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Biden administration sued over surveillance records amid FISA debate

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EXCLUSIVE — The Cato Institute has sued the Biden administration for records of possible surveillance violations as Congress debates reauthorizing a crucial statute.

Section 702 of the Foreign Intelligence Surveillance Act, or FISA, will expire on April 19 unless renewed by Congress, and a key question is whether warrants should be required to obtain data on citizens using the act. This is being hotly debated on Capitol Hill, but all parties are operating without knowledge of possible past violations of the act by the FBI, CIA, or National Security Agency.

Cato requested Department of Justice audit records of potential FISA violations last June but has received nothing. It is now filing an injunction to force the release of those records no later than March 29 so that Congress can take them into account in the reauthorization fight.

“The people of our country are demonstrably and dangerously less free from government surveillance abuses and related political repression than at any point since the worst days of the Cold War,” Cato Institute senior fellow Patrick Eddington told the *Washington Examiner*. “And laws like the PATRIOT Act and the FISA Amendments Act are key reasons why.”

While the reauthorization debate in Congress crosses party lines, national security adviser Jake Sullivan raised quite a few eyebrows last week when he implied that the Biden administration opposes a warrant requirement to access FISA data on U.S. citizens.

“We do not believe that that serves the national security interests of the United States,” Sullivan said on Feb. 14. “And in fact, today I will be making that case to a number of members [of Congress], that the warrant requirement, as conceived, is not the best way to ensure the protection of the personal privacy of Americans.”

The answer implies that Congress might need to override a veto from President Joe Biden in order to require warrants.

Section 702 of FISA lets the government essentially use surveillance on foreign nationals outside the country without needing a warrant to do so, even if the party on the other side of communications is on American soil. The tool has been credited with preventing national security threats and criticized as a vehicle for spying on U.S. citizens.

Cato argues that FISA has been violated repeatedly by multiple presidential administrations since Section 702 was enacted in 2008.

“[Violations include] searches of stored data collected under the Section 702 program that targeted Black Lives Matter members, other groups engaged in First Amendment protected activities, and in one case, a ‘batch’ search that yielded the names of 19,000 donors to a political campaign,” Eddington wrote in his declaration accompanying the lawsuit.

Several conservative groups are pressing for FISA reform, saying it has been used to spy on former President Donald Trump’s political campaigns, among other alleged abuses.

Rep. Andy Biggs (R-AZ) has proposed an amendment that would require a warrant or court order before FISA is used to obtain data on a citizen. Rep. Warren Davidson (R-OH) has filed the Fourth Amendment is Not for Sale Act, which would prevent the federal government from trying to work around constitutional protections by buying the data of citizens from third parties.

But no one in Congress has seen the audit records Cato seeks, which the think tank said would better inform debate on all sides. In fact, the suit said the audits were proposed expressly to prevent Section 702 abuse, but the audits themselves have never been made public outside of top-line summaries.

“[This denies] the public and the Congress the ability to judge whether public assurances by the Director of National Intelligence and the Attorney General that abuses have been curbed are backed up by the actual audit results themselves,” read a declaration from Eddington.

The lawsuit requests that records be processed and released no later than March 29, as well as a hearing within 21 days unless the court rules on the motion during that time frame. Cato argues that it is likely to succeed on the merits, that the public would suffer irreparable harm if the records are not released by March 29, and that the injunction is in the public interest as evidenced by the debate on Congress and surveillance implications.

“Plaintiff’s June 2023 request to DOJ has now been pending without any determination or production of records for eight months and counting, in clear violation of FOIA’s deadlines,” the suit said.

Eddington argued the public and Congress have an “urgent need” for information about the integrity and accuracy of FISA Section 702.

“Put simply, both the public and members of Congress would consider informative to this debate the extent to which the FBI has violated Section 702 and how it has done so,” according to the suit.

The *Washington Examiner* has contacted the White House and the Department of Justice for comment.