

# The Fight Over Renewing Section 702 of the Foreign Intelligence Surveillance Act

BY JOHN SAKELLARIADIS AND ROSMERY IZAGUIRRE | 09/29/2023 05:00:00 AM EDT

## PRO POINTS

- **Lawmakers on Capitol Hill have until the end of December to decide the fate of one of the U.S. intelligence community's most powerful surveillance tools: Section 702 of the Foreign Intelligence Surveillance Act.**
- **Set to expire at the end 2023, Section 702 allows the intelligence community to compel American tech companies like Google and Microsoft to collect the communications of specific foreigners located abroad. The Biden administration has argued that access to that data, which is stored in a government repository, is critical to combatting a wide range of national security threats, from drug trafficking to terrorism and cybercrime.**
- **A collection of lawmakers on the left and the right are threatening to let the law sunset if they aren't able to secure new privacy safeguards in any renewal of the power by Congress.**
- **Critics argue the program has become a "backdoor" for the U.S. intelligence community to spy on Americans. When U.S. citizens communicate with targeted foreigners, their data also gets sent into the 702 database, where the FBI, the National Security Agency, the CIA and the National Counterterrorism Center can access it.**
- **The White House is working hard to persuade Congress to keep the program largely as is, even as it has acknowledged the benefit of some new privacy guardrails.**

## HOW WE GOT HERE

Privacy and civil liberties-oriented Democrats have criticized the 702 program since it was passed into law under the FISA Amendments Act of 2008. The fact that agencies don't need a warrant to access and comb through the data is unacceptable, they say. But national security hawks in both parties have carried the day during the two prior reauthorization battles over the program, in 2013 and 2018. This year, the ground has shifted in favor of reform. One big reason: a number of Republican lawmakers are incensed by the government's handling of the

investigations into Donald Trump and the Trump campaign. That has led them to call for major overhauls at the Justice Department, the FBI and elements of the U.S. intelligence community, including the 702 program.

In recent years, the Foreign Intelligence Surveillance Court — a special federal court overseeing Section 702 — has also identified a large number of cases in which FBI personnel improperly searched through the database of communications collected under the program for information on Americans. For example, FBI personnel used 702 to look up information on Black Lives Matter protesters, rioters at the Jan. 6th Capitol attack and donors to a U.S. congressional campaign.

Pro-reform lawmakers are arguing that the intelligence community should be required to get a warrant -- or other forms of judicial approval -- before accessing Americans' data stored in the program.

The White House has known for months that those political realignments will make this year's reauthorization battle the toughest yet. In a sign of how concerned it is about renewing the program largely as is, the Biden administration has declassified more information than ever before about how the program is used, and why it is so valuable.

It confirmed for the first time that the 9/11-era spy program has helped combat modern threats such as fentanyl trafficking and foreign ransomware attacks. It has also trotted out representatives from various federal agencies to argue on its behalf.

## FBI FISA query compliance improved in 2022

Percent of FBI FISA queries that met compliance with query standards



Note: Query Audit 1 assessed query logs from April 1, 2020 to March 31, 2021 and used a sample of 2,159 queries. Query Audit 2 assessed query logs from July 1, 2021 to March 31, 2022 and used a sample of 538 queries.

Source: FBI Office of Internal Auditing  
Rosmery Izaguirre/POLITICO

### WHAT'S NEXT

While the White House has embraced the idea of new privacy safeguards, it has warned lawmakers that some of their most ambitious proposals could significantly undercut the value of the program. A warrant requirement, the administration argued, would hinder its ability to track fast-moving foreign threats, like cybercrime, and to protect Americans targeted by foreign intelligence services.

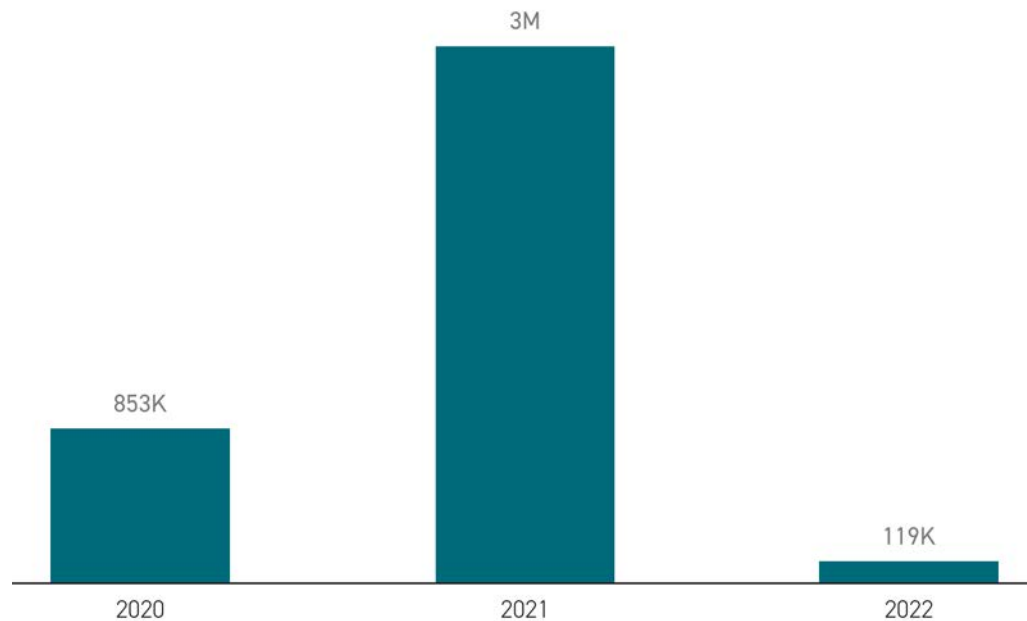
Backers of the warrant requirement argue that it would be one of the strongest ways to bolster the program's privacy protections. They also point to the recently disclosed instances of FBI violations as evidence that the bureau cannot be trusted to police itself.

The FBI has countered that minor reforms can address the problem privacy advocates have identified with warrantless data collection.

To back up their case, the FBI has pointed to a significant decline of overall U.S. persons queries following the implementation of new in-house protections in 2021, such as an opt-in requirement for analysts who want to access the 702 database. The White House has invited Congress to codify those internal reforms — setting a baseline for what to expect out of a looming reauthorization package.

## FBI FISA queries into Americans decreased 96 percent from 2021 to 2022

Number of times the FBI queried the 702 database for details on Americans



Note: Queries are tracked beginning in December of the previous year and ending in November.  
Source: Office of the Director of National Intelligence  
Rosmery Izaguirre/POLITICO

In addition to reforms to Section 702, Republicans have threatened to use the deadline for the program's expiration to ram through changes to a separate section of the law, known as traditional, or Title I, of FISA.

Title I of FISA involves court-ordered surveillance of U.S. citizens, as well as foreigners on domestic soil. And while it is not set to sunset this year, many conservatives blame it for the Justice Department's bungled investigation into Trump campaign adviser Carter Page.



## POWER PLAYERS

- **House Intelligence Committee:** HPSCI has been the most proactive Congressional committee on the issue since Chair Rep. Mike Turner (R-Ohio) and ranking member Rep. Jim Himes (D-Conn.) launched a bipartisan working group on 702 reform in March. Since then, the committee — which has vowed not to reauthorize 702 as is — has been working to educate other members about how the program works and what new safeguards it needs.
- **Sen. Dick Durbin (D-Ill.):** Durbin has said he will not reauthorize the 702 program without “addressing the warrantless surveillance of Americans.” As chair of the Senate Judiciary Committee, which shares jurisdiction over the program with the Intelligence Committee, he could be a major roadblock for the White House. But it’s unclear how far he’s willing to go in support of the warrant requirement, given that he’d be defying his own president.
- **The White House:** The White House has already declassified new intelligence on 702, committed to new reforms, and met frequently with Congress about how it can address their concerns. It could have other big cards to play before the New Year’s reauthorization deadline.