

Testimony of Stewart Baker on Renewal of Section 702 of FISA

Before the Senate Judiciary Committee

January 28, 2026

Mr. Chairman, Ranking Member Durbin, members of the Committee, it is an honor to appear before you to support renewal of Section 702 of FISA, the Foreign Intelligence Surveillance Act.

I bring a long history to this hearing. I was General Counsel of the National Security Agency in the early 1990s, testified in 2003 to the 9/11 Commission on the reasons why the U.S. failed to prevent the attack, served as General Counsel to the commission that examined our Iraq WMD intelligence failures, and from 2005 to 2009 was Assistant Secretary of Policy for the Department of Homeland Security. I have also been a critic of FISA abuses,¹ and have proposed that FISA reforms be part of 702 reauthorization legislation.²

That history is the reason I'm testifying today. I understand the risk that intelligence authorities can be abused, and I support reforms that preserve the essentials of intelligence capabilities. But I also saw up close the mistakes that led to 9/11, and I will do all I can to make sure that we do not repeat them, especially when a changing international environment is creating new cross-border threats.

No one denies the immense intelligence value of Section 702. It has been debated and approved by Congress multiple times -- in 2007, 2008, 2012, 2018, 2023, and 2024 -- without anyone seriously questioning the protection it provides to Americans. The US government recently credited the program with helping to

- disrupt several terrorist attacks here and abroad,³
- identify the Chinese origins of imported fentanyl precursors,⁴

¹ Stewart Baker and Michael Ellis, *Many Are Focusing on the Wrong FISA Fix*, *THE HILL* (Aug. 14, 2023, 12:30 PM EDT), <https://thehill.com/opinion/congress-blog/4153890-many-are-focusing-on-the-wrong-fisa-fix/>; Stewart Baker, *Vicious Cycle: How Press Bias Fed FISA Abuse in the Trump-Russia Panic*, *Lawfare* (Jan. 30, 2023), <https://www.lawfaremedia.org/article/vicious-cycle-how-press-bias-fed-fisa-abuse-trump-russia-panic>.

² Stewart Baker and Michael Ellis, *Republicans' FISA Reform Opportunity*, *RealClearPolicy* (Jan. 10, 2023), https://www.realclearpolicy.com/articles/2023/01/10/republicans_fisa_reform_opportunity_874436.html.

³ Office of the Director of National Intelligence, *FISA Section 702 Fact Sheet* (June 2023), https://www.intel.gov/assets/documents/702-documents/FISA_Section_702_Fact_Sheet_JUN2023.pdf (FISA 702 Fact Sheet).

⁴ *Id.*

- respond to ransomware attacks on US companies,⁵
- identify Chinese hackers' intrusions into a network used by a key US transportation hub,⁶ and
- disrupt foreign government efforts to carry out kidnappings, assassinations, and espionage on US soil⁷

Those examples just scratch the surface. Section 702 is a uniquely flexible capability that adds value to most US intelligence priorities; indeed, it regularly contributes to 60% of the President's Daily Brief.⁸

The program's value goes far beyond the provisions that have sparked controversy. Section 702 authorizes the collection of communications data about foreign intelligence targets that are using US telecommunications infrastructure. Section 702 does not authorize the targeting of any US person, but some of its targets communicate with Americans. When the foreign target is involved in a full FBI national security investigation, the target's communications are stored in a database that can be later accessed by FBI agents. Queries of that database have spurred all the controversy, but the targets whose data it contains represent only 3.2 percent of all 702 targets.⁹

That tiny percentage has now driven a controversy lasting 25 years. Congress has chosen to authorize 702 only for limited periods --never more than six years and most recently only two. And the program has been the subject of multiple legislative battles, attracting scores of hostile amendments and often surviving by the skin of its teeth. Most recently, in 2024, the House rejected by the narrowest possible margin (a tie 212-212 vote) an amendment that would have crippled the program.

These increasingly precarious reauthorization votes do not reflect a decline in the program's value. As we've seen, it remains one of the country's most valuable sources of intelligence. But they have encouraged opponents of 702 to wage a relentless campaign against the program, hoping either to kill it outright or seriously reduce its utility.

⁵ Id.

⁶ FBI, *Op-Ed: Reauthorizing Section 702 of the Foreign Intelligence Surveillance Act Is a National Security Imperative*, <https://www.fbi.gov/news/press-releases/op-ed-reauthorizing-section-702-of-the-foreign-intelligence-surveillance-act-is-a-national-security-imperative>.

⁷ FBI, *Foreign Intelligence Surveillance Act (FISA) and Section 702*, <https://www.fbi.gov/how-we-investigate/intelligence/foreign-intelligence-surveillance-act-fisa-and-section-702>.

⁸ Office of the Director of National Intelligence, *FISA Section 702 Vignettes* (Feb. 14, 2024), https://www.intelligence.gov/assets/documents/702-documents/FISA_Section_702_Vignettes-20240214_Final.pdf

⁹ FISA 702 Fact Sheet at 2.

One consistent line of attack charges that the FBI has routinely violated its own rules for access to 702 data, particularly in queries that include the names or numbers of US persons. There is no doubt that the rules were widely violated over a period of years, although that is no longer the case. More important, the violations were almost without exception good-faith errors, not intentional abuses; most of them were the result of a badly framed rule rather than bad intent.

Let me explain. At bottom, the 702 program assembles a database of US phone numbers and IP addresses communicating with foreign parties who are under investigation for law enforcement or national security reasons – terror suspects, foreign government hackers, drug smugglers, and the like. The 702 database thus allows agents to find out whether a person of interest has been in touch with one of those targets. By and large, of course, Americans don't talk to foreign terrorists or drug smugglers, and if their computers are communicating with foreign hackers, they almost certainly want to know about it so they can stop it. In short, putting an American citizen's name into the 702 database is extraordinarily unlikely to result in a "hit," let alone cause the citizen harm, unless he is up to no good. In the twenty-five years of its existence, no one has pointed to a query that violated the rules because the agent was acting out of malice toward the query subject.¹⁰ Twenty-five years of history tells us that launching a 702 query to dig dirt on an innocent American citizen is a fool's errand.

So where did those thousands of violations come from? I believe those violations are as much the fault of the rules as of the agents who performed the queries. The rules require that, before making a query, an agent must have a specific factual basis for believing it will yield foreign intelligence or evidence of a crime. For an FBI agent, that is a trap. It means that the agent can only ask the 702 database whether a US person is talking to a foreign intelligence target if the agent already has reason to believe the person is talking to such a target.

The problem is that law enforcement does not use most databases that way. Police can query the DMV to learn whether a person has a driver's license even if they have no idea whether he does or not. Similarly, they don't need evidence that a suspect's fingerprints are in a federal database to inquire about a match. They can check arrest records without any reason to believe they will get a hit. They can do the same for searches

¹⁰ Indeed, in its comprehensive review of the program, the Privacy and Civil Liberties Oversight Board identified only two improperly motivated query violations by FBI officers – both of which centered on queries relating to family members. Privacy & Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 136 (July 2023), [https://documents.pclob.gov/prod/Documents/OversightReport/054417e4-9d20-427a-9850-862a6f29ac42/2023%20PCLOB%20702%20Report%20\(002\).pdf](https://documents.pclob.gov/prod/Documents/OversightReport/054417e4-9d20-427a-9850-862a6f29ac42/2023%20PCLOB%20702%20Report%20(002).pdf).

of databases listing suspected terrorists, stolen vehicles, sex offenders, DNA identifiers, ballistics, missing persons, and on and on. Anyone using those databases needs a legitimate purpose and authority but many, perhaps most, of the queries are “just in case” searches based on nothing more than a hunch or a desire to be thorough. None of these queries requires a warrant or probable cause. And for good reason; the use of existing government databases to run down tips and leads is a standard, lawful – and immensely valuable – law enforcement practice.

Perhaps not surprisingly, FBI agents who were used to doing such database searches treated 702 the same way. It was hard not to. The forms that agents used to request database searches routinely included the 702 database, which meant it was queried unless the agent affirmatively opted out. As a result, hundreds of thousands of searches violated the rules, not because the agents were conducting illegal surveillance but because they did not realize that such queries were governed by a special and counterintuitive rule.¹¹

These good faith searches were blown into a national scandal by interest groups and politicians with an ax to grind against section 702. In truth, some of the queries – on J6 suspects or Black Lives Matters activists – did suggest that they might have had an improper motive, but after all the furor and investigations, none of the 702 queries that violated the rules has been flagged as undertaken with malice or intent to cause harm to an innocent American. This looks more and more like a scandal without a victim.

This criticism is especially pointed in 2026, more than a year after President Trump returned to office. The national security leaders he appointed have aggressively pursued and publicized abuses of intelligence programs, from as the Carter Page FISA surveillance orders to the highly irregular intelligence community assessment claiming collusion between Russia and the 2016 Trump campaign. If Section 702 had been abused for partisan purposes under Presidents Obama or Biden, we would have heard about it. The silence reinforces the lesson that, unlike other FISA authorities, this is simply not a program that can easily be used for improper purposes.

The lack of identifiable victims, however, didn’t stop opponents from attacking the program. The resulting public furor and a fear of losing 702 led earlier administrations to adopt aggressive measures to enforce the rules. As a result, by 2023, standard FBI

¹¹ The rule also prevents legitimate queries. Take the example of the office that clears visitors to the White House or Oval Office. It’s highly unlikely that an American going to a meeting with the President is in touch with foreign terrorists, so there’s no articulable reason to do a 702 query on visitors’ names. But considering the risk, it seems irresponsible not to do a routine check. Congress acknowledged the value of such checks in RISAA, which requires that 702 queries be used to vet persons seeking to enter the United States but does not require that the query be grounded in any reason to believe that it will yield a hit.

database searches no longer query 702 data unless the agent affirmatively asks for it; training in the rules is now mandatory, field office leadership can lose bonuses as a consequence of their office's violations, and agents who are negligent in following the rules face an escalating set of penalties.¹²

These measures worked. By 2023, FBI queries had achieved a 98% compliance rate.

The next year, Congress added to the enforcement campaign. The 2024 Reforming Intelligence and Securing America Act (RISAA) barred searches for law enforcement purposes in the absence of a threat to life or serious bodily harm.¹³ By law, 702 queries now require a written justification and supervisor approval.¹⁴ "Sensitive" queries relating to politicians and political, media, or religious organizations require even higher approvals.¹⁵ The FBI is also required to institute "minimum accountability standards" with "escalating consequences for noncompliant querying of [U.S.-person] terms."¹⁶ These standards must include (1) "zero tolerance for willful misconduct"; (2) "escalating consequences for unintentional noncompliance," including a threshold for mandatory revocation of access to Section 702 information; and (3) "consequences for supervisors who oversee users that engage in noncompliant queries."¹⁷

It's now clear that these measures have dramatically reduced noncompliance. In 2024, the FISA court noted a "striking ... decline" in FBI queries.¹⁸ In 2025, the Justice Department Inspector General noted that the FBI "is no longer engaging in ... widespread noncompliant querying of U.S. persons" and that most of the remaining violations, "were noncompliant due to administrative mistakes, such as typographical errors, rather than due to fundamental misunderstandings of the query standard."¹⁹ In fact, the volume of US person 702 queries has dropped by 99.8%:²⁰

¹² U.S. Dep't of Justice, Nat'l Sec. Div., *FBI Remedial Measures Produce ~98% Query Compliance Rate*, <https://www.justice.gov/nsd/media/1344761/dl?inline=>.

¹³ Cong. Rsch. Serv., *FISA Section 702 and the 2024 Reforming Intelligence and Securing America Act*, R48592 (July 8, 2025), <https://www.congress.gov/crs-product/R48592>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ In re DNI/AG 702(h) Certifications 2024-A, 2024-B, and 2024-C, and Predecessor Certifications, Docket Nos. 702(j)-24-01, 702(j)-24-02, 702(j)-24-03, and predecessor dockets, Memorandum Opinion and Order, at 46 (April 4, 2024) (April 2024 FISC Order)

¹⁹ U.S. Dep't of Just., Off. of the Inspector Gen., *A Review of the Federal Bureau of Investigation's Querying Practices Under Section 702 of the Foreign Intelligence Surveillance Act* (Oct. 2025), https://oig.justice.gov/sites/default/files/reports/26-002_0.pdf (2025 IG report)

²⁰ 2025 IG report at 47. See also Office of the Dir. of Nat'l Intelligence, *Annual Statistical Transparency Report Regarding the Intelligence Community's Use of National Security Surveillance Authorities: Calendar Year*

This is an understatement. According to FBI records, its 702 queries have fallen like a stone over four years:

2020-21:	2,964,643
2021-22:	119,393
2022-23:	57,094
2023-24:	5,518

This is not entirely good news. It suggests that the effort to discourage FBI agents from conducting US person 702 queries may be overachieving. Frankly, my greatest concern today is not that the FBI is abusing 702 but that it is afraid to use 702.

Several FBI and Justice witnesses confirmed this fear, telling the IG that they had “a high degree of concern” that “users are failing to run queries that they should run, which ... could lead the FBI to miss potentially critical threat information.”²¹ The IG identified several reasons why agents might not submit a legitimate 702 query, including the burden of drafting a special justification for each query and the risk of being audited and subjected to discipline for any errors.²² In short, the new measures have greatly reduced noncompliant queries, but at the cost of making Section 702 look more and more like a law enforcement “no-go zone.”

This all reminds me of a dark chapter in US intelligence policy that I lived through and have written about before.²³ The short version is this. In the 1990s, like today, FISA was viewed with suspicion on both the left and the right. Critics claimed that it made national security wiretaps too easy, so that the government could use FISA as a back-door way of gathering criminal evidence. To reassure the critics, the Justice Department declared that a “wall” would separate national security and law enforcement investigations. Any sharing of evidence across the wall required special permission. But criticism of intelligence surveillance continued, on the Hill and elsewhere, so the wall grew higher. The FISA court began requiring promises from investigators that they were observing the wall. Finally, in 2001, when Chief Judge Lamberth of the FISA court discovered that the wall had been breached in a terrorism case, he imposed career-threatening sanctions on the agent in charge. By the summer of 2001, aggressive enforcement by Chief Judge Lamberth and others had turned the wall into a no-go zone for agents who valued their careers.

2024 at 27 (2025), https://www.dni.gov/files/CLPT/documents/2025_ASTR_for_CY2024.pdf.

²¹ Id. at 47.

²² Id. at 48.

²³ Stewart Baker, *Skating on Stilts: Why We Aren't Stopping Tomorrow's Terrorism* 39-69 (2010)

It couldn't have happened at a worse time. That same summer, in August 2001, an FBI agent learned from intelligence sources that an al-Qaeda terrorist had entered the United States. The only task force with the resources to find the terrorist was investigating the bombing of the USS Cole – as a federal crime. To get their help would mean sending intelligence over the wall, and FBI's lawyers wouldn't allow it. The agent kept pressing in eerily prescient terms: "Someday someone will die—and wall or not—the public will not understand."²⁴

He was right. The FBI's underpowered intelligence arm had weeks to find Khalid al-Mihdhar but without the Cole task force's resources, it didn't learn where he was until his team of hijackers flew American Airlines Flight 77 into the Pentagon. Thousands of Americans died that day because measures meant to protect civil liberties had left FBI agents afraid to do their jobs.

Now, 25 years later, the same thing could happen with 702. Even if 702 is renewed, the enforcement measures already in place need to be reviewed with that risk in mind.

Because we need 702 more than ever. From Venezuela and Syria to Iran, the Trump administration approach to hostile regimes has been to achieve its goals with the threat of short raids and stand-off strikes rather than large-scale interventions. When it works, this strategy will often be far better than putting American lives at risk on the ground. But it also leaves in place well-organized and resentful enemies, from government security services to camps full of ISIS supporters; the risk is great that one of these enemies will decide to strike back at us here at home.

Section 702, with its focus on tracking foreign actors who might send agents to hurt us here, is a key defense against such a strike. That's why no one will forgive Congress or the Executive if such an attack succeeds because we let 702 lapse or made it too risky for ordinary agents to use. That's why Congress should renew section 702 promptly and with as few additional amendments as possible.

I have one more suggestion. It may not fit the political moment, but I saw with the wall that bowing to the political moment can lead to disaster. And in my view, disaster is where an endless cycle of legislative sunsets for 702 will take us. Everyone agrees that the country, and the Congress, are more bitterly divided than at any time in decades, perhaps a century. The instinct to reach across the aisle to protect national security is weaker than it's been since the 1930s. Bipartisan votes for "must pass" legislation are disappearing. Knowing all

²⁴ Id.

that, why in the world would we require Congress to muster a bipartisan majority every few years to keep alive a program that is a key to our security?

My friends who work in finance sometimes describe a bad investment strategy as “picking up nickels in front of a steamroller.” It can pay off, but it courts disaster. That’s what we are doing with section 702: Scratching to find the amendments and votes that will get us past the next deadline while ignoring the long-term unsustainability of the effort.

It’s time to treat 702 as what it is, a central piece of our homeland security architecture. It has stood the test of time, It has been legislatively authorized under two Republican and two Democratic Presidents, and it has mustered majority support in Congresses controlled by both Democrats and Republicans.

That’s enough. It’s time.

There is no excuse for not making 702 permanent.