



Section 702 Undermines the Warrant Requirement: Backdoor Search Loophole and Use Limitations

When Congress debated and passed the FISA Amendments Act of 2008, it was with the idea that this was a surveillance authority to help investigate and prevent terrorism and espionage. For this reason, Congress authorized the NSA to collect Americans' communications with foreigners with far less judicial oversight and using evidentiary standards that fall far short of the probable cause requirement under the Fourth Amendment.

Section 702 of the FISA Amendments Act is now used to authorize programmatic surveillance that sweeps up Americans' communications at a scale much larger than the public and many in Congress ever conceived. Without any judicial oversight or approval, the FBI conducts warrantless searches of that database for Americans' communications, dubbed backdoor searches, and uses that information in ordinary criminal investigations and prosecutions. This undermines Americans' Fourth Amendment protections.

The Justice Department's interpretation of FBI authority to conduct backdoor searches and use Americans' communications in investigations undermines the Fourth Amendment

DOJ's interpretation of the FBI's authority to use Americans' communications collected under Section 702 for criminal investigations and prosecutions is that if the information was lawfully collected, then it may be lawfully searched and used.

This means that since the large-scale collection of Americans' communications was authorized under the law (Section 702), the FBI may search that information without judicial approval or oversight for Americans' communications. These searches are referred to as the "backdoor search loophole". It also means that without judicial oversight or approval, the FBI may use any information it finds for any authorized investigation or prosecution, no matter how minor, as well as other government proceedings, like those regarding immigration. This includes everything from theft to fraud, drug offenses, violent offenses, copyright law violations, or any other crime, even if it is entirely unrelated to national security.

Even if the FBI would not have been able to show probable cause to obtain a warrant to access the same information, DOJ asserts that the FBI has the authority to search the 702 database and use anything they find.

- **Theoretically, the FBI could build a case against a suspect with enough evidence for prosecution without ever going before a judge to ensure the investigation was not improper and that the rule of law and constitution had been upheld.**

For more information, contact Robyn Greene, Policy Counsel and Government Affairs Lead, New America's Open Technology Institute, at greene@opentechinstitute.org.

Current FBI use limitations are overbroad

While DOJ asserts that the FBI has the authority to use Section 702 data to investigate any crime, in response to public outcry following the Snowden revelations, DOJ issued [new minimization procedures](#) that offered one additional protection. Under the new procedures, the FBI can still access and use Section 702 data to initiate or further any of its investigations. However, those procedures now state that the FBI may only use communications collected pursuant to Section 702 in proceedings, such as prosecutions, with the approval of the Attorney General.

At a [public event](#), Bob Litt, General Counsel for the Director of National Intelligence, announced an additional protection as a matter of policy: Section 702 information would only be introduced into evidence in cases involving national security or “other serious crimes”. Currently those prosecutions involve death, kidnapping, substantial bodily harm, sexual offenses against minors, incapacitation or destruction of critical infrastructure, cybersecurity, transnational crimes, and human trafficking. It is good that DOJ has updated its minimization procedures and imposed additional limitations. However, these protections remain insufficient as they undermine the Fourth Amendment warrant requirement and invite abuse.

- **The FBI is still permitted to search through the Section 702 database for Americans’ communications to initiate or further any investigation, irrespective of the seriousness of the suspected crime and without a warrant or any judicial oversight.**
- **The list includes crimes that are entirely unrelated to the national security and counterintelligence purposes for which Congress passed the FISA Amendments Act, permitting the collection of Americans’ communications absent an individualized showing of probable cause.**

Current FBI use limitations are not guaranteed

The protections offered by the minimization procedures and the intelligence community policy on use in criminal proceedings can be changed at any time. The FISA Court annually reviews the minimization procedures to ensure that they meet the requirements of the law. However, statutory requirements do not include use limitations. Additionally, since the “serious crimes” limitation is a matter of policy, not law, it is subject to change at any time, without any judicial review or public notification. The Trump administration could do away with the protections adopted by the Obama administration, and the public may never find out about it.

- **The Trump administration could direct DOJ to change its policy or update the minimization procedures to allow the FBI to use Americans’ information found in the 702 database to investigate or prosecute any crime, irrespective of its seriousness or relevance to national security.**