

Is the Constitution a Threat to National Security?



By Paul Engel

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- FISA Section 702 has been used repeatedly by the FBI to illegally spy on Americans.
- There are those who claim requiring a warrant to search the Section 702 database is unreasonable.
- Will the American people give up their rights for the promise of safety?

A policy statement released by the Executive Office of the administration's Office of Management and Budget, effectively made the very bold statement that the Constitution of the United States was a threat to national security. Does this not remind you of the saying from Benjamin Franklin?

"They who would give up an essential liberty for temporary security, deserve neither liberty or security."

Benjamin Franklin

Are the American people willing to give up their right to be free from unreasonable searches for the promise of national security?

On April 12, 2024, Jordain Carney posted on X what she claims is a [memo from the Biden Administration](#) regarding an amendment to HR 7888, a bill to reauthorize Section 702 of the Foreign Intelligence Surveillance Act (FISA). The title of the memo is "THE BIGGS AMENDMENT IS A THREAT TO NATIONAL SECURITY". I say

she “claims to” because she provided no link to the original document and I have not been able to find a copy of the document she posted anywhere else. I did, however, find a [policy statement from the administration’s Office of Management and Budget](#) that, while not as explicit in its claims as the memo Ms. Carney posted, essentially says the same thing.

Spying on Americans

There have been numerous examples of the Federal Bureau of Investigations misusing the data collected under FISA Section 702 and stored on its database. The FBI lied to the FISA court to authorize surveillance on a Presidential candidate and his staff, and then again to continue the surveillance after Donald Trump had been elected President. The FISA Court identified more than 278,000 times the FBI violated their own standards to use Section 702 to spy on Americans, including those suspects in the Jan. 6, 2021 breach of the capital, Black Lives Matters, and even political campaign donors. This has led to numerous calls to either eliminate Section 702 or modify it in order to protect the rights of the American people. During the debate of HR 7888, the [Reforming Intelligence and Securing America Act](#), an amendment was offered by Rep. Andy Biggs which stated:

An amendment numbered 1 printed in House Report 118-456 to prohibit warrantless searches of U.S. person communications in the FISA 702 database, with exceptions for imminent threats to life or bodily harm, consent searches, or known cybersecurity threat signatures

[H.Amdt.876 – 118th Congress \(2023-2024\)](#)

This led to the OMB policy statement of April 11, 2024, which included the statement:

For these same reasons, the Administration strongly opposes the amendment proposed by Rep. Biggs to H.R. 7888 that would

rebuild a wall around, and thus block our access to, already lawfully collected information in the possession of the U.S. Government.

[STATEMENT OF ADMINISTRATION POLICY H.R. 7888 –Reforming Intelligence and Securing America Act](#)

Interesting. The administration doesn't claim Mr. Biggs' amendment would create a new wall around the 702 database, but rebuild one that previously existed.

The Whitehouse Position on Section 702

The Whitehouse has expressed unqualified support for the renewal of FISA Section 702.

The Administration strongly supports H.R. 7888, a bipartisan bill to reauthorize an essential intelligence authority, Section 702 of the Foreign Intelligence Surveillance Act ("FISA"), and other FISA provisions before they would expire on April 19, 2024.

[STATEMENT OF ADMINISTRATION POLICY H.R. 7888 –Reforming Intelligence and Securing America Act](#)

If it has been shown that the FBI has been abusing their access to the Section 702 database, why does this administration want to retain such access?

Expiration of Section 702 authorities would deprive us of insight into precisely the threats Americans expect their government to identify and counter: terrorist threats to the Homeland, fentanyl supply chains bringing deadly drugs into American communities, hostile governments' recruitment of spies in our midst, PRC transnational repression, penetrations of our critical infrastructure, adversaries' attempts to illicitly acquire sensitive dual-use and military commodities and technology, ransomware attacks against major American companies and nonprofits, Russian war crimes, and many more.

[STATEMENT OF ADMINISTRATION POLICY H.R. 7888 –Reforming Intelligence and Securing America Act](#)

The Administration lists a number of threats they claim from which the American people expect to be protected. That's fine, but what about the abusive uses of this data?

To protect the American people, we need to maintain this vital collection authority while strengthening its protective guardrails with the most robust set of reforms ever included in legislation to reauthorize Section 702, and H.R. 7888 does that.

[STATEMENT OF ADMINISTRATION POLICY H.R. 7888 –Reforming Intelligence and Securing America Act](#)

I'm not sure if the protections in HR 7888 are the most robust ever put in place for a reauthorization of Section 702, but I do know they are, at best, as thin as tissue paper. For example, if someone in the FBI wishes to query the Section 702 database for data on an American citizen, the requirements would be:

Federal Bureau of Investigation personnel must obtain prior approval from a Federal Bureau of Investigation supervisor (or employee of equivalent or greater rank) or attorney who is authorized to access unminimized contents or noncontents obtained through acquisitions authorized under subsection (a) for any query of such unminimized contents or noncontents made using a United States person query term.

[HR 7888 – Reforming Intelligence and Securing America Act](#)

So FBI personnel merely needs the OK from a supervisor or higher to access this data. That's the "unminimized" data. No probable cause, no proof of relevancy to an ongoing and approved investigation. Just a request and approval from an FBI supervisor or an attorney with access to the unminimized (unredacted) data. Isn't this a case of the "fox guarding the

hen house"? Isn't this what so many people have been complaining about? But wait, there's more:

A United States person query to be conducted by the Federal Bureau of Investigation of unminimized contents or noncontents obtained through acquisitions authorized under subsection (a) using a United States person query term may be conducted without obtaining prior approval as specified in clause (i) only if the person conducting the United States person query has a reasonable belief that conducting the query could assist in mitigating or eliminating a threat to life or serious bodily harm."

[HR 7888 – Reforming Intelligence and Securing America Act](#)

So, as long as the FBI actor has a "reasonable" belief that someone could be killed or injured, even the tissue paper thin protections go out the window? Notice, there is no timeframe for the threat to life or serious bodily harm. The investigation could be looking into a possible attack months, even years in the future, but they do not require even the most minimal of review by a supervisor? This is, to the Biden Administration, sufficient safeguards to protect the American people's rights from the administration's abuses?

What About the Constitution?

It seems that those in the Biden Administration, not to mention many in the Republican Caucus in the House of Representatives, have forgotten they have sworn or affirmed to support the Constitution, which includes the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

[U.S. Constitution – Amendment IV](#)

Much of what has been collected in Section 702's database are

emails and other digital communications, the modern day equivalent of a person's papers and effects. While the U.S. Constitution has no legal authority in foreign nations, it most certainly does within the borders United States and when the United States is dealing with its citizens and residents. Since the Constitution of the United States is the supreme law of the land ([Article VI](#), Clause 2), that means for a search of the digital papers and effects of any American to be legal, there must be a reason. And to provide proof of that reasonableness, the government must acquire a warrant or show an exigent (urgent) circumstance exists. Which sounds an awful lot like what would be required by Mr. Biggs' amendment.

to prohibit warrantless searches of U.S. person communications in the FISA 702 database, with exceptions for imminent threats to life or bodily harm, consent searches, or known cybersecurity threat signatures.

[H.Amdt.876 – 118th Congress \(2023-2024\)](#)

However, it appears the Biden Administration, like many of its predecessors, doesn't like the idea of their illegal powers being challenged.

For these same reasons, the Administration strongly opposes the amendment proposed by Rep. Biggs to H.R. 7888 that would rebuild a wall around, and thus block our access to, already lawfully collected information in the possession of the U.S. Government. The amendment would prohibit U.S. officials from reviewing critical information that the Intelligence Community has already lawfully collected, with exceptions that are exceedingly narrow and unworkable in practice. Our intelligence, defense, and public safety communities are united: the extensive harms of this proposal simply cannot be mitigated. Therefore, the Administration strongly opposes the amendment.

[STATEMENT OF ADMINISTRATION POLICY H.R. 7888 –Reforming](#)

Intelligence and Securing America Act

Yes, the amendment would prohibit the unlawful review of what is, in some cases, lawfully collected data. It would require the Intelligence Community to follow the law, including the Constitution, that they swore or affirmed to follow. The restrictions are narrow for two very important reasons. First, so they would be pursuant to the Constitution of the United States. And second, to prevent the types of criminal abuses we have already seen those in the FBI are more than willing to commit. The administration seems concerned about the “extensive harms” the Biggs Amendment would have on their ability to illegally spy on the American people, while at the same time showing no concern of the extensive crimes they have committed against them.

THE BIGGS AMENDMENT IS A THREAT TO NATIONAL SECURITY Memo

I place limited confidence in the memo Ms. Carney posted, simply because there is no evidence that it is actually a Whitehouse memo. With that caveat, and giving Ms. Carney the benefit of the doubt, there are details in this memo that would be of great importance if it's real.

According to the memo Ms. Carney published, the FBI claims to have thwarted three (3) attacks based on data they found by searching the Section 702 database. Of course, they provide no details to verify their claims. While that makes sense from an operational security standpoint, with all of their illegal activity and proven targeting of political opponents, does anyone trust the FBI's claims anymore?

In this memo, the Biden Administration admits that their searches of the Section 702 database violate the Fourth Amendment.

The “warrant” exception allows a query if, beforehand, the executive branch has obtained a court order based on probable cause. But the executive branch almost never can meet that

standard at the earliest stages of an investigation when queries are most critical.

THE BIGGS AMENDMENT IS A THREAT TO NATIONAL SECURITY

The Biden Administration admits that it does not have the probable cause necessary to obtain a warrant when they search the database. That is not only the definition of an unreasonable search, but a deprivation of due process, thereby violating the Fifth Amendment as well. The Biden Administration has turned Section 702 into a “general warrant” like those used during the colonial period to investigate the person in search of a crime, and effectively neutering the Fourth Amendment.

Conclusion

The FBI has already committed crimes in their abuse of the Section 702 database. They have searched the database without a warrant, thus depriving their victims of their security against unreasonable searches. Although not as straightforward, I claim they also violated the Fourth Amendment when they seized copies of the digital versions of papers and effects of U.S. citizens and residents to store in such a database. (That is why I propose a Constitutional amendment to specifically expand the Fourth Amendment for the digital age by including digital documents, communications, and data about the person.) Yet to date, I am not aware of a single FBI employee who has been charged with the crimes that have been committed. Even those who lied under oath when they knowingly provided false data in their affidavits to obtain therefore invalid warrants to spy on the President of the United States and members of his campaign and cabinet have not been charged. And yet the sitting President wants us to trust that FBI supervisors and attorneys with access to the database will follow the law this time?

And here we have the Biden Administration, telling us we need

to give up our essential liberty, our rights to due process, and to be secure against unreasonable searches and seizures, all with the promise of protecting our national security. Are you willing to give up your essential liberties for what has shown to be the false promise of temporary safety?

It seems to me there is a much greater threat to national security than the FBI losing its unrestricted and illegal access to their precious Section 702 database: That would be allowing them to continue to criminally spy on the American people.

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