



Written by [Joe Wolverton, II, J.D.](#) on July 3, 2014

So Much Warrantless Surveillance, Feds Can't Keep Track

The National Security Agency (NSA) conducts warrantless surveillance of millions of people around the world and very little of it has anything to do with stopping terrorism.

Not that this is any sort of revelation to those who pay attention to the contraction of constitutional liberty, but recent reports from mainstream news outlets are highlighting not only the vacuuming up of metadata in violation of the Fourth Amendment, but the use of Section 702 of the FISA Amendments Act to justify untold spying operations carried out under cover of this federal statute.

Some light is being shed on these activities lately with the release this week of the report published by the Privacy and Civil Liberties Oversight Board (PCLOB). The *Guardian* reports that the information revealed in this report “gives Americans a fairly detailed look unclassified at how the NSA spies through its notorious Prism program — and how it snoops ‘upstream’ (a euphemism for the agency’s direct access to entire internet streams at telecoms like AT&T). The board issued a scathing report on the Patriot Act surveillance months ago, but oddly they went the opposite route this time around.”

In other words, the board recommends no substantive changes to the surveillance status quo, prompting a critical response from the Electronic Frontier Foundations (EFF). EFF writes:

The Privacy and Civil Liberties Oversight Board (PCLOB) issued a legally flawed and factually incomplete report late Tuesday that endorses Section 702 surveillance. Hiding behind the “complexity” of the technology, it gives short shrift to the very serious privacy concerns that the surveillance has rightly raised for millions of Americans. The board also deferred considering whether the surveillance infringed the privacy of many millions more foreigners abroad.

The board skips over the essential privacy problem with the 702 “upstream” program: that the government has access to or is acquiring nearly all communications that travel over the Internet. The board focuses only on the government’s methods for searching and filtering out unwanted information. This ignores the fact that the government is collecting and searching through the content of millions of emails, social networking posts, and other Internet communications, steps that occur before the PCLOB analysis starts.

Beyond this condemnation, the EFF points out the PCLOB’s lack of attention to constitutional restraints on such wholesale, surreptitious, unaccountable spying on citizens’ otherwise private communications:

The Fourth Amendment requires a warrant for searching the content of communication. Under Section 702, the government searches through content without a warrant. Nevertheless, PCLOB’s analysis incorrectly assumes that no warrant is required. The report simply says that it “takes no position” on an exception to the warrant requirement when the government seeks foreign





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intelligence. The Supreme Court has never found this exception.

PCLOB findings rely heavily on the existence of government procedures. But, as Chief Justice Roberts recently noted: “the Founders did not fight a revolution to gain the right to government agency protocols.” Justice Roberts’ thoughts are on point when it comes to NSA spying — mass collection is a general warrant that cannot be cured by government’s procedures.

As Founding Era jurist [St. George Tucker wrote](#), “In the administration of preventive justice, the following principles have been held sacred; that some probable ground of suspicion be exhibited before some judicial authority; that it be supported by oath or affirmation.”

Section 702 of the FISA Amendments Act requires no such constitutionally sound oath or affirmation and it thus directly deprives Americans of the rights against warrantless searches protected by the Fourth Amendment.

As for the scope of the Section 702 snooping, *The New American* [reported on July 2](#):

The National Security Agency (NSA) is actively conducting wholesale surveillance of communication in nearly every country around the world, and a secret court has said it has the authority to do so.

Top-secret documents released by former NSA subcontractor Edward Snowden reveal that the United States has what the *Washington Post* described in a June 30 exposé as “broad no-spying arrangements” with the governments of four nations: Great Britain, Australia, New Zealand, and Canada. With the United States, this select group is known collectively as the Five Eyes.

As of 2010, the new cache discloses, those restrictions have been loosened by the Foreign Intelligence Surveillance Court (the so-called FISA Court). Under the more liberal guidelines given the green light by the secret court, NSA can “intercept through U.S. companies not just the communications of its overseas targets but any communications about its targets as well.

Although the PCLOB report reveals many of the operational details of the Section 702 spying, it does not include the number of Americans who have had their rights robbed by government under the guise of this act. As of Tuesday, however, there is at least some idea of how rampart the deprivation of rights is.

On his official website, Senator Ron Wyden (D-Ore.) published [a letter sent to him by the Office of the Director of National Intelligence](#) (ODNI). Among other things, the letter provides a purported tally of the number of Americans targeted for surveillance by the NSA, FBI, CIA, and other federal agencies.

In 2013, the NSA used these “backdoor” Section 702 searches to “query” the erstwhile private communications of 198 Americans. During the same period it also conducted over 9,500 queries of metadata of Americans.

The CIA was much more active in violating the Fourth Amendment, however. According to the ODNI’s letter to Wyden, the CIA conducted warrantless searches on about 1,900 Americans.

That’s not the worst of it, however. The data provided to Wyden reveals that the FBI conducts so many unconstitutional searches of Americans’ private communications that the government doesn’t even keep count. The ODNI does admit that the “the FBI believes the number of queries is substantial.”

Of the unholy alliance of the FBI and NSA, *The Guardian* reports, “The FBI has always been the NSA’s silent partner in all its surveillance and has long been suspected of doing the dirty work on Americans’



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data after it's been collected by NSA.”

Senator Wyden agrees, writing in response to the ODNI's disclosure:

When the FBI says it conducts a substantial number of searches and it has no idea of what the number is, it shows how flawed this system is and the consequences of inadequate oversight. This huge gap in oversight is a problem now, and will only grow as global communications systems become more interconnected.

While we may not know how many Americans have had their fundamental liberties violated and their communications surveilled by the federal government, we do know that Congress is doing little or nothing to stop it. Fortunately, we need not rely on a recalcitrant Congress for the protection of our God-given liberty.

State legislatures can step into the gap and follow James Madison's counsel in *Federalist*, No. 46 and refuse “to cooperate with officers of the Union” when cooperation would make the state a collaborator in the violation of the Constitution.

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