

## Trump and FISA: A fact check

Patrick Eddington

April 11, 2024

In the wee hours of April 10, former President Donald Trump went onto his social media network, TruthSocial, and exclaimed, “KILL FISA, IT WAS ILLEGALLY USED AGAINST ME, AND MANY OTHERS. THEY SPIED ON MY CAMPAIGN!!! DJT.”

The “FISA” Trump was referring to is the Foreign Intelligence Surveillance Act (FISA), first enacted in 1978 as the exclusive means for conducting electronic surveillance designed to uncover foreign spies who might be trying to recruit Americans. It was that specific authority that was misused by the FBI to target Trump campaign advisor Carter Page, and which was subsequently the subject of a blistering Department of Justice Inspector General (DoJ IG) investigation.

Kevin Clinesmith, the FBI lawyer who altered a document as part of a FISA application to the Foreign Intelligence Surveillance Court (FISC), got a year of probation and 400 hours of community service as a sentence for his misconduct – likely a far lighter sentence than a non-government attorney would have received for falsifying information submitted to a federal court.

But it was not that provision of FISA that was at issue the day Trump posted on TruthSocial. Instead, the surveillance authority up for renewal was Title VII of FISA, specifically Section 702, a provision added to the law in July 2008 in an effort to make George W. Bush’s previously secret and illegal mass electronic surveillance program (codenamed STELLAR WIND) at least nominally constitutional. That Section 702 program has become infamous for a 15-year pattern of abuses by the FBI, one of the most outrageous of which was rifling through the communications of 19,000 donors to a political campaign.

Opposition among the hard-core House GOP Freedom Caucus (HFC) to any status quo renewal of the Section 702 program was no doubt bolstered by Trump’s announcement, as later that day the procedural motion to bring a compromise FISA reauthorization bill to the floor was defeated when 19 House GOP members joined all Democrats in voting against it.

As Section 702 is set to expire on April 19, it naturally raises the question: what’s next?

To be fair, there’s not much doubt that the 702 program has provided useful intelligence for the FBI and multiple federal intelligence agencies. But at present, there is no probable cause-based warrant requirement imposed on FBI agents if they want to access the stored communications of Americans swept up under the 702 program. That’s at odds with how things have worked in conventional criminal cases since 1968, and that’s exactly what FISA reformers are no longer willing to tolerate.

Given the short window for action before the April 19 deadline, House Speaker Mike Johnson only has three realistic options.

First, he could seek yet another extension of the existing law (say 30-45 days) to try to get some kind of final FISA reform reauthorization bill to the House floor. Given that Johnson has already used that option back in December 2023 during the first House GOP internal impasse over 702 reauthorization, it's unclear whether another extension could pass the House with majority GOP support. And if Johnson had to rely primarily on Democratic votes to pass another extension, it's a move that could put his hold on the Speaker's gavel in peril.

Second, Johnson could try to pass his compromise FISA bill by bringing it up under what's known as "suspension of the rules." In this scenario, no amendments would be allowed and the bill would need at least two-thirds of House members to vote for it. Normally, this method is used only for legislation that the majority and minority parties both deem non-controversial, and Johnson's preferred bill is anything but that. Given the divisions in both the House GOP conference and the House Democratic Caucus on FISA, it's unlikely the bill could get the necessary 288 votes to pass on suspension.

Finally, Johnson could bring up one of the existing FISA reform bills and allow a substantial (say 25-50) amendments to the bill to be voted on. This is the best play because it would fulfill a pledge he and other Republicans said they'd do at the start of the 118th Congress: let the House work its will through a more open, fluid legislative process.

If both supporters and opponents of the FISA Section 702 program get to vote on their preferred changes on the House floor via the amendment process, it would help diffuse much of the animosity and internal rancor over FISA that has roiled the GOP conference for the better part of a year. The question is, will he?

*Author Biography: Former CIA analyst and ex-House senior policy advisor Patrick Eddington is a senior fellow at the Cato Institute.*