

Warrant Requirement for Accessing Contents of U.S. Person Communications

This amendment, which is based on language from Senate Judiciary Committee Chair Durbin's bipartisan Security and Freedom Enhancement (SAFE) Act, would require the government to obtain a warrant from the Foreign Intelligence Surveillance Court (FISC) before reviewing the contents of innocent Americans' private communications.

Section 702 of the Foreign Intelligence Surveillance Act (FISA) permits warrantless surveillance and therefore may only be used to target foreigners located abroad. However, such surveillance sweeps in millions of Americans' private emails, text messages, and phone calls. The government then conducts hundreds of warrantless searches of Section 702 databases for the communications of Americans on a daily basis. This authority has been widely abused in recent years to conduct unlawful domestic surveillance of protesters, members of Congress, and journalists.

Requiring the government to obtain court approval before accessing the content of Americans' private communications that get swept up in Section 702 surveillance would protect Americans while preserving Section 702 as a foreign intelligence collection tool. Provisions in the House bill purportedly aimed at ensuring compliance with existing law will not protect Americans from warrantless surveillance under Section 702.

An amendment in the House that would have required a warrant before running searches for Americans' communications was narrowly defeated on a tied 212-212 vote. By contrast, the Senate amendment is a narrower, pragmatic compromise that requires the government to obtain a court order or warrant only in the less than 1.58% of instances in which the FBI conducts a U.S. person search that yields results, and the government wants to access these results—less than 80 per month, based on current figures.

It also contains critical exceptions for 1) exigent circumstances to ensure that in a true emergency the government will not be delayed in accessing communications; and for 2) cybersecurity and 3) when the target consents to the search to account for circumstances in which the government may not be able to meet the probable cause standard, but a search is still necessary. In other circumstances, the government should not be permitted to conduct fishing expeditions into Americans' private communications and should be required to demonstrate to a court that it has probable cause.

This requirement protects the contents of Americans' private communications from improper government access without restricting the government's ability to access the communications of foreign targets, including their communications with Americans or persons inside the United States. This provision is consistent with the recommendations of the independent Privacy and Civil Liberties Oversight Board (PCLOB), which found after a thorough classified review of Section 702 that it would be feasible to implement such a requirement without jeopardizing national security.

The government's long track record of misusing Section 702 under Republican and Democratic Administration alike demonstrates that court oversight—not internal executive branch oversight—is necessary to protect the privacy, civil liberties, and Fourth Amendment rights of the American people—who cannot be targeted under Section 702 in the first place.