

**American Domestic Mass Data Collection and Surveillance Program:**

**Potentials for Public Policy Reform**

By Lauren B

## **Key Issue: Mass Domestic Surveillance and Data Collection**

In 2013, whistleblower Edward Snowden shocked the world when he exposed information that the United States had been operating an extensive mass surveillance program on United States citizens called PRISM<sup>1</sup>. This program was a collaboration between the National Security Agency and other top intelligence communities like the UK's Government Communications Headquarters<sup>2</sup>. In addition to collaboration with other intelligence agencies, it became apparent that the NSA had used a Foreign Intelligence Surveillance Act (FISA) court order to compel Verizon Wireless to collect millions of phone records from citizens in the United States and outside of it for a period of three months in 2013<sup>3,4</sup>. The information Snowden leaked brought up the issue of Mass Surveillance in United States, though the NSA claimed that any data collected of U.S citizens through foreign intelligence was "incidental collection" only<sup>5</sup>.

The policy of Domestic Surveillance is not entirely new in the United States. It has been around since the late 1950s with the creation of the NSA and the surveillance program known as SHAMROCK<sup>6</sup>. This program - along with another one in the 1960s called MINARET - collected information on U.S citizens that was later established as illegal and a violation of the Fourth

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<sup>1</sup> Luke Harding, "How Edward Snowden went from loyal NSA contractor to whistleblower," The Guardian, February 01, 2014, , accessed April 20, 2017, <https://www.theguardian.com/world/2014/feb/01/edward-snowden-intelligence-leak-nsa-contractor-extract>.

<sup>2</sup> Nick Hopkins, "From Turing to Snowden: how US-UK pact forged modern surveillance," The Guardian, December 2, 2013, , accessed April 20, 2017, <https://www.theguardian.com/world/2013/dec/02/turing-snowden-transatlantic-pact-modern-surveillance>.

<sup>3</sup> Glenn Greenwald, "NSA collecting phone records of millions of Verizon customers daily," The Guardian, June 06, 2013, , accessed April 20, 2017, <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>4</sup> Carter, Chelsea J. "Report: Court order forces Verizon to turn over records of millions - CNNPolitics.com." CNN. June 06, 2013. Accessed April 20, 2017. <http://www.cnn.com/2013/06/05/politics/nsa-verizon-records/>.

<sup>5</sup> Rosenzweig, Paul. "Maintaining America's Ability to Collect Foreign Intelligence: The Section 702 Program." The Heritage Foundation. May 13, 2016. Accessed April 21, 2017, <http://www.cnn.com/2013/06/05/politics/nsa-verizon-records/>.

<sup>6</sup> Ray Downs, "A Brief History of the US Government Spying on Its Citizens," Vice, June 14, 2013, , accessed April 21, 2017, [https://www.vice.com/en\\_us/article/a-brief-history-of-the-united-states-governments-warrentless-spying](https://www.vice.com/en_us/article/a-brief-history-of-the-united-states-governments-warrentless-spying).

Amendment<sup>3</sup>. As a response to these programs and to the unfolding Watergate scandal, Congress passed the Foreign Intelligence Surveillance Act of 1978. This Act dictated how domestic spying was supposed to be handled<sup>7</sup>. In the early 2000s, after the 9/11 terrorist attacks, President George W. Bush authorized another domestic intelligence program, later shut down over concerns about mass surveillance, and soon after the USA Patriot Act was signed into law allowing a broader domestic surveillance program<sup>7</sup>.

In 2007 and 2008, Congress passed the Protect America Act and other amendments to FISA that allowed for warrantless eavesdropping and immunity for cooperating telecommunications companies<sup>7</sup>. These amendments created Sections 702 and 703 that allowed for the targeting of persons abroad and within the United States<sup>8</sup>. During this time, a program never officially recognized by the NSA, nicknamed ECHELON, developed into the PRISM and Upstream programs that Edward Snowden released information on in 2013<sup>3</sup>. PRISM allowed the NSA and other members of the intelligence community to collect information of almost anyone using technology companies and Upstream allowed the same intelligence community members to use Internet Service Providers (ISPs) to collect all information moving through internet infrastructure before it reaches its destination<sup>9,10</sup>. The PRISM and Upstream programs allowed

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<sup>7</sup> "Factbox: History of mass surveillance in the United States," Reuters, June 07, 2013, , accessed April 21, 2017, <http://www.reuters.com/article/us-usa-security-records-factbox-idUSBRE95617O20130607>

<sup>8</sup> "Legal Resources." Legal Resources | Intelligence Committee. Accessed April 21, 2017, <https://www.intelligence.senate.gov/laws/fisa-amendments-act-2008>.

<sup>9</sup> Caleb Chen, "Trump Administration wants to renew FISA Section 702; keep Snowden revealed NSA surveillance programs PRISM and Upstream." Privacy Online News, March 03, 2017, Accessed April 21, 2017, <https://www.privateinternetaccess.com/blog/2017/03/trump-administration-wants-renew-fisa-section-702-keep-snowden-revealed-nsa-surveillance-programs-prism-upstream/>

<sup>10</sup> Jay Shooster et al., "Unprecedented and Unlawful: The NSA's "Upstream" Surveillance," Just Security, September 19, 2016, , accessed April 21, 2017, <https://www.justsecurity.org/33044/unprecedented-unlawful-nsas-upstream-surveillance/>.

the NSA to collect information an estimated half of all NSA targets that were U.S citizens or located inside the United States<sup>11</sup>.

The now public spying program of the NSA has had lasting effects on other areas of policy, not just intelligence. In fact, the NSA practice of metadata collection and mass surveillance is broadening to include local police task forces<sup>12</sup>. In Baltimore, Maryland, the police taskforce there uses a tool nicknamed StingRay that collects cellphone information retroactively. The StingRay was used to collect information about potential targets for the Baltimore Police Department, however, the tool was indiscriminate and actually could collect information from many other people in the area due to the way the tool itself works<sup>13</sup>. The Baltimore Police Department policy for using the StingRay tool was to deliberately misled judges and attorneys about the usage of the StingRay device to collect information and dismiss cases in order to avoid divulging any information about the tool<sup>14</sup>.

### **Mass Surveillance Public Policy Reform**

With the new revelations of the broad domestic spying program led by the NSA and other law enforcement agencies, the question now turns the development of new policies to reform and curb domestic surveillance programs. Now, even the FBI would like to follow in the footsteps of

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<sup>11</sup> "Are They Allowed to Do That? A Breakdown of Selected Government Surveillance Programs." Brennan Center For Justice. Accessed April 20, 2017.

<https://www.brennancenter.org/sites/default/files/analysis/Government%20Surveillance%20Factsheet.pdf>.

<sup>12</sup> Greg Thomas, "The NSA's Data Collection Habits Are Trickling Down to Cops and Credit Agencies,"

Motherboard, June 11, 2013, , accessed April 21, 2017,

[https://motherboard.vice.com/en\\_us/article/the-nsas-data-collection-habits-are-trickling-down-to-cops-and-credit-agencies](https://motherboard.vice.com/en_us/article/the-nsas-data-collection-habits-are-trickling-down-to-cops-and-credit-agencies).

<sup>13</sup> Kim Zetter, "Feds Admit Stingrays Can Disrupt Cell Service of Bystanders," Wired, March 01, 2015, , accessed April 20, 2017, <https://www.wired.com/2015/03/feds-admit-stingrays-can-disrupt-cell-service-bystanders/>.

<sup>14</sup> Kris Hermes, "Law Enforcement Uses StingRays To Spy On Americans And Lies About It," The Huffington Post, September 26, 2016, , accessed April 22, 2017, [http://www.huffingtonpost.com/kris-hermes/law-enforcement-uses-stin\\_b\\_12080634.html](http://www.huffingtonpost.com/kris-hermes/law-enforcement-uses-stin_b_12080634.html).

the NSA and wiretap electronic communications taking place in the United States<sup>15</sup>. The potential area of major domestic mass surveillance reform lies within the Foreign Intelligence Surveillance Act, its amendments, and its implementation.

The first area of mass surveillance reform deals with the FISA Court. Parts of the FISA is currently up for reauthorization by Congress, specifically Section 702. Considered to be the ‘legal backbone’ of the NSA mass surveillance program, FISA Section 702 allows for a “backdoor” loophole that lets the Intelligence Community search for U.S persons and collect data about them while also searching for foreign targets<sup>16</sup>. This approach to warrantless searches of U.S persons was recently upheld by the U.S Federal Appeals Court in the case *United States v. Mohammad*, where they determined that the defendant (Muhammad) did not have his Fourth Amendment rights violated. However, this same case brought up the potential for constitutional issues involving both the Upstream and PRISM programs used to collect the information<sup>17</sup>.

Currently, Section 702 is up for reauthorization by Congress, but Human Rights Watch advocates and other groups such as the Electronic Frontier Foundation are calling for reform of Section 702 to limit the backdoor loopholes the NSA has used to justify and collect information on U.S persons<sup>18</sup>. Additional amendments have been called for by the Brennan Center for Justice in a report released in 2015. The report called for amendments to Article III of the FISA Court to

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<sup>15</sup> Dell Cameron, "Yes, the NSA Can Spy on Every US Citizen," Vice, June 10, 2013, , accessed April 24, 2017, [https://www.vice.com/en\\_us/article/the-fbi-wants-to-wiretap-every-us-citizen-online](https://www.vice.com/en_us/article/the-fbi-wants-to-wiretap-every-us-citizen-online).

<sup>16</sup> Dia Kayyali, "The Way the NSA Uses Section 702 is Deeply Troubling. Here's Why.," Electronic Frontier Foundation, May 08, 2014, , accessed April 22, 2017, <https://www.eff.org/deeplinks/2014/05/way-nsa-uses-section-702-deeply-troubling-heres-why>.

<sup>17</sup> Taylor Hatmaker, "Court upholds warrantless surveillance of U.S. citizens under Section 702," TechCrunch, December 05, 2016, , accessed April 22, 2017, <https://techcrunch.com/2016/12/05/section-702-mohamud-appeals-ruling/>.

<sup>18</sup> "What It Means to Be An NSA "Target": New Information Shows Why We Need Immediate FISA Amendments Act Reform," Electronic Frontier Foundation, August 14, 2013, , accessed April 23, 2017, <https://www.eff.org/deeplinks/2013/07/what-it-means-be-target-or-why-we-once-again-stopped-believing-government-and-once>.

provide for transparency and allow for challenges to the program, ensuring the collection of intelligence follows a “rubric” of foreign intelligence collection to prevent loopholes, and finally, an end to the “programmatically surveillance” of the act and a fix to the constitutional issues FISA brought up<sup>19,20,21</sup>.

An additional part of FISA reform is with Executive Order 12333 (EO 12333). Executive Order 12333 expands the original FISA and allows for “the Attorney General [to be able] to approve the use of any technique for intelligence purposes within the United States or against a U.S. person abroad<sup>22</sup>.” This Executive Order has been cited as part of the legal basis for the “Google-like” search engine, called ICREACH, of all the information collected by the NSA for the perusal of at least 23 intelligence agencies since it’s inception in 2007<sup>23</sup>.

EO 12333 was recently amended by the Obama administration in late 2016 to allow for the sharing of any intelligence collected by the NSA to be shared with any other member of the Intelligence Community without previous authorization of the Director of National Intelligence. This rule change now allows for the NSA to stop scrubbing identifying information collected before posting to the ICREACH database<sup>24</sup>.

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<sup>19</sup> Elizabeth Goitein and Faiza Patel, "What Went Wrong With The FISA Court," Brennan Center For Justice, 2015, , accessed April 22, 2017,

[https://www.brennancenter.org/sites/default/files/analysis/What\\_Went\\_%20Wrong\\_With\\_The\\_FISA\\_Court.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf).

<sup>20</sup> Wells Bennett, "Brennan Center Report on "What Went Wrong with the FISA Court"," Lawfare, June 01, 2015, , accessed April 23, 2017, <https://www.lawfareblog.com/brennan-center-report-what-went-wrong-fisa-court>.

<sup>21</sup> Carrie Cordero, "Brennan Center Report on "What Went Wrong with the FISA Court"," Lawfare, June 01, 2015, , accessed April 23, 2017, <https://www.lawfareblog.com/brennan-center-report-what-went-wrong-fisa-court>.

<sup>22</sup> Edward C. Liu, "Reauthorization of the FISA Amendments Act ," Congressional Research Service, April 8, 2013, , accessed April 22, 2017, <https://fas.org/sgp/crs/intel/R42725.pdf>.

<sup>23</sup> Ryan Gallagher, "How the NSA Built Its Own Secret Google," The Intercept, August 25, 2014, , accessed April 22, 2017, <https://theintercept.com/2014/08/25/icreach-nsa-cia-secret-google-crisscross-proton/>.

<sup>24</sup> Alex Emmons, "Obama Opens NSA's Vast Trove of Warrantless Data to Entire Intelligence Community, Just in Time for Trump," The Intercept, January 13, 2017, , accessed April 24, 2017, <https://theintercept.com/2017/01/13/obama-opens-nsas-vast-trove-of-warrantless-data-to-entire-intelligence-community-just-in-time-for-trump/>.

The changes to Executive Order 12333 have brought up significant concerns with opponents, including congressional leaders who have called the rule change “unconstitutional”. Civil rights leaders also argued that this move could lead to an increase in domestic policing using technology designed for foreign collection<sup>25</sup>. Some have further established the theory that this new rule change - right before the Trump Administration began - was in part done to prevent any further encroachment on civil liberties<sup>26</sup>. Speaking about this subject, Susan Hennessey, of The Brookings Institute, mentioned that this could be “a source of comfort” for people in the future because it meant that it would be harder for future administrations to change the rules later<sup>27</sup>.

Other potential areas of reform include reforming the Electronic Communications Privacy Act of 1986 (ECPA). This act allows for the data collection and storage of anything deemed electronically communicated and is severely outdated and does not take into account the current standards of technology and communication. Currently, the ECPA does not provide a uniform level of usage, with different levels of interpretation of the law allowing for different law enforcement agencies to collect electronic communication such as emails different ways<sup>28</sup>. There have been several calls for restructuring the Electronic Communications Privacy Act to meet today’s usage of technology communications. Notably, the Cato Institute, BSA | The

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<sup>25</sup> Dustin Volz, "Lawmakers say NSA plan to expand sharing data 'unconstitutional'" Reuters, March 23, 2016, , accessed April 24, 2017, <http://www.reuters.com/article/us-usa-congress-nsa-idUSKCN0WP28K>.

<sup>26</sup> Kaveh Waddell, "Why Is Obama Expanding Surveillance Powers Right Before He Leaves Office?," The Atlantic, January 13, 2017, , accessed April 24, 2017, <https://www.theatlantic.com/technology/archive/2017/01/obama-expanding-nsa-powers/513041/>.

<sup>27</sup> Susan Hennessey, "I know this will be spun as a bad news civil liberties story. But—details squabbles aside—this should actually be a huge source of comfort. <https://t.co/4U8MRwKQxY>," Twitter, January 12, 2017, , accessed April 24, 2017, [https://twitter.com/Susan\\_Hennessey/status/819588528472551424](https://twitter.com/Susan_Hennessey/status/819588528472551424).

<sup>28</sup> "Cato Handbook for Policymakers: Reforming Surveillance Authorities," Cato Institute, February 16, 2017, , accessed April 24, 2017, <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/reforming-surveillance>.

Software Institute, and the Electronic Frontier Foundation have all called for reform(29)<sup>29,30</sup>.

There have been several bills proposed to reform the Electronic Communications as it stands, but very little have made much headway. In early January of 2017, the Email Privacy Act was reintroduced to the 115th Congress with the goal of amending the ECPA, but it is not expected to make much headway<sup>31</sup>.

### **Feasibility of Future Policy Reform**

Politically, Section 702 and EO 12333 are not likely to be amended further or removed from public policy usage in the coming year. There has been backlash against changing Section 702 on both sides of the political aisle with senators defending the NSA's usage of Section 702 and 703 publicly in 2013<sup>32</sup>. A well-known think tank, The Hoover Institution, recently published a paper calling for Congress to ignore calls for reform of Section 702, because it has an "unprecedented system of checks and balances" to prevent abuse<sup>33</sup>. Others have issued demands for Congress to reform Section 702 to protect the privacy of American citizens and to stop any widespread abuse of the surveillance program. The Electronic Frontier Foundation, a nonprofit dedicated to protecting civil rights on the internet, called for Congress to let Section 702 expire in 2017 if there are no reforms made to it. Others, such as Human Rights Watch, Freedom of the

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<sup>29</sup> Victoria Espinel, "The Web Is Worldwide -- Shouldn't Privacy Protections Be Global as Well?," The Huffington Post, September 16, 2015, , accessed April 24, 2017, [http://www.huffingtonpost.com/victoria-espinel/the-web-is-worldwide--sho\\_b\\_8147638.html](http://www.huffingtonpost.com/victoria-espinel/the-web-is-worldwide--sho_b_8147638.html).

<sup>30</sup> Rainey Reitman, "Deep Dive: Updating the Electronic Communications Privacy Act," Electronic Frontier Foundation, December 06, 2012, , accessed April 24, 2017, <https://www.eff.org/deeplinks/2012/12/deep-dive-updating-electronic-communications-privacy-act>.

<sup>31</sup> Caroline Lynch, "ECPA Reform 2.0: Previewing the Debate in the 115th Congress," Lawfare, January 30, 2017, , accessed April 24, 2017, <https://www.lawfareblog.com/ecpa-reform-20-previewing-debate-115th-congress>.

<sup>32</sup> Ed O'Keefe, "Transcript: Dianne Feinstein, Saxby Chambliss explain, defend NSA phone records program," The Washington Post, June 06, 2013, , accessed April 24, 2017, [https://www.washingtonpost.com/news/post-politics/wp/2013/06/06/transcript-dianne-feinstein-saxby-chambliss-explain-defend-nsa-phone-records-program/?utm\\_term=.b1a517cdfbe1](https://www.washingtonpost.com/news/post-politics/wp/2013/06/06/transcript-dianne-feinstein-saxby-chambliss-explain-defend-nsa-phone-records-program/?utm_term=.b1a517cdfbe1).

<sup>33</sup> John C Ingles and Jeff Kosseff, "In Defense of FAA Section 702," Hoover Institution, April 26, 2016, , accessed April 24, 2017, <http://www.hoover.org/research/defense-faa-section-702>.



Press Foundation, and the Government Accountability Project, have all signed on to the EFF's call to Congress<sup>34</sup>. Known national security policy- analysis blog *Just Security* also called on Congress to reform Section 702 before reauthorizing it in the fall of 2017<sup>35</sup>.

While reforming Sections 702 and Executive Order 12333 do not seem to be on the table for this session of congress, municipalities and local governments have taken their own steps to limit the expanse of domestic surveillance on U.S persons<sup>36</sup>. The Providence Community Safety Act of Providence, Rhode Island, has been hailed as a “monumental legal shift” in how domestic surveillance can be done by law enforcement<sup>37</sup>. This new reformation provides a template for other local communities and states to enact their own surveillance reforms instead of waiting on national reforms to be enacted into federal law.

It's seems that for now at least, any reformation of public policies to prevent any incidental (or not so incidental) mass surveillance collection of data from U.S citizens will come from the local governments instead. The current political feasibility of Section 702 or Section 703 reform seems very slim as it is not a priority as much as reauthorization is. Any further changes to Executive Order 12333 by the current administration do not seem to be a priority, but as it is only the first year of the new term, only time will tell. Domestic Mass Surveillance Policy is severely needed, but local options are the most realistic option for policy reform for the current Congressional Session and Presidential Administration.

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<sup>34</sup> Shahid Buttar, "A Coalition Says to Congress: End 702 or Enact Reforms," Electronic Frontier Foundation, June 06, 2016, , accessed April 24, 2017, <https://www.eff.org/deeplinks/2016/06/end-702>.

<sup>35</sup> Zoë Chapman et al., "Drawing a Line on Mass Surveillance: How Congress Must Reform Section 702," *Just Security*, March 23, 2017, , accessed April 24, 2017, <https://www.justsecurity.org/39142/drawing-line-mass-surveillance-congress-reform-section-702/>.

<sup>36</sup> "Full Text of the CSA – Updated March 2017," Providence Community Safety Act, March 29, 2017, , accessed April 24, 2017, <https://providencecommunitysafetyact.wordpress.com/full-text-of-the-csa/>.

<sup>37</sup> Shahid Buttar, "A Municipal Vote in Providence for Police Reform Carries National Implications," Electronic Frontier Foundation, April 21, 2017, , accessed April 24, 2017, <https://www.eff.org/deeplinks/2017/04/municipal-vote-carries-national-implications>.

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