06/05/us/hunting-for-hackers-nsa-secretly-expands-internet-spying-at-us-border.html>

⁵ 50 U.S.C. § 1881a(g)(2)(A)(v); 50 U.S.C. § 1801(e)(2)(B).

⁶ 50 U.S.C. § 1881a(i)(1)(A).

⁷ U.S. Foreign Intelligence Surveillance Court, Memorandum Opinion of Oct. 3, 2011, pp. 5, 15-16 and n. 14, available at <https://www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional>.

prosecutions.⁸ Although the Justice Department has notified a small number of defendants that evidence against them was discovered through Section 702, the Department's policy regarding when it will provide such notification has not yet been disclosed, and there is evidence that the Department has failed to provide appropriate notification in cases where information derived from Section 702 surveillance was used.

+ *Myth: US Internet companies are unscathed by the US government's use of Section 702 to force them to turn over customers' private data.*

+ *Reality: A 2014 analysis by New America's Open Technology Institute found that US technology companies, particularly in the cloud computing sector, are likely to lose billions of dollars in revenue due to the US' warrantless surveillance.⁹ Moreover, Section 702 surveillance has now prompted the Court of Justice of the European Union to strike down the Safe Harbor Agreement, which allowed companies to transfer data from the EU to the United States.¹⁰ This is likely to create enormous economic burdens for US companies.*

Signatories:

Center for Democracy & Technology
American Civil Liberties Union
Brennan Center for Justice
Electronic Frontier Foundation
National Association of Criminal Defense Lawyers
New America's Open Technology Institute
Niskanen Center
OpenTheGovernment.org
R Street
Restore The Fourth

⁸ See, e.g., Patrick Toomey, "NSA Spy Target Challenges Warrantless Wiretapping Law," Jan. 29, 2014, <https://www.aclu.org/blog/nsa-spy-target-challenges-warrantless-wiretapping-law>; Congressional Record Vol. 158, No. 168, Dec. 27, 2012, p. S8393 (Sen. Feinstein), available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-12-27/html/CREC-2012-12-27-pt1-PgS8384-2.htm>.

⁹ Danielle Kehl et al., *Surveillance Costs: The NSA's Impact on the Economy, Internet Freedom & Cybersecurity* (2014), pp. 7-13, available at https://www.newamerica.org/downloads/Surveillance_Costs_Final.pdf

¹⁰ Schrems v. Data Protection Commissioner (Case C-362-14), Judgment, Oct. 6, 2015.