

# WIRED

## Congress is Debating Warrantless Surveillance in the Dark

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In 2013, former National Security Agency contractor [Edward Snowden](#) famously brought to light a series of classified US government spying programs. For the first time, the American people learned that the NSA was collecting millions of their phone calls and electronic communications—emails, Facebook messages, texts, browsing histories—all without a warrant.

Several of the programs Snowden revealed are authorized under Section 702 of the Foreign Intelligence Surveillance Amendments Act. The 2008 law was scheduled to sunset on December 31, but in a last-ditch effort Thursday, Congress [extend its authority](#) through January 19.

The Trump administration, meanwhile, [believes](#) that the authorization doesn't really expire until April, leaving lawmakers several months to either reform or strengthen the provision. Hanging in the balance is the legal framework the government largely relies on to conduct mass surveillance of foreigners, and Americans who communicate with them. Which makes it all the more concerning that the fight over Section 702's future has taken place largely in the dark.

### Swept Up

Section 702 is intended to allow intelligence officials to electronically surveil “persons reasonably believed to be located outside the United States” without a warrant. The provision was crafted after the Bush administration’s [secret warrantless surveillance program](#), dubbed Stellar Wind, was disclosed to [The New York Times](#) by whistleblower and former Department of Justice prosecutor [Thomas Tamm](#) in 2005.

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NEEMA SINGH GULIANI, ACLU

The NSA collects hundreds of millions of video chats, instant messages, and emails under Section 702 by compelling companies like Facebook, [AT&T](#), and Google to hand them over. The law also allows the FBI to search through the NSA's databases without a warrant. Section 702 technically only authorizes intelligence agencies to collect information about foreign individuals, but citizens and permanent residents can easily get swept up by dragnet.

“Under the authority, the government can target anybody who has ‘foreign intelligence,’ that’s defined so broadly,” says Neema Singh Guliani, legislative council at the ACLU. “If you’re a reporter who reports on global affairs, or an activist who works on global affairs, you could be a target under 702. We don’t have exact clarity on who's been targeted.”

Which only begins to get at the difficulty any discussion about Section 702 runs into. Democrats, Libertarians, and privacy groups believe it violates the Fourth Amendment, while Republicans argue that limiting its powers would impede national security. But most proponents of the expiring law, along with its detractors, don't truly know how Section 702 works. No one, except those with the right security clearances, really understands how the law is used, how many Americans it affects, or how effective the programs it authorizes are at catching terrorists. The only individuals with a detailed understanding of Section 702's programs are those inside the US intelligence apparatus.

“We’re having a debate where the intelligence agencies are refusing to provide any information to Congress about the effectiveness of this program and the effect it has on people’s liberties,” says Guliani. “You have a case where you have this massive program, and in many respects Congress is being asked to vote on it blind.”

### Blurry Snapshots

While the intelligence community does provide statistics about how many foreigners Section 702 programs target, intelligence officials have refused to provide civil liberties groups and lawmakers with statistics about how many Americans’ communications are vacuumed up into its massive surveillance apparatus.

“There are kind of nibbles or snapshots of how the program operates, but we don’t really have an overall picture of what the numbers are,” says Andrew Crocker, a staff attorney at the Electronic Frontier Foundation.

Earlier this year, the NSA agreed to provide the public with some information about how many American citizens may be impacted, only to later walk back that promise. Director of National Intelligence Dan Coats explained the about face by saying that it “remains infeasible” for the government to cite a meaningful number.

The NSA has also largely refused to provide concrete evidence of Section 702's efficacy. The Foreign Intelligence Surveillance Court, which oversees Section 702, is required to release some of its opinions, and the Office of the Director of National Intelligence compiles a yearly transparency report. But civil liberties advocates say the intelligence community has still not done enough to justify Section 702’s programs.

“There’s been no meaningful assessment, no data-driven cost-benefit analysis,” says Sascha Meinrath, the founder of the Open Technology Institute at the New America Foundation and the founder of technology policy think tank X-Lab. “It’s a massive experiment with no checks, no scientific methodology. We have no idea if this is causing more harm than good, we have no way to know.”

One of the only extensive government analyses conducted of Section 702 is an often-cited 2014 report compiled by the Privacy and Civil Liberties Oversight Board, an independent agency within the executive branch. It found that intelligence collected by Section 702 programs has been “valuable and effective in protecting the nation’s security.” The board also found “no evidence of intentional abuse,” but did recommend intelligence officials disclose more information.

Privacy advocates argue that the report is misleading, and its methodology opaque. “What we need is an actual enumeration of what’s happening, and transparency about the actual total costs, opportunity costs, the false positives and the false negatives,” says Meinrath.

### In the Balance

Because outside legal experts don’t know exactly how Section 702 programs operate, it’s difficult to tell if they’re constitutional. Democratic senator Ron Wyden, a longtime critic of the NSA and member of the Senate Select Committee on Intelligence, believes that they create a “backdoor” to the Fourth Amendment, allowing law enforcement to search the communications of Americans without needing a warrant.

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### SASCHA MEINRATH, OPEN TECHNOLOGY INSTITUTE

Some reforms to the program have already been made in response to Fourth Amendment concerns; in April, the NSA halted one kind of surveillance authorized under Section 702, called “about” collection. It stopped amassing conversations concerning foreign targets, but that weren’t from the targets themselves. If two Americans discussed a known terrorist over text, for instance, they previously could get swept into the NSA’s database. The spy agency put the breaks on the program because it couldn’t stop accidentally collecting information belonging to Americans.

Section 702’s opacity, though, makes it hard to know to what extent the remainder of its programs infringe on the rights of US citizens. “It impairs the ability of the courts to even determine if this is a run around of the Fourth Amendment or not,” says Crocker. Guliani agrees. “How can you assess the constitutionality of a program if you don’t know the effect it has on Americans?” she asks.

Opponents of Section 702 believe that if its programs were to be independently assessed, they would be found to be both expensive and ineffective. “Every time that one of these programs has been exposed, and really subjected to genuine independent scrutiny we find that they have three things in common,” says Patrick Eddington, a homeland security and civil liberties analyst at the Cato Institute, referring to previous programs like Stellar Wind. “One they’re constitutionally violative, two they’re ineffective—they don’t work—and number three, they cost you and me, the taxpayer, millions of dollars.”

The lack of definitive information about Section 702 hasn’t stopped Republicans from advocating for the law’s continuation. In November, representative Devin Nunes, who chairs the Permanent Select Committee on Intelligence, introduced a bill that would have reauthorized Section 702. In order to drum up support for it, his office circulated a two-page fear-mongering pamphlet to members of Congress. It said 702 was vital in apprehending terrorist Haji Iman, and in one version, in all red caps, declared “VOTE YES.”