

Section-by-Section: FISA Reform and Reauthorization Act of 2023

Section 702 of the Foreign Intelligence Surveillance Act, which is scheduled to expire on April 19 unless renewed, is a warrantless surveillance authority that is supposed to be targeted at non-Americans located abroad. But this collection “[inevitably](#)” captures Americans’ communications, too. Intelligence agencies have turned Section 702 into a domestic spying tool, using it to perform [hundreds of thousands](#) of warrantless “backdoor” searches for Americans’ private phone calls, e-mails, and text messages every year. These searches have included shocking abuses, including baseless searches for the communications of [racial justice protesters](#), [members of Congress](#), and [political donors](#). Lawmakers from both parties have thus vowed not to reauthorize the law without “[significant reforms](#).”

Below is a section-by-section analysis of the [FISA Reform and Reauthorization Act, S. 3351](#). The section titles are taken verbatim from the bill text; commentary on the sections is included in italics. As this document demonstrates, **the FISA Reform and Reauthorization Act fails to enact the reforms necessary to curtail abuses of Section 702.**

- **Sec. 1. Short title; table of contents.**

Title I — Reform and Reauthorization of Title VII of FISA

This title purports to reform FISA Title VII, which includes Section 702. However, as discussed more fully below, these so-called “reforms” would do almost nothing to rein in abuses of Section 702 and would actually expand warrantless surveillance in certain respects.

- **Sec. 101. Extension of title VII of FISA.**
 - Extends FISA Title VII, including Section 702, until December 31, 2035.
 - *Section 702 has historically had no more than a six-year sunset because it is an extremely potent authority with tremendous potential to intrude on Americans’ civil liberties. That is why it is so important for Congress to regularly revisit it and determine whether new developments warrant changes.*
- **Sec. 102. Expanded protections for United States person queries.**
 - Prohibits the government from performing queries for the sole purpose of returning evidence of a crime, unless the person performing the search reasonably believes that the query could help prevent a threat to life or serious bodily harm or the query is needed to identify information that the government must produce in connection with litigation.
 - *The FBI almost never performs queries solely for the purpose of finding evidence of a crime; in the vast majority of cases, the FBI claims there is also a foreign intelligence purpose. In 2022, for example, the FBI performed more than [200,000](#) U.S. person queries, yet this prohibition would have stopped the FBI from accessing the results of those queries in just [two instances](#). This prohibition would have done nothing to prevent the searches for communications of [141 Black Lives Matter protesters](#), [members of Congress](#), [19,000 donors to a congressional campaign](#), [a local political](#)*

party, and tens of thousands of people involved in “civil unrest,” all of which were purportedly intended to find foreign intelligence.

- **Sec. 103. Federal Bureau of Investigation compliance requirements.**

- Requires the FBI’s querying procedures to include provisions prohibiting queries by untrained personnel; requiring queries of the FBI’s Section 702 database to be performed on an “opt-in” basis; requiring attorney approval for “batch” queries; requiring supervisory approval for sensitive queries, including queries of elected officials, political candidates, members of the media, and religious organizations; and requiring written justification for the facts justifying a U.S. person query.

- *This is a codification of existing FBI policies. Under these policies, FBI personnel still performed approximately 4,000 non-compliant U.S. person queries over a one-year period, including baseless searches for the private communications of a U.S. Senator, a state senator, and a state court judge who reported civil rights violations to the FBI.*

- Requires the FBI to develop accountability procedures for querying compliance incidents.

- *The FBI already has accountability procedures, which include escalating penalties for compliance incidents and heightened penalties for “intentional misconduct and reckless behavior.” While these policies might sound useful, the FBI also claims that there have been no “instances of intentional or reckless behavior . . . since 2018,” despite multiple documented and publicly disclosed abuses that were clearly reckless or intentional, such as an FBI employee who intentionally mislabeled searches for U.S.-based mosques and businesses; an FBI agent who did a batch query for 19,000 donors to a congressional campaign, when only eight of those donors were likely to have foreign ties; and an FBI task force officer who searched for family members who had argued with his mother.*

- *This provision also applies only to the FBI, despite known instances of abuse at the other agencies with access to raw Section 702 information, such as NSA analysts who searched for a potential tenant and another NSA analyst who searched for people the analyst had met on an online dating site.*

- **Sec. 104. Additional reporting regarding the FBI’s use of section 702 of FISA.**

- Requires the FBI to supplement annual reporting to the congressional intelligence and judiciary committees regarding U.S. person queries, and to make declassified versions of those reports available to the public.

- *While more reporting and transparency is always better, this provision largely codifies categories of information that are already included in the DNI’s Annual Statistical Transparency Report.*

- **Sec. 105. Increased oversight of activities involving Members of Congress.**
 - Requires the FBI to notify members of Congress when the FBI queries them.
 - *This provision gives special treatment to members of Congress, offering them a protection that is withheld from ordinary Americans.*
- **Sec. 106. Exception for consensual queries.**
 - Allows agencies to perform queries, including U.S. person queries, whenever the subject of the query or a third party authorized to consent on their behalf has provided consent.
 - *While a person should be able to consent to a search of their own communications, the government is likely to argue (based on legal positions it has taken in analogous contexts) that companies are “authorized to consent on behalf of” their customers. The third-party consent provision thus opens the door to phone and Internet companies waiving their customers’ privacy rights, which they should not be allowed to do.*
- **Sec. 107. Procedures to enable travel vetting of non-United States persons.**
 - Requires agencies with access to raw Section 702 information to develop procedures allowing them to vet non-U.S. persons traveling to the United States.
 - *This provision would permit entirely suspicionless searches of Section 702 data for all people seeking to travel to the United States, whether on student or work visas or as tourists and business travelers. This invasive measure is wholly unnecessary, given the [multiple vetting mechanisms](#) already in place to ensure that visitors to this country pose no threat to our national security. People should be able to vacation, study, or work in the United States without exposing their private emails and text messages to U.S. government scrutiny.*

Title II — Accuracy and Integrity of FISA Process

Title II contains measures designed to improve the workings of the Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Court of Review (FISCR). While many of these measures would improve the functioning and congressional oversight of those courts, none of them would solve the main problem with Section 702 — the government’s abusive backdoor searches — because, under this bill, the FISC would have no role to play in approving searches.

Additionally, the provisions in this title are in many cases weaker than analogous provisions included in the Government Surveillance Reform Act (GSRA) ([S. 3234](#)) and the Protect Liberty and End Warrantless Surveillance Act ([H.R. 6570](#)).

- **Sec. 201. Certifications regarding accuracy of FISA applications.**
 - Requires federal agents applying for orders from the FISC to certify that they have disclosed to the attorney filing the application any information that could call into question the accuracy or reasonableness of the application.
 - Requires the Attorney General to establish review procedures to ensure that applications to the FISC concerning U.S. persons are complete and accurate.
 - *Both the GSRA and the Protect Liberty Act include a stronger version of this section that requires the Attorney General to establish accuracy procedures and requires agents applying for orders from the FISC to disclose any exculpatory information to the FISC itself, not just to DOJ attorneys representing them before the FISC.*

- **Sec. 202. Submission of court transcripts to Congress.**
 - Requires transcripts of proceedings before the FISC to be provided to the judiciary and intelligence committees within 45 days of the proceeding.
 - *The Protect Liberty Act includes a similar provision that also would allow the chairs and ranking members of the congressional intelligence and judiciary committees to attend all FISC and FISCR proceedings.*

- **Sec. 203. Enhanced authorities for amicus curiae.**
 - Requires to FISC to appoint *amicus curiae* in matters presenting novel or significant interpretations of law; where there are “exceptional concerns” about targeting a U.S. person’s First Amendment-protected activity; involving “sensitive investigative matters” such as investigations targeting politicians, members of the media, or religious organizations; targets a U.S. person and is a request for approval of “programmatic surveillance”; or targets a U.S. person and presents “novel or exceptional civil liberties issues.” In each circumstance, the FISC could waive the requirement if it issued a finding that the appointment of *amici* would be inappropriate.
 - Authorizes *amici* to seek the FISC’s permission to raise “novel or significant privacy or civil liberties issue[s],” even if the FISC has not requested assistance with that issue, and allows *amici* to petition the FISC and FISCR to certify questions of law for appellate review.
 - Provides that *amici* should have access to certain classified information if the FISC determines that such access “is necessary.”
 - *This section is a watered-down version of the [Lee-Leahy amendment](#), which passed the Senate [77–19](#) in 2020. There is no excuse for weakening basic accountability provisions that have such strong support. Congress should enact the full Lee-Leahy amendment, as incorporated into both the GSRA and the Protect Liberty Act.*

- **Sec. 204. Prohibition on use of politically derived information in applications for certain orders by the Foreign Intelligence Surveillance Court.**
 - Prohibits applications to the FISC based solely on uncorroborated information obtained as opposition research by a political organization or campaign.
 - *The Protect Liberty Act includes a substantially similar prohibition, and the GSRA requires federal agents applying for surveillance orders from the FISC to disclose any information that might reasonably call into question the accuracy or completeness of the factual basis for the order — a requirement that would force the government to disclose to the FISC if an application for surveillance was based, in whole or in part, on information acquired through a political campaign’s opposition research.*

- **Sec. 205. Investigations relating to Federal candidates and elected Federal officials.**
 - Requires Attorney General approval for surveillance of elected federal officials or candidates for federal office.
 - *This dangerous provision risks politicizing surveillance, as the Attorney General has far more incentive than career officials to suppress legitimate investigations of the Attorney General’s political allies.*

- **Sec. 206. Removal or suspension of Federal officers for misconduct before Foreign Intelligence Surveillance Court.**
 - Requires individuals who engage in “knowing” misconduct related to proceedings before the FISC or FISCR to be subject to “appropriate” adverse employment actions.
 - *The FBI already has the ability to penalize misconduct before the FISC or FISCR, but it almost never finds such penalties to be “appropriate.” The GSRA and Protect Liberty Act both include substantially more detailed provisions requiring agencies to establish accountability procedures for employees who engage in FISA-related misconduct (whether or not that misconduct occurs before the FISC or FISCR), including minimum penalties that must be imposed. Moreover, whereas the FISA Reform and Reauthorization Act contemplates penalties only for intentional misconduct, the GSRA and Protect Liberty Act provisions apply to intentional, reckless, or negligent misconduct. Finally, both the GSRA and the Protect Liberty Act require the intelligence agencies to submit a report to the congressional intelligence and judiciary committees detailing the implementation of the accountability procedures, including any discipline meted out pursuant to them.*

- **Sec. 207. Additional penalties for offenses relating to FISA.**
 - This provision creates harsher penalties for individuals abusing FISA for improper purposes or for leaking information obtained pursuant to FISA, allowing such individuals

to be imprisoned for up to ten years, and makes it a crime to leak applications submitted to the FISC.

- *This provision is unlikely to serve as a deterrent, given that DOJ has never brought any prosecutions under these criminal statutes and is even less likely to do so if the sentences are increased.*

- **Sec. 208. Contempts constituting crimes before the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review.**

- This provision makes it a crime to willfully commit contempt of the FISC or FISCR, if the action constituting contempt of court would separately be a crime under another provision of federal or state law.
 - *Because the underlying action must separately be criminal, this provision will do nothing to deter individuals or entities appearing before the FISC from committing contempt of court. Instead, this provision will simply allow federal prosecutors to stack charges against individuals or entities who do commit criminal contempt of the FISC or FISCR.*

- **Sec. 209. Effective and independent advice for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review.**

- This provision creates “independent legal advisors” who may be employed by the FISC and the FISCR to advise the judges of those courts on issues of law and fact.
 - *It is unclear what benefit this provision would give to the FISC and FISCR judges beyond that furnished by the amici and judicial law clerks who are already available to advise them.*

- **Sec. 210. Enhancements to congressional oversight.**

- This section clarifies that the congressional intelligence committees may, on request, receive any applications to the FISC or orders issued by the court.
 - *While it is important to ensure that Congress has access to the materials it needs to oversee the implementation of FISA, this provision does not require FISC-related materials to be shared with the congressional judiciary committees, which have primary jurisdiction over FISA.*

- **Sec. 211. Establishment of compliance officers.**

- This provision establishes compliance officers at each agency that has access to raw FISA information, who would be responsible for auditing their agency’s compliance with FISA and with orders issued by the FISC.

- *Each of the covered agencies already has intelligence oversight and civil liberties and privacy officers, as well as an inspector general; all of whom could — and frequently do — audit various aspects of their agency’s compliance with FISA.*
- **Sec. 212. FISA Reform Commission.**
 - Creates a “FISA Reform Commission” to review the implementation of FISA and propose recommended legislative changes to it, which must be submitted to congressional leadership and the judiciary and intelligence committees within seven years.
 - *This provision appears to be an attempt to delay meaningful congressional action to reform Section 702 and other provisions of FISA. There are multiple problems with FISA that are well known and extremely well documented. While a full accounting from a Commission could be useful in uncovering new problems and highlighting the need for additional reforms in the future, Congress should act now to pass reforms that will address the many known problems, rather than allowing them to fester for an additional 12 years. Moreover, the timing of the issuance of the Commission’s report — seven years from now, with another five years to go before Section 702 would sunset under this bill — would mean that the report would be issued at a time when it could be expected to have minimal impact.*