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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Bill No:** AJR 8                      **Hearing Date:** April 2, 2024  
**Author:** Essayli  
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**Urgency:** No                              **Fiscal:** No  
**Consultant:** JD

**Subject:** *The Foreign Intelligence Surveillance Act*

### HISTORY

**Source:** Author

**Prior Legislation:** SB 178 (Leno, Ch. 651, Stats. of 2015)  
AJR 27 (Donnelly 2013)  
SR 16 (Lieu 2023)

**Support:** Council on American-Islamic Relations, California; Oakland Privacy; Secure Justice

**Opposition:** None known

### PURPOSE

*The purpose of this resolution is to call upon Congress to not reauthorize Section 702 of the Foreign Intelligence Surveillance Act without significant reform, reform that includes requiring agencies to obtain a warrant before searching Americans' communications.*

*Existing law* provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (U.S. Const., 4th Amend. See also Cal. Const. Art. I, Section 13 (nearly identical to 4th Amendment).)

*Existing law* holds that the U.S. Constitution implies a right to privacy in various aspects of one’s personal life. (See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479; *Lawrence v. Texas* (2003) 539 U.S. 558.)

*Existing law* provides, in the California Constitution, “All people . . . have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy.” (Cal. Const. Art. I, Section 1.)

*Existing law* authorizes the targeted collection of foreign intelligence information from non-U.S. persons located abroad. (50 U.S.C. § 1801 et seq. [FISA].)

*Existing law* requires the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power and that each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power. (50 U.S.C. §§1805(a)(2)(A), (a)(2)(B).)

*Existing law* provides a supplemental framework under which the government may seek the Foreign Intelligence Surveillance Court's (FISC's) authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad. (122 Stat. 2436 [FISA § 702, enacted as part of the FISA Amendments Act of 2008]; 50 U.S.C. 1881a.)

*Existing law* requires, in the case of FISA surveillance authorized by Section 702, which targets be “reasonably believed to be located outside the United States to acquire foreign intelligence information.” 50 U.S.C. § 1881a, subd. (a).)

*Existing law* states that Section 702 surveillance may not be intentionally targeted at any person known to be in the United States or any U.S. person reasonably believed to be located abroad. (50 U.S.C. §§1881a, subd. (b)(1)-(3); see also §1801, subd. (i).)

*Existing law* states that acquisitions under Section 702 are to be consistent with the Fourth Amendment. (50 U.S.C. §1881a, subd. (b)(6).)

*Existing law* provides that the Attorney General, in consultation with the Director of National Intelligence (DNI), must adopt targeting procedures, minimization procedures, and querying procedures that they attest satisfy the statutory requirements of Section 702 and are consistent with the AJR 8 Page 4 Fourth Amendment. (50 U.S.C. §1881a.)

*Existing law* provides that absent exigent circumstances, before the government may use Section 702, it must apply for approval from the FISC, and the FISC must issue an order if it finds that the certification complies with statutory requirements. The FISC reviews targeting procedures, minimization procedures, and querying procedures that the government intends to use to govern the selection of targets and the retention, dissemination, use, and querying of information collected under Section 702. (50 U.S.C. § 1881a, subs. (c), (h), & (j)(1)(A).)

*Existing law* sunsets Section 702 on December 31, 2023. (P.L. 110-261, § 403(b)(1), 122 Stat. 2474 (2008), as amended by P.L. 112-238, §2(a)(1), 126 Stat. 1631; P.L. 115-118, § 201(a)(1), 132 Stat. 19 (2018).)

*This resolution* states that Section 702 of the FISA allows the United States government to engage in mass, warrantless surveillance of Americans and their electronic communications.

*This resolution* states that information collected under the law without a warrant has been used to prosecute and imprison people, even for crimes unrelated to national security.

*This resolution* states that due to the secrecy surrounding the program, there is concern that Section 702 is and will be used to disproportionately target disfavored groups, including but not limited to minority communities, political activists, or even journalists.

*This resolution* states that Section 702 allows the government the broad authority to target foreigners abroad if it believes they possess “foreign intelligence information,” which is a term so broadly defined that it allows the government to cast a wide net that ensnares the communications of ordinary Americans on a massive scale.

*This resolution* states that targets of surveillance could include human rights defenders, journalists, whistleblowers, or business owners.

*This resolution* reveals that under the authority provided by Section 702, the government can collect the personal information of these individuals, including any emails, text messages, and other communications they may have with people in the United States, and stores it in databases for years, and in some cases, indefinitely.

*This resolution* states that once the government collects vast amounts of information, including emails, text messages, and other communications, under Section 702, that content is stored in databases for years at a time, and the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), and the National Security Agency (NSA) officials routinely search through this vast trove of data for information specifically about Americans despite the fact that these communications were all collected without a warrant and despite legal requirements that prevent “reverse targeting” of Americans through Section 702 collection.

*This resolution* states that the FBI exploited “backdoor searches” to search Americans’ communications 204,090 times in 2022 alone without a warrant.

*This resolution* states that information found through these “backdoor searches” can be used to prosecute Americans for crimes that are not related to national security.

*This resolution* states that the government can use information collected under Section 702 in a wide variety of contexts, from criminal cases to immigration proceedings, and despite the fact that the government is legally required to provide notice to defendants when information collected under Section 702 is to be used against them, in only a handful of cases has this notification ever been provided.

*This resolution* states that the government has a history of using surveillance to target activists, government critics, political candidates, and minority communities.

*This resolution* states the American Muslim community has long been the target of discriminatory government surveillance, including the surveillance of Muslim leaders, mosques, and Muslim student associations and organizations

*This resolution* states that in the past, prominent civil rights leaders like Martin Luther King, Jr. and Cesar Chavez were labeled national security threats and targeted for surveillance by the FBI.

*This resolution* states that more recently, FBI agents have searched the communications of a United States congressman, a local political party, multiple current and former United States government officials, journalists, political commentators, two “Middle Eastern” men flagged by a witness because they were loading boxes of cleaning supplies into a vehicle, business,

religious, and community leaders who applied to participate in the FBI's "Citizens Academy," and colleagues and relatives of the FBI agent performing the search.

*This resolution* states that recent declassified information revealed 278,000 instances of FBI misusing Section 702, including to investigate protestors involved in the Black Lives Matter movement, individuals suspected of involvement in the January 6 Capitol breach, and more than 19,000 donors to a congressional campaign.

*This resolution* states that, as written, Section 702 contains minimal protections to prevent these types of surveillance abuses, and the FBI and other federal agencies routinely search through the Section 702 database without a warrant in cases unrelated to national security, which results in that authority being used to support government selectively targeting certain communities without cause.

*This resolution* states that this broad, warrantless collection of data under Section 702 violates Americans' constitutional rights.

*This resolution* states that Section 702 has become a domestic spying tool, which is something Congress never intended.

*This resolution* states that Section 702 is set to expire at the end of 2023.

*This resolution* resolves by the Assembly and the Senate of the State of California, jointly, that the Legislature of the State of California urges the United States Congress to refrain from reauthorizing Section 702 absent fundamental reform of the program, which must include requiring agencies to obtain a warrant before searching Section 702-acquired information AJR 8 Page 3 from Americans' communications.

*This resolution* resolves that the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to the Majority Leader of the Senate, to each Senator and Representative from California in the Congress of the United States, and to the author for appropriate distribution.

## COMMENTS

### 1. Need for This Resolution

According to the Author:

Section 702 of the Foreign Intelligence Surveillance Act allows the United States government to engage in mass warrantless surveillance of American citizens. My resolution calls on the federal government to put an end to this domestic spying tool and restore privacy rights for all Americans, regardless of their political ideology, race, or ethnicity."

## 2. The Foreign Intelligence Surveillance Act of 1978 (FISA) and Section 702

In 1978, Congress enacted FISA to govern foreign intelligence surveillance and searches.<sup>1</sup> FISA “generally addresses electronic surveillance and other methods of acquiring foreign intelligence information that are directed at targets outside the United States.”<sup>2</sup> The FISC (Foreign Intelligence and Surveillance Court), created by FISA, reviews the government's applications for surveillance orders “for the purpose of obtaining foreign intelligence information.”<sup>3</sup> The FISC is composed of 11 federal district judges appointed by the Chief Justice of the US, and confirmed by the Senate. Judges serve one week at a time on a rotating schedule, where they serve in conjunction with their federal district appointments. The FISC oversees the Intelligence Community’s use of the FISA, and ultimately is responsible for managing the government’s authority to survey foreign threats. FISC is responsible for authorizing the electronic surveillance of a US person. The FISC may issue an order showing that there is probable cause to believe that the target of the electronic surveillance is a “foreign power or an agent of a foreign power” and that the “facilities or places” at which the surveillance is directed are “being used, or . . . about to be used, by a foreign power or an agent of a foreign power.”<sup>4</sup> After this order is issued, and written justification is provided, the electronic surveillance of a US person may begin.

Following the September 11 terrorist attacks, Section 702 was created, which supplements pre-existing FISA authority.<sup>5</sup> Specifically Section 702 allows the US Government to work with US companies to gather foreign intelligence on non-US persons located outside the US.

With respect to foreigners, Section 702 offers an alternative procedure for acquiring foreign intelligence information notwithstanding FISA’s traditional requirements. Section 702 may only be used to target non-U.S. persons who are reasonably believed to be outside the United States in order to obtain foreign intelligence information. Unlike traditional FISA orders authorizing electronic surveillance, Section 702 does not require the Foreign Intelligence Surveillance Court (FISC) to make probable-cause determinations with respect to individual targets of surveillance or the facilities at which surveillance will be directed. Instead, Section 702 directs the Attorney General, in consultation with the Director of National Intelligence (DNI), to develop targeting procedures that intelligence officials will use to identify targets for surveillance under Section 702. As one federal court stated, “judicial review of Section 702 functions as a form of programmatic preclearance.” The U.S. Courts of Appeals for the Second, Ninth, and Tenth Circuits have agreed that where “the target of Section 702 surveillance is a foreign national located abroad having no substantial connections with the United States, that target is not entitled to Fourth Amendment protections,” even if the acquisition occurs in the United States.<sup>6</sup>

As noted by the ACLU, powers provided by Section 702 “would be akin to a judge signing off on thousands of warrants at a time — after only reviewing the process by which police departments decide who to search.”<sup>7</sup> And while the Attorney General and DNI may not

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<sup>1</sup> 50 U.S.C. § 1801 et seq.

<sup>2</sup> <https://crsreports.congress.gov/product/pdf/R/R47477> [emphasis in original]

<sup>3</sup> 50 U.S.C. §§ 1802, subd. (b); 1803

<sup>4</sup> 50 U.S.C. § 1805, subd. (a)(2)(A)-(B)

<sup>5</sup> *Clapper v. Amnesty Int’l USA* (2013) 568 U.S. 398, 404 [citation omitted]; 50 U.S.C. § 1881a

<sup>6</sup> <https://crsreports.congress.gov/product/pdf/R/R47477>, supra; see also 50 U.S.C. § 1881a

<sup>7</sup> [WARRANTLESS SURVEILLANCE UNDER SECTION 702 OF FISA](#)

intentionally target any person within the U.S. or U.S. persons outside of the country,<sup>8</sup> information about U.S. persons may be incidentally collected by Section 702 surveillance – e.g., communications between foreigners and their American friends, relatives, or colleagues. The Attorney General, in consultation with DNI, is required to adopt procedures which minimize the sharing, use, and retention of incidentally collected information about Americans.<sup>9</sup> When Congress last reauthorized Section 702 in 2018, it added a requirement that the Federal Bureau of Investigations (FBI) demonstrate probable cause and obtain an order from the FISC prior to accessing American’s communications (by conducting a U.S. person query of 702-acquired information) in certain criminal cases – i.e., those in which criminal investigations not relating to national security had reached a certain stage of the investigation.<sup>10</sup> The limited requirement for a court order does not apply if the FBI determines there is a reasonable belief that the contents could assist in mitigating or eliminating a threat to life or serious bodily harm.<sup>11</sup>

For 2021, the Office of the DNI reported that the NSA, CIA, and National Counterterrorism Center (NCTC) “used 8,790 U.S. person query terms to search Section 702 contents. CIA and NSA used 3,958 U.S. person query terms to search Section 702 metadata for the same period. FBI reports these statistics differently, counting the total number of queries using U.S. person terms, as opposed to CIA, NSA, and NCTC’s practice of counting the number of U.S. person terms used. Between December 2020 and November 2021, FBI estimates it has conducted “fewer than 3,394,053” queries using a U.S. person term.”<sup>12</sup>

### 3. Balancing Constitutional Rights and Public Safety

The California Constitution affirms the importance of civil liberties, both with its protection against unreasonable searches and seizures (Cal. Const. Art. I, Section 13) and its specific guarantee of the inalienable right to privacy (Cal. Const. Art. I, Section 1). The federal government recognizes the former right in the Fourth Amendment and the latter right in a variety of Supreme Court decisions. (See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479; *Lawrence v. Texas* (2003) 539 U.S. 558.) These constitutional rights are the cornerstone of our democracy.

At the same time, Congress has the power to “provide for the common defense and general welfare of the United States” (U.S. Const. Art. I, Section 8), and the President’s Oath of Office includes a pledge to “protect and defend the Constitution of the United States” (U.S. Const. Art. II, Section 1). Keeping the country safe and secure is also a responsibility of both Congress and the President.

### 4. President’s Intelligence Advisory Board Report

Recently, the President’s Intelligence Advisory Board, which voted unanimously to support reauthorization of Section 702, released a report reviewing FISA Section 702.<sup>13</sup> Concluding that Section 702 is “essential to generating the intelligence necessary to protect the United States from a host of threats,” the Board recommended 13 reforms to address past Section

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<sup>8</sup> 50 U.S.C. § 1881a, subd. (b)(1)-(3)

<sup>9</sup> 50 U.S.C. § 1881a, subd. (e)

<sup>10</sup> 50 U.S.C. § 1881a, subd. (f)(2)

<sup>11</sup> 50 U.S.C. § 1881a, subd. (f)(2)(E)

<sup>12</sup> <https://crsreports.congress.gov/product/pdf/R/R47477>, supra

<sup>13</sup> <https://www.nbcnews.com/politics/congress/section-702-foreign-intelligence-surveillance-act-congress-what-know-rcna96259>

702 mishandlings.<sup>14</sup> These recommendations fall short of requiring warrant before searching Section 702-acquired information from Americans' communications, reasoning: "A requirement to establish probable cause and obtain a warrant before querying Section 702 data with a U.S. person query term would effectively prevent the government from protecting the American people in many situations because the information is incomplete and, thus, not sufficient to meet the probable cause standard. In addition, in many cases, the purpose of the query is to protect a U.S. person, not to connect a U.S. person to a foreign plot." (*Ibid.*) The Board did recommend that the FBI's authority to conduct queries for evidence of a non-national security-related crime in its Section 702 data be removed. (*Ibid.*)

## 5. Congressional Investigation into FISA and Section 702

Congressional jurisdiction for FISA Section 702 falls under the United States House Permanent Select Committee on Intelligence (HPSCI) and the House Judiciary Committee. Under direction of Speaker McCarthy, the two committees formed the FISA Joint Working Group to "consider meaningful reforms to improve the legislation and protect American civil liberties from cases of misuse and exploitation"<sup>15</sup> The working group put together a report outlining the existing function of FISA and Section 702, examples of misuse, and proposed changes to the program that ensures it protects American liberties while ensuring its use to maintain national security.

Section 702 contains provisions that require the Director of National Intelligence and the Attorney General to outline a "querying procedure" that specifies how searches, or "queries", collect information and view information. The "querying procedure" is intended to recognize the Fourth Amendment and ensure that the query is reasonably believed to collect foreign intelligence information or lead to the discovery of a crime. However, the working group found that the FBI had not been consistently following the querying and targeting procedures, which resulted in personal privacy violations and rampant misuse. The report attributed the FBI violations to be:

[C]aused by a culture at the FBI where searches of FISA databases were done with impunity by poorly trained agents and analysts with easy access to a database that was in dire need of better safeguarding. For example, prior to reforms made in 2021, FBI systems for storing raw Section 702 information did not require personnel to affirmatively "opt-in" to query that information, leading to many inadvertent, noncompliant queries of Section 702 data. Now, FBI personnel are required to affirmatively "opt-in" before they query the Section 702 database. It also seems that FBI management failed to take query compliance incidents seriously and were slow to implement reforms that would have addressed many of the problems." [Taken from the [Report of the Majority FISA Working Group of the House Permanent Select Committee on Intelligence](#)]

The FISC oversees the FBI's surveillance authority provided by Section 702. The court recently unsealed a memorandum opinion and order that reveals the FBI improperly used the Section 702 database. According to that document, the FBI was found to have conducted

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<sup>14</sup> <https://www.whitehouse.gov/wp-content/uploads/2023/07/Presidents-Intelligence-Advisory-Board-and-Intelligence-Oversight-Board-Review-of-FISA-Section-702-and-Recommendations-for-Reauthorization.pdf>

<sup>15</sup> [House Intelligence Committee Announces Bipartisan FISA 702 Working Group | Permanent Select Committee On Intelligence](#)

more than 278,000 improper queries within the Section 702 databases.<sup>16</sup> These searches did not follow the guidelines set forth by FISA and the Justice Department, guidelines that help ensure the queries pertain to a national security concern and do not violate an American citizen's liberty. Queries violating Section 702 guidelines were conducted upon "crime victims, Jan. 6 riot suspects, people arrested at protests after the police killing of George Floyd in 2020 and — in one case — 19,000 donors to a congressional candidate"<sup>17</sup> This court opinion dates back to 2022, and the FBI claims to have implemented internal reforms during 2021, supposedly correcting the violations cited by the court document.<sup>18</sup>

Reforms for Section 702 proposed by the joint working group include increasing penalties for compliance violations or abuse, increasing transparency and reporting, implementing more measures to ensure the IC's compliance to FISA guidelines, tightening querying restrictions, and increasing congressional oversight of the FISC. Several bills have been introduced proposing varying levels of reform for FISA Section 702.

## 6. Amendments to be Accepted in Committee

The author has accepted an amendment proposed by the committee that would modify the expiration date of Section 702. The National Defense Authorization Act passed by Congress included a provision that extended the reauthorization date of Section 702 from the end of 2023 to April 19<sup>th</sup> 2024. The amendments proposed by the committee would update the resolution to reflect this change.

## 7. Arguments in Support

According to the Council on American Islamic Relations, California Chapter:

"Section 702 allows the federal government to conduct mass, warrantless surveillance of phone calls, text messages, emails, and other electronic communications by foreigners and Americans who interact with foreigners. The information collected can be used to prosecute and imprison those surveilled, even for crimes which bear no relevance to national security concerns. Section 702 has historically & disproportionately targeted minority communities, including the Muslim community. Section 702 sunsets on December 31, 2023, although Congress has previously reauthorized the act during past sunsets.

"The FBI v. Fazaga case is an apt example of Section 702 being used beyond its intent, causing harm to the American Muslim community. The case began in February 2011, after the public learned from a government informant that the FBI was surreptitiously surveilling mosques in Orange County, California, under a secret government operation during 2006 and 2007. Based on sworn statements by the informant, the operation was designed to collect information about Muslims who attended mosques in the region, regardless of any suspicion of wrongdoing. After Shaikh Fazaga, Ali Malik, and Yasser AbdelRahim filed the suit, the government moved to dismiss the case by asserting the

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<sup>16</sup> [Unsealed Surveillance Court Document](#)

<sup>17</sup> "What's the Database the FBI Misused to Seek Info on Jan. 6 ..." The Washington Post, May 19, 2023.

<sup>18</sup> "[FBI broke rules in scouring foreign intelligence on Jan. 6 riot, racial justice protests, court says](#)" AP News, May 9, 2023



‘state-secrets’ privilege, arguing that defending the case in court would threaten the disclosure of information sensitive to our national security. The district court agreed and dismissed most of the suit on that basis. The Ninth Circuit reversed on appeal, holding that the procedures Congress established in the Foreign Intelligence Surveillance Act (FISA) should govern, rather than the law state-secrets privilege, and that the case could move forward on that basis. As it is being used for purposes beyond its intent, including to surveil Americans, Section 702 is in dire need of aggressive reform or closure.”

According to Oakland Privacy:

“The broad powers allotted under Section 702 are ripe for abuse, and it is becomingly increasingly obvious that the abuse is happening. In legal discovery, documents revealed improper searches by FBI employees of a U.S. senator, a state senator, and a state judge. These were not fringe outlier cases. There were 278,000 queries declared to be ‘off the standards’ from 2020-2021, including queries about Black Lives Matter protesters, political campaign donors, and January 6th participants. That is 380 improper queries a day for over two years. The judge who reviewed the documents stated: ‘Compliance problems with the F.B.I.’s querying of Section 702 information have proven to be persistent and widespread.’” (Footnotes omitted.)

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