

UNCLASSIFIED



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

FISA Section 702 Debate

Myth/Fact: The Massie-Lofgren Amendment

Myth: The Massie-Lofgren amendment stops the NSA practice of carrying out warrantless “backdoor searches” of Americans’ communications.

Fact: It takes more than a bumper sticker slogan to explain, but there is no “backdoor” and NSA does not go after U.S. persons using Section 702. Here’s the truth:

- Section 702 of the Foreign Intelligence Surveillance Act allows NSA to seek court approval to go after the communications of non-U.S. persons located outside the United States who are likely to provide foreign intelligence information.
- The law expressly forbids NSA from using Section 702 to go after the calls or emails of a U.S. person. Even if incidental collection reveals a U.S. person is communicating with al Qaeda, under FISA, NSA must get a specific court order based on probable cause to go after that U.S. person’s communications. And NSA must follow court-approved procedures to protect the identity of the U.S. person and limit how the communication can be used.
- When NSA receives communications of a non-U.S. person outside the United States—for instance, an ISIS planner in Syria—NSA will also receive the other side of the phone call or email. Sometimes, that person on the other end of the call may be inside the United States—for instance, the ISIS operative inside the United States who will carry out the attack. These can be the most important communications, as we want to know when terrorists are calling into the United States to conduct attacks.
- The target of the collection, however, remains the non-U.S. person overseas. The collection of the other side of the phone call is considered “incidental.” It remains lawful because the target of the collection was the non-U.S. person outside the United States.
- Just like police officers don’t have to close their eyes to evidence of a crime they don’t expect to find when they search a house, NSA doesn’t have to blind itself to the other side of a conversation when it monitors an overseas terrorist.

- Under certain circumstances, NSA can 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.
 - It is important for NSA to be able to look at its own databases to help stop attacks against the United States. For example, if NSA figured out the location of a likely attack—such as the name of a mall in the United States— looking for the name of the mall in the database would uncover the terrorist targets talking about that mall. It would be a mistake to stop NSA from figuring out which lawful targets are talking about the mall because the mall falls under the legal definition of a U.S. person. That’s what this amendment would do.
 - NSA can only look at the database to find foreign intelligence information like information related to terrorism or espionage. NSA cannot look at the database for information about traditional domestic crimes, and the Department of Justice and Office of Director of National Intelligence check every time NSA looks at the database to make sure NSA follows the rules.

Myth: The Massie-Lofgren amendment stops NSA from violating Americans’ constitutional rights.

Fact: When NSA looks into its database using U.S. person information, it is not a Fourth Amendment “search.” NSA is not collecting any new information. Rather, NSA is simply looking through the database of foreign communications it already has.

This act is like police officers looking through an evidence locker to see if evidence from past crimes might help solve an open case. The police do not violate anyone’s constitutional rights because they are simply reviewing evidence *already in their possession lawfully*, not carrying out a search.

Myth: The Massie-Lofgren amendment is necessary because Section 702 allows the government to collect Americans’ phone calls and e-mails without a warrant.

Fact: Again, this is not true: Section 702 already explicitly prohibits the government from going after a U.S. person and requires the government to follow the Fourth Amendment. Under FISA, to go after the calls and emails of a U.S. person, the government must get an individual court order based on probable cause.

Myth: Section 702 allows NSA to get any U.S. person’s e-mail if the e-mail merely mentions a foreign intelligence target, for instance, by telling a joke about Osama bin Laden.

Fact: Section 702 only allows the government to go after emails and calls of non-U.S. persons outside the United States. It does not allow the government to go after a U.S.

person, no matter what the content of the U.S. person's e-mail. In fact, Section 702 expressly *forbids* targeting the communications of U.S. persons.

Myth: The Massie-Lofgren amendment is necessary because the USA FREEDOM Act didn't go far enough.

Fact: The USA FREEDOM Act was the product of months of careful deliberation by the Judiciary and Intelligence committees and passed the house with 338 votes. It reaffirmed the statutory prohibition on using Section 702 to target U.S. persons and ended bulk collection of telephone metadata without compromising the effectiveness of important counterterrorism tools.

The Massie-Lofgren amendment, on the other hand, had limited review or debate, and if enacted, will cripple the government's ability to discover threats inside the United States.

Myth: The Massie-Lofgren amendment brings NSA in line with traditional law enforcement practices.

Fact: In reality, the Massie-Lofgren amendment would give *more* legal protections to terrorists than other criminals. If, for instance, the government has a court-approved wiretap on a drug dealer's cell phone and records a conversation where a second drug dealer talks about committing a murder, the police can use that phone call as evidence against the second drug dealer in a murder trial. The Massie-Lofgren amendment would stop the government from doing the same for terrorists.

Myth: The Massie-Lofgren amendment will help build confidence in American technology companies by prohibiting NSA or CIA from bypassing electronic privacy controls.

Fact: Although building confidence in U.S. companies is a worthy goal, the Massie-Lofgren amendment is the wrong way to go about it. The amendment's text is so broad that it will have far-reaching implications. The amendment would, for instance, prohibit the government from obtaining a court order to demand assistance from a technology provider or even from requesting assistance from a provider to comply with lawful, court-ordered requests for information.

Myth: The Massie-Lofgren amendment would not harm national security.

Fact: The amendment would hurt national security in two ways.

First, it would prevent the government from quickly linking overseas terrorist plots to attackers inside the United States. Take, for example, the 2009 New York subway plot. Section 702 collection targeted against an al-Qai'da terrorist overseas revealed that the terrorist was in contact with an unknown person inside the United States—Najibullah Zazi, who had prepared backpacks of explosives to set off in the New York City subway. If it had been law, the Massie-Lofgren amendment would have prohibited

NSA from running a query through its database of Section 702 communications to see if any other al-Qa'ida operatives overseas were in contact with Zazi.

Second, the amendment would prevent NSA and CIA from carrying out lawful electronic surveillance. For instance, if the government discovers that al Qaeda is using encryption software to plot another 9/11 attack in the U.S., the Massie-Lofgren amendment would forbid NSA or CIA from requesting assistance from the company that designed the software to decrypt al Qaeda's communications and prevent the attack. The government could also be prohibited from seeking a court order for decryption assistance.