

# Evaluation of the Competing House Bills on FISA Reform: The Good, the Bad, and the Ugly

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## KEY TAKEAWAYS

The Judiciary Committee bill (H.R. 6570) to reform FISA goes too far by giving extraordinary protections to foreign nationals in the U.S.

The House Intelligence bill (H.R. 6611) to reform FISA does not go far enough in preventing the FBI's abuses of Americans' civil liberties.

H.R. 6570 and H.R. 6611 both have some good provisions. The Judiciary and Intelligence Committees must fix the problematic ones.

The U.S. House of Representatives is currently considering two bills to reform the Foreign Intelligence Surveillance Act (FISA)<sup>1</sup> and reauthorize FISA Section 702,<sup>2</sup> a critical national security tool set to expire in April 2024. The first bill, H.R. 6570, approved by the House Judiciary Committee, is known as the Protect Liberty and End Warrantless Surveillance Act.<sup>3</sup> The second bill, H.R. 6611, approved by the House Permanent Select Committee on Intelligence, is known as the FISA Reform and Reauthorization Act.<sup>4</sup>

Both bills have serious problems. While each includes some good reforms, each is flawed in important respects and must be fixed.

The Judiciary Committee bill extends extraordinary protections to foreign nationals in the U.S. and who may present a serious threat to national security,

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including agents of Iran and the Chinese Communist Party (CCP) who have entered the U.S. due to the Biden Administration's disastrous open borders.

The House Intelligence bill fails to prevent the FBI's abuses of Americans' civil liberties.

## FBI Abuses and the Need to Reform Section 702

As detailed in the July 2023 Heritage Foundation *Backgrounders* "How to Fix the FBI,"<sup>5</sup> the FBI has come to pose a clear threat to the liberties of Americans. Since 9/11, the FBI has increasingly directed its broad intelligence-gathering powers at political movements that threaten the Washington establishment, such as Donald Trump's presidential campaigns, and at the exercise of free speech (usually speech that dissents from the government's preferred policy positions), religious liberties, and other constitutionally protected rights by ordinary Americans.<sup>6</sup> The record is chilling and demands fundamental reforms, if not a complete rebuilding, to rein in an out-of-control agency and secure Americans' most basic freedoms.

Among the most worrisome of the FBI's abuses has been its abuse of the powerful FISA surveillance authorities.<sup>7</sup> With regard to FISA's Section 702, specifically, the FBI has repeatedly abused its access to the sensitive data collected under that program. While 702 surveillance targets foreign nationals *located outside* the U.S., it may capture communications involving persons in the U.S., and, as the FISA court reported last year, the FBI has improperly dipped into (or "queried") the 702 database more than *278,000 times* to gather information on Americans for purposes having no true connection to national security threats, even though national security is often the pretext. The subjects of these improper FBI searches have included January 6 rioters, Black Lives Matters protesters, visitors to FBI headquarters, and even donors to congressional campaigns.<sup>8</sup>

In response to these shocking abuses, "How to Fix the FBI" recommended that Congress insulate the FBI from the 702 program entirely, so that the FBI would no longer participate directly in section 702 surveillance and would be prohibited from accessing the 702 database on its own authority.<sup>9</sup> The *Backgrounders* also recommended other specific reforms to improve the FISA process and prevent further abuses of FISA like those seen in the 2016 "Crossfire Hurricane" investigation.<sup>10</sup> And, it urged Congress to include these reforms as a necessary part of any legislation reauthorizing Section 702.<sup>11</sup>

While acknowledging Section 702's importance as a national security tool, "How to Fix the FBI" concluded that, because of its foreign-threat

focus, the 702 collection need not be directed by FBI investigators, whose primary mission is domestic law enforcement. The program can be operated effectively by other components of the U.S. intelligence community—specifically, the National Security Agency (NSA).<sup>12</sup>

Section 702 enables nimble and broadscale surveillance of foreign nationals who are reasonably believed to be located outside the United States.<sup>13</sup> By its terms, section 702 does not allow any surveillance of American citizens or lawful permanent residents of the U.S. (collectively referred to in the intelligence laws as “U.S. persons”) or even of foreigners known to be in the U.S.<sup>14</sup> The surveillance is high quality because it occurs on electronic communications facilities in the U.S. and takes advantage of the fact that a large portion of international communications passes through the United States.

In contrast to 702, traditional FISA authority, which is used directly by the FBI and can target any person in the U.S. for foreign intelligence surveillance, requires the government to obtain an individualized court order from an Article III federal judge supported by probable cause to believe that the person in question is an agent of a foreign power or a terrorist,<sup>15</sup> with each court order typically involving a detailed application to establish the necessary showing of probable cause.

Because Section 702 does not involve individualized court approvals, it allows surveillance of a much wider array of foreign targets than traditional FISA. Thus, in 2022, the 702 program was used to monitor 246,073 foreign targets, while the government obtained only 337 court orders for traditional FISA surveillance.<sup>16</sup>

“How to Fix the FBI” stressed that in removing the FBI from direct involvement in 702, Congress must be sure to avoid erecting a new wall of separation between foreign-intelligence collection and law enforcement. Intelligence agencies must remain able to pass information gathered using 702 to the FBI in detailed intelligence reports that allow immediate understanding of the national security significance of the information and enable prompt, effective law enforcement action. The FBI’s follow-up may involve a further investigation of the identified threats using traditional law enforcement measures or traditional FISA authorities with individualized approvals from the courts.<sup>17</sup>

At the same time, the *Backgrounders* recognized the continuing value of the 702 program and the need to reauthorize it:

We take it as a given that Section 702 remains a critical tool for protecting our nation from the greatest external threats we face today, such as the malign

encroachments of Communist China and the insidious transborder activities of the Latin cartels. The 702 program accounts for well over half of the most important foreign intelligence relied upon by senior U.S. policymakers, and we accept that future Presidents will continue to require the real-time threat-assessment capabilities enabled by 702. As Congress considers the important question of reauthorizing 702 this year, it must insist, at a minimum, on the FISA reforms urged above, including insulating the FBI from 702, as a condition of reauthorization.<sup>18</sup>

The importance of Section 702 has only become amplified by America's ongoing open-border disaster and the rise in threatening conflicts and tensions around the globe. There is no doubt that national security concerns are heightened for the U.S.

Because of the Biden Administration's reckless open-border immigration policies, the U.S. government has no idea how many Iranian Revolutionary Guard Corps (IRGC) operatives, Hamas-inspired jihadist terrorists, or malign agents of the CCP are operating within the country today. With the wars raging in the Middle East and Eastern Europe, and with China possibly plotting the invasion of Taiwan, U.S. intelligence agencies, more than ever, need to retain the capabilities that Section 702 provides for identifying and tracking these foreign-controlled bad actors, wherever they may be, and for understanding the threats they present to Americans and America's interests, both domestically and internationally.

The 702 program enables the government to collect international communications to or from selected foreign targets of interest. For many of these intercepts, both ends of the communication will be overseas. But the 702 surveillance also encompasses instances when the foreign target is communicating with a person who happens to be in the U.S., and in some cases, those communications will be among the most important to capture. They can reveal the existence and activities of previously unknown persons within the U.S. who are acting as the agents of a malign foreign entity, like the IRGC or the CCP. Sometimes those persons are foreign nationals who have found their way into the U.S., whether on a visa or by crossing the U.S. border illegally. And sometimes they include "U.S. persons."

Every federal court of appeals to rule on the issue has held that the 702 surveillance program fully complies with the Fourth Amendment of the U.S. Constitution.<sup>19</sup> These courts have concluded that because the program is targeted at foreigners who are reasonably believed to be outside the U.S., no warrant is required to conduct the surveillance. And, because the surveillance is conducted for foreign intelligence purposes and the information

incidentally collected about U.S. persons is protected with “minimization” procedures (restrictions on collection, retention, and distribution, which include, among other things, masking the U.S. person’s information unless the information is necessary to understand the foreign intelligence significance of a particular intercept), the program satisfies the general reasonableness requirements of the Fourth Amendment.

Furthermore, since the data obtained under 702 has been lawfully collected in the first place, courts have held that the Constitution imposes no warrant requirement on the subsequent use of the data. In other words, no warrant is constitutionally required for government agencies, including law enforcement agencies, to query the 702 database for U.S. person information and to make use of the fruits of those queries for lawful and authorized purposes in accordance with 702’s approved minimization procedures.<sup>20</sup>

However, when Congress acts by statute to establish or reauthorize a special program of surveillance, such as Section 702, Congress is not limited to the requirements of the Fourth Amendment and may choose to put additional protections and restrictions on the program, particularly with regard to the collection or use of U.S. person information. That is where the current proposed legislation comes in.

## Good Provisions in Both Bills

Both House bills include helpful reforms to FISA that are consistent with recommendations in the July 2023 “How to Fix the FBI.”

The House Judiciary bill includes provisions that would:

- Place strict limits on the number of FBI employees who are authorized to access the 702 collection (Section 2(a) of H.R. 6570), though, as noted, Heritage recommends going further and insulating the FBI completely from the 702 program;
- Require greater accountability for FBI abuses and beefed-up compliance for all intelligence agencies (Sections 16 and 17);
- Reform and improve the process for FISA applications, including through more robust amicus participation, oversight, and transparency (Sections 5–10);
- Require reviews and reports on FBI abuses (Section 11); and

- Provide tougher enforcement and penalty provisions for violations (Sections 13–15).

The House Intelligence bill also includes some good reforms along these lines. It would:

- Place special approval and disclosure requirements and other limitations on FBI queries under 702 (Sections 102–105 of H.R. 6611), though, here again, the better approach would be to prohibit all such queries;
- Restrict the FBI’s use of unminimized information about U.S. persons collected under Section 702 and prohibit queries for improper purposes (Sections 108 and 110);
- Impose accountability standards and mandatory audits on the FBI (Sections 107 and 109);
- Improve the standards and process used for traditional FISA applications (Title II);
- Increase scrutiny of FISA applications, including through greater amicus participation (Title III);
- Establish enhanced penalties for FISA violations (Title IV);
- Add international production, distribution, and financing of dangerous narcotics, such as fentanyl, to the definition of foreign intelligence (Section 501);
- Improve reporting requirements (Sections 502 and 503);
- Improve vetting of non-U.S. persons attempting to enter the U.S. (Section 505); and
- Enhance accountability for FBI leadership, improve compliance systems, and require an Inspector General report on querying practices (Sections 506–508).

## Problematic Provisions in Both Bills

On the other side of the ledger, each bill includes provisions that raise serious concerns and that should be the focus of further debate and revision.

**Provisions of Concern in the House Judiciary Bill.** The core provisions of the House Judiciary bill restricting the ability to query and use the 702 database are much broader than the Section 702 reforms recommended in “How to Fix the FBI.” They would encompass all agencies of the federal government, not just the FBI, and would restrict queries that focus on any person in the U.S., not just on “U.S. persons.”

- The House Judiciary bill includes provisions that would severely limit the value of 702 for monitoring the activities of malign foreign nationals who are in the U.S. (Sections 2(b) and 3). These provisions would put restrictions on any query of the 702 database conducted by any “officer or employee of the United States” that focuses on a U.S. person or on any “person reasonably believed to be located in the United States.”
- Absent emergency circumstances or consent, all such queries would require an individualized FISA order issued by the FISA court or a traditional criminal-law search warrant from a court (Section 2(b)).
- Otherwise, the information learned from such queries could not be used by the U.S. government in any subsequent proceeding or investigation (Section 3).

These provisions would likely prevent U.S. intelligence agencies from using the lawfully collected 702 database to discover critical information about the activities and threats posed by suspicious foreign nationals who are currently in the U.S. Such restrictions could have the effect of blinding the U.S. by taking away a prime protective monitoring tool, particularly in the current threat environment. “How to Fix the FBI” stressed the importance of ensuring that future Presidents continue to have the ability to identify these threats and stop them from harming the nation.

The restrictions on 702 queries proposed in the House Judiciary bill could be narrowed in two important respects to address these concerns—in one respect relating to the scope of the agencies covered by the restrictions and in another respect relating to the application of the restriction to non-U.S. persons who are in the U.S. (foreign nationals who are here either legally on a visa or illegally):



First, the phrase “officer or employee of the United States” could be changed to “employee or agent of the Federal Bureau of Investigation” (or potentially “of the Department of Justice”). That change would continue to allow other intelligence agencies, like the NSA and the Central Intelligence Agency, to query the 702 database as needed for national security purposes, and it would promote the goal of restricting the FBI’s involvement in 702 and protecting the rights of U.S. persons from FBI abuses.

Second, the phrase “person reasonably believed to be located in the United States” could be deleted from the bill altogether wherever it appears. This change reflects the view that it is appropriate to limit queries by the FBI that focus on U.S. persons, but that it would not be consistent with U.S. national security interests to create a new blanket protection for all foreigners who have come into the U.S., even potential terrorists and CCP agents who crossed the border in the uncontrolled stream of got-aways and unvetted asylum seekers that the Biden Administration has encouraged.

Separately, the House Judiciary bill also includes provisions that would fundamentally restrict U.S. intelligence gathering in ways that could have the unintended consequence of seriously undermining America’s national security. These are:

- Section 4 of H.R. 6570, which would prohibit collection under 702 of communications “about” the foreign targets (for example, communications that reference the target, even if not addressed to or from the target)—a type of collection that was conducted in the past by the NSA as part of the 702 program. The NSA suspended this “abouts” collection in 2017 because of technical difficulties in making sure that it was limited to international communications and attendant imprecision in the collection. Under current law, it may only be reinitiated with the approval of the FISA court and after notifying Congress.<sup>21</sup> Given the current restrictions on “abouts” collection, it is unclear why an absolute prohibition is necessary. If, in the future, the technical issues could be resolved (such that “abouts” collection could be done with high confidence that no purely domestic communications would be captured), this type of collection could potentially have significant national security value. In theory, it could be an effective means (perhaps the most effective way) to discover the existence of persons and activities within the U.S. that are connected to a foreign target that pose an immediate threat to America’s interests;



- Sections 18, 19, and 20, which would prohibit U.S. intelligence agencies from acquiring from data brokers and other intermediaries batches of data relating to U.S. persons or to any persons, including foreigners, who are located in the U.S.—a restriction on the ability to track foreign threats that would uniquely disadvantage the U.S. vis-à-vis China and other unfriendly foreign governments, which are unrestricted in their ability to acquire the very same datasets;
- Section 21, which would severely constrict the President’s ability to undertake surveillance under Executive Order 12333 that is conducted entirely on foreign communications facilities in foreign countries and that is focused on suspicious foreigners who are in the U.S.—a very significant restriction on one of the most traditional and important forms of U.S. signals intelligence; and
- Section 22, which would impose highly constrained limits on the civil immunity available for telecommunications and technology companies that provide the necessary assistance to the government for surveillance in circumstances where the law does not require an individualized court order or warrant.

**Provisions of Concern in the House Intelligence Bill.** The House Intelligence bill takes a different approach on the scope of queries and use of the 702 data:

- It would require an individualized FISA order or a warrant only for queries of the 702 database that are conducted for criminal law enforcement purposes (Section 101 of H.R. 6611). As “How to Fix the FBI” fleshes out, that alternative approach is much too narrow in scope, because it would still allow the FBI to conduct unrestricted queries of the database whenever the FBI can claim that the query is focused on U.S. persons for “national security” purposes, which could include pretextual claims about an unsubstantiated foreign connection or claims about “domestic terrorists.” Under this proposed approach, many of the worst abuses of Americans’ civil liberties in recent years from the FBI could continue. The solution is to prohibit the FBI from participating directly in the 702 collection and from querying the 702 database on its own authority.

- Another provision would prohibit political appointees from participating in the FBI's decisions to query the 702 database (Section 106). As noted, the better approach is to prohibit the FBI from querying the database on its own authority at all. But if the FBI is going to retain some authority to query the 702 data collection, Congress should not allow FBI career staff to make those decisions on their own. Senior-level approval must be required for any such queries involving U.S. person information, and those approvals should be made with political accountability that runs through the President's appointees.

Political accountability through the chain of command that leads to the President is how the Founders designed the Constitution: All potentially sensitive exercises of executive authority are supposed to be supervised and managed by the President and his appointed subordinates in order to maximize accountability to the people who elect the President and approve his agenda. Any approach that would make such sensitive decisions more "independent" and insulated from supervision by the President and his political appointees would only encourage out-of-control actions by rogue agencies like the FBI.

- Finally, the House Intelligence bill also would expand the definition of "electronic communications service provider" for purposes of Section 702 collection to include equipment providers (Section 504). This proposed expansion in scope has understandably raised red flags with civil liberties groups and other commentators.<sup>22</sup> It is not at all clear why such an expansion is needed and what may be the implications for civil liberties of such an expansion.

## Conclusion

The House Judiciary Committee bill and the House Intelligence Committee bill for reforming FISA and reauthorizing the Section 702 surveillance authority each include good reforms that merit approval, but each also includes problematic provisions that should be reconsidered and amended.

The House Judiciary bill goes too far by giving extraordinary protections to foreigners in the U.S. who may be here illegally and who may be acting against U.S. national security interests as agents of hostile foreign powers. It also includes other provisions that could unintentionally harm national security.

The House Intelligence bill, on the other hand, does not go nearly far enough to constrain the FBI's pattern of abusing FISA and querying the Section 702 collection for information about Americans with no true national security purpose. It also includes provisions that would likely exacerbate the rogue and unaccountable actions of the FBI and that would expand the coverage of section 702 in a manner that could prove unwise and unjustified.

As emphasized in "How to Fix the FBI," The Heritage Foundation stands ready to assist with the technical work needed to help Congress to achieve the right balance between civil liberties protections and national security in reauthorizing Section 702.

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## Endnotes

1. Codified in 50 U.S. Code, chapter 36, <https://www.law.cornell.edu/uscode/text/50/chapter-36> (accessed February 5, 2024).
2. 50 U.S. Code § 1881a, <https://www.law.cornell.edu/uscode/text/50/1881a> (accessed February 5, 2024).
3. H.R. 6570, 118th Congress, 1st Session, <https://www.congress.gov/118/bills/hr6570/BILLS-118hr6570rh.pdf> (accessed February 5, 2024).
4. H.R. 6611, 118th Congress, 1st Session, <https://www.congress.gov/118/bills/hr6611/BILLS-118hr6611ih.pdf> (accessed February 5, 2024).
5. Steven G. Bradbury, “How to Fix the FBI,” Heritage Foundation *Backgrounders* No. 3777, July 10, 2023, <https://www.heritage.org/the-constitution/report/how-fix-the-fbi>.
6. *Ibid.*, pp. 2–5.
7. *Ibid.*, pp. 2, 3, and 6.
8. *Ibid.*, p. 6.
9. *Ibid.*, pp. 15 and 16.
10. *Ibid.*, pp. 16 and 17. The FBI’s abuses of FISA in the Crossfire Hurricane investigation of supposed Russian involvement in the 2016 Trump presidential campaign are exposed in great detail in the Durham Report. See Special Counsel John H. Durham, “Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns,” May 12, 2023, <https://www.justice.gov/storage/durhamreport.pdf> (accessed February 5, 2024).
11. Bradbury, “How to Fix the FBI,” pp. 17 and 18, and Durham, “Report on Matters Related to Intelligence Activities,” pp. 2 and 20.
12. Bradbury, “How to Fix the FBI,” pp. 15 and 16.
13. *Ibid.*, p. 15, and 50 U.S. Code § 1881a.
14. Under FISA, any foreign intelligence surveillance targeted at an American citizen or lawful permanent resident of the U.S. requires an individualized court order, supported by probable cause and separately approved by the FISA court, no matter where in the world the U.S. person happens to be at the time of the surveillance. See 50 U.S. Code §§ 1881b–1881c.
15. See 50 U.S. Code §§ 1801, 1804–1805.
16. Office of the Director of National Intelligence, *Annual Statistical Transparency Report Regarding the Intelligence Community’s Use of National Security Surveillance Authorities, Calendar Year 2022*, April 2023, pp. 12 and 18, [https://www.intel.gov/assets/documents/702%20Documents/statistical-transparency-report/2023\\_ASTR\\_for\\_CY2022.pdf](https://www.intel.gov/assets/documents/702%20Documents/statistical-transparency-report/2023_ASTR_for_CY2022.pdf) (accessed February 6, 2024).
17. Bradbury, “How to Fix the FBI,” p. 16.
18. *Ibid.*, p. 18 (footnotes omitted).
19. See *United States v. Muhtorov*, 20 F.4th 558, 594 (10th Cir. 2021), cert. denied, 143 S. Ct. 246 (2022); *United States v. Hasbajrami*, 945 F.3d 641, 670 (2d Cir. 2019); and *United States v. Mohamud*, 843 F.3d 420, 424 (9th Cir. 2016).
20. Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, September 28, 2023, Annex B: Separate Statement of Board Members Beth A. Williams and Richard E. DiZinno, pp. B-8 and B-9, (citing cases), <https://documents.pclob.gov/prod/Documents/OversightReport/8ca320e5-01d3-4d6a-8106-3384aad6ff31/2023%20PCLOB%20702%20Report%20-%20Nov%2017%202023%20-%201446.pdf> (accessed February 6, 2024).
21. Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, pp. 30, 41, 42, and 61–65, and FISA Amendments Reauthorization Act of 2017, § 103(b).
22. See, for example, Marc Zwillinger and Steve Lane, *House Intelligence Committee FISA “Reform” Bill Would Greatly Expand the Class of Businesses and Other Entities Required to Assist in FISA 702 Surveillance*, ZwillGenBlog, updated December 12, 2023, <https://www.zwillgen.com/law-enforcement/fisa-reform-bill-702-surveillance/> (accessed February 5, 2024).