

Congress prepares renewal of Section 702 warrantless surveillance by US intelligence

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On February 14, the House of Representatives scrapped plans to vote on a bill to reauthorize warrantless electronic surveillance that has been used by US law enforcement agencies to violate Fourth Amendment rights against unreasonable searches and seizures since 2008.

After a meeting of the bipartisan House Rules Committee revealed disagreements over amendments to the bill renewing Section 702 of the Foreign Intelligence Surveillance Act (FISA), the measure was pulled back and reauthorization delayed. The rules in Section 702 must be periodically renewed by Congress and are currently set to expire on April 19, 2024.

In a statement posted on Twitter/X, the deputy chief of staff for communications for House Speaker Mike Johnson, Raj Shah, wrote that Congress needed more time to “reach consensus on how best to reform FISA and Section 702 while maintaining the integrity of our critical national security programs,” and the House “would consider the reform and reauthorization bill at a later date.”

According to the language of Section 702 of the FISA law, digital communications, including phone calls, email and text messages, of foreigners living outside the US can be collected and searched for national security reasons without a warrant. The law states that intelligence and law enforcement agencies are not permitted to use the Section 702 authority to target digital communications of American citizens.

However, any time a US citizen interacts with a foreign surveillance target, their communications are collected up in the electronic dragnet and this is known by the intelligence agencies as “incidental” collection. In other words, US intelligence agencies are permitted to gather the electronic communications of whomever they choose without a warrant.

Meanwhile, numerous audits conducted by the government itself of Section 702 data queries have shown that the FBI, in particular, has repeatedly violated Fourth Amendment rights and searched through the information of US citizens.

For example, a decision made by the Foreign Intelligence Surveillance Court (FISC) and released by the Office of the Director of National Intelligence on May 19 showed that the FBI had improperly searched the foreign intelligence communications database more than 278,000 times between 2016 and 2020.

The ruling found that illegal FBI searches of the database were used in the criminal investigations into the fascist assault on the US Capitol on January 6, 2021, and to look into participants in the nationwide protests following the police murder of George Floyd on May 25, 2020.

The FISA court ruled that the searches violated the Section 702 rules because there was “no reasonable basis to expect they would return foreign intelligence or evidence of crime,” while the FBI argued that it was “reasonably likely.”

The release of details of the ruling by FISC—a secret court whose judges are appointed by the Chief Justice of the US Supreme Court without confirmation or oversight by the US Congress—of the blatant violations by the FBI was carefully timed to coincide with the Biden administration’s campaign to obtain Congressional renewal of Section 702 warrantless surveillance before its original expiration at the end of 2023.

Preoccupied with the war in Ukraine and Israel’s ethnic cleansing in Gaza, the Biden administration secured an extension of the rules until April as part of its \$886 billion National Defense Authorization Act, which the President signed on December 23.

The differences in Congress about renewing Section 702 are over changes that will make it look more like the FBI and other intelligence agencies are only spying on Americans if a probable cause warrant is obtained from the FISA court before doing so. There are no differences over the necessity of keeping the Section 702 data-gathering authority in place.

For its part, the White House has made it clear that it is firmly opposed to Fourth Amendment rights articulated in the US Constitution. When asked by a reporter on February 14 if President Biden would veto a bill that required the US government to obtain a warrant to conduct FISA surveillance, National Security Advisor Jake Sullivan said, “We do not believe that that serves the national security interests of the United States. A warrant requirement from our perspective would go too far in undermining the very purpose of FISA, and, frankly, it would put victims at risk.”

Currently, there are three different bills proposed in the House, one from the Judiciary Committee, one from the Intelligence Committee and one from the far-right Freedom Caucus of the Republican Party. Both Democrats and Republicans are jockeying for media attention as they absurdly claim to call for a warrant amendment to the Section 702 bill while also stating how important warrantless surveillance is for national security.

As for the members of the Freedom Caucus—who essentially represent the politics of Donald Trump in the House of Representatives—it is a measure of the rot within the American political system that the fascist 2024 Republican candidate for president and his mouthpieces are posturing as opponents of illegal surveillance of the American public. They are only able to do this because the Biden administration is so openly supporting illegal surveillance and directly attacking democratic rights.

Freedom Caucus member Representative Andy Biggs, an Arizona Republican, claimed to oppose the standard argument from police agencies that imposing a warrant requirement would disrupt and delay critical intelligence work and would cost lives. Biggs said, “The narrative from some on the other side is if you have warrants, if you require a warrant for a query, you will kill law enforcement and you will be responsible for dastardly deeds.” However, the Judiciary

Committee bill that Biggs worked on includes numerous exceptions to the warrant requirement.

Responding to the fakery going on in the House, Elizabeth Goitein, senior director of the Brennan Center for Justice’s Liberty and National Security Program, said the House bill’s purpose is to look like reform “without actually changing anything.” She said the so-called reform legislation was a “trick” meant for members not closely familiar with Section 702.

Goitein went on, “You have to know a fair amount about how Section 702 works to realize how little this bill actually does. And the Intelligence Committee leaders are counting on, or they are betting on, other members not knowing enough about Section 702 to see through this ruse.”



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