

THE IMPACT OF SECTION 702 ON ASIAN AMERICANS

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STOP AAPI HATE



AASF
Asian-American Scholar Forum

Asian Americans Against Warrantless Surveillance is a coalition led by Asian Americans Advancing Justice – AAJC, Asian American Scholar Forum, Chinese for Affirmative Action (CAA), and Stop AAPI Hate. The coalition joins over 60 Asian American and allied organizations to call on Congress to oppose the reauthorization of Section 702 of the Foreign Intelligence Surveillance Act (FISA) without comprehensive reforms.

We recognize the grave dangers posed by unchecked national security programs in the United States and the persistent legacy of discrimination that the Asian American and Arab, Middle Eastern, Muslim, and South Asian (AMEMSA) communities have endured due to racial profiling and prejudice in the name of national security.

WHAT IS SECTION 702?

Section 702 of the Foreign Intelligence Surveillance Act (FISA) was enacted by Congress in 2008. Its original purpose was to grant federal intelligence agencies the authority to collect communications from non-U.S. persons located outside the United States without obtaining a warrant. Unfortunately, over the past 20 years, Section 702 has undergone significant mission creep. As of 2024, intelligence officials are targeting approximately 290,000 non-U.S. people and groups for surveillance under Section 702. They collect any communications these individuals or groups send or receive, even when they are to or from Americans. The number of internet transactions collected is estimated to be close to one billion annually, with several billion sitting in storage. It has thus become a substantial source of warrantless access to the communications of American citizens, which raises serious concerns about government surveillance overreach.



“Incidental” Collection:

Section 702 involves the extensive collection of communication data, including emails, phone calls, and text messages. This data collection inevitably includes the communications of ordinary American citizens, an activity often referred to as "incidental" collection. Section 702 surveillance is intentionally structured in a way that anticipates and includes the communication of U.S. persons as part of the broader effort to collect information from specific targets.



Fourth Amendment Loophole:

Government agencies, most notably the FBI, exploit this situation. They use Section 702 as a legal loophole within the Fourth Amendment of the U.S. Constitution, which protects Americans against unreasonable and unwarranted searches. Section 702 allows the government to maintain and search the communications of American citizens that were incidentally collected under this program. Importantly, these searches can occur without the need for a judge's warrant, despite the fact that these communications weren't initially the primary focus of Section 702 surveillance.



Backdoor Searches:

Section 702 effectively serves as a "backdoor" for government agencies to bypass the general requirement that they obtain a warrant before reviewing Americans' private communications. It allows them to conduct searches of Americans' communications without the standard oversight and approval that a judge's warrant would offer. This erosion of Fourth Amendment safeguards constitutes a grave and ongoing threat to the privacy and civil liberties of American citizens – including members of the Asian American and AMEMSA communities.

HOW DOES SECTION 702 HURT ASIAN AMERICANS?

Asian Americans have a history of being subjected to racial profiling and discrimination, often rooted in stereotypes and misconceptions. Authorities like Section 702 that lack proper oversight and targeting criteria can exacerbate these issues, leading to unjust scrutiny of innocent individuals within the Asian American and AMEMSA communities. Here are various ways in which these communities are affected by Section 702:



Overrepresentation in Data Collection:

Asian Americans and AMEMSA individuals are likely overrepresented in the data collected under Section 702. These persons often have family, friends, and business associates in foreign countries, making their communications more likely to be incidentally collected. This overrepresentation increases the risk of these communities being subjected to "backdoor searches," further infringing on their privacy.

Disproportionate Targeting:

Federal agencies like the FBI, CIA, and others frequently target members of the Asian American and AMEMSA communities based on unfounded presumptions of connections to foreign interests, particularly amid rising geopolitical tensions. This targeting leaves these communities more vulnerable to warrantless surveillance compared to the average American.

Reinforcing Stereotypes:

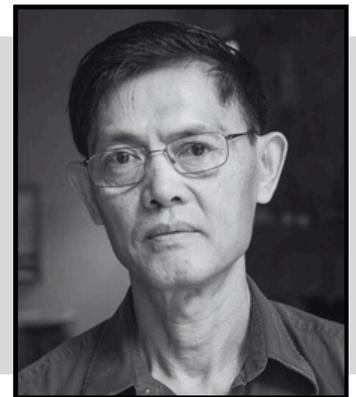
Heightened tensions between the U.S. and Chinese governments have generated concerns of "espionage." This has led to numerous instances of unwarranted surveillance and prosecutorial misconduct against Chinese American academics and researchers. Section 702's involvement in such surveillance reinforces harmful stereotypes depicting Asian Americans as "disloyal" and "perpetual foreigners" and foster an environment of unjustified suspicion and bias against Asian Americans.

Chilling Effect:

Unjust investigations and warrantless surveillance have a chilling effect on Asian Americans, deterring them from engaging in normal activities such as traveling, communicating with loved ones, applying for federal grants, entering leadership positions, or meeting with family for crucial moments like weddings. In a critical study, 67% of respondents cited government investigations as a reason for not feeling safe, and 37% fear family and friends would be targeted in retaliation for what they say.

THE CASE OF DR. XIAOXING XI

Section 702 was allegedly used to investigate an Asian American academic, Professor Xiaoxing Xi, who was wrongfully prosecuted in the years leading up to the China Initiative. After being arrested by the FBI at his home, where his wife and daughters were detained at gunpoint by armed agents, Dr. Xi faced hours of interrogation and intrusive bodily searches. Although the Justice Department dismissed their baseless indictment, the harm was done. Dr. Xi had endured years of litigation and suffering and was left with lasting trauma for him and his family. His case underscores the potential for unwarranted targeting and surveillance of Asian Americans under Section 702 and its impact on civil liberties within the Asian American community.



WHAT REFORMS ARE NEEDED?

Congress should enact the following reforms to help ensure that government surveillance programs are not used in a biased manner that subjects Americans to scrutiny on the basis of race, ethnicity, or national origin:



Require Warrant to Access Americans' Communications and Personal Data:

Congress should not reauthorize Section 702 without requiring the government obtain a warrant before searching for Americans in Section 702 data. This would require officials to demonstrate to a judge either that they have probable cause to believe a search for Americans' communications will produce evidence of a crime, or that they have probable cause to believe the target of the search is an agent of a foreign power.



Close Data Broker Loophole:

Federal agencies are circumventing privacy safeguards by purchasing data from brokers, bypassing the need for warrants, court orders, or subpoenas. Congress must close this loophole to prevent the government from sidestepping warrant requirements through data broker purchases.



Repeal the expanded ECSP definition:

A new and dangerous definition of "electronic communication service provider" a.k.a. ECSP was passed in 2024. It expanded the number of Americans who can be secretly compelled to help the government tap into most communications equipment without a warrant. As a result, virtually any business or location that provides WiFi could be forced to provide communications data to the government such as apartment buildings, gyms, coffee shops, or cultural centers. Congress should restore reasonable bounds to the ECSP definition to prevent this, such as by including language offered in the 2024 Senate Intelligence Authorization Act.



Repeal the 'visa vetting' provision:

Passed in 2024, this provision allows the government to target and surveil any individual who is seeking to travel to the United States. This may be used disproportionately against Asian Americans communities, and is an especially dangerous mechanism in a political environment that still sees repeated attempts to revive the China Initiative.