

NATIONAL REVIEW

Cato Institute Sues DOJ over Possible FISA Violations as Congress Debates Reauthorization

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The Cato Institute sued the Justice Department last week to obtain internal records of possible surveillance violations, as Congress debates reauthorizing Section 702 of the Foreign Intelligence Surveillance Act.

The Washington, D.C.-based libertarian think tank filed a Freedom of Information Act request, forcing the Justice Department to release audit records of potential FISA violations by the FBI so that Congress may take them into consideration while debating whether to reauthorize the divisive statute. Cato argues the prompt release of the records would be in the public interest, considering bipartisan lawmakers are debating the warrantless surveillance program without full knowledge of past violations.

“The requested records are relevant to public debate and potential Congressional action on whether to reauthorize FISA Section 702, and if so, how to reform it,” the court filing reads. “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.”

Cato Institute senior fellow Patrick Eddington, who filed the motion for a preliminary injunction and an accompanying declaration on February 22, said this isn’t the first time his organization has sought the release of the Section 702 database audits.

Cato filed a similar FOIA request in June, but no records were handed over. Cato then filed litigation in a Washington, D.C., federal court to compel disclosure of the records on February 8, before ultimately submitting the latest FOIA request.

The think tank gave the federal agency until March 29 to comply with the inquiry, with three weeks left before Congress must renew Section 702 of FISA. Its expiration deadline is April 19. If the audits are not released by the end of this month, Eddington worries they could become irrelevant to the current Section 702 debate in Congress.

“Unless the records are produced sufficiently in advance of any Congressional action before the April 19, 2024 expiration, they will lose their value in the Section 702 debate,” he wrote in the injunction.

Moreover, if Section 702 expires without being renewed by Congress, American national security could be at risk, proponents of the statute argue.

Enacted in 2008, the Section 702 program builds upon the 1978 FISA legislation, empowering the federal government to monitor the communications of foreigners located overseas. The purpose of the statute is to provide intelligence on the activities of terrorists and other foreign adversaries in a post-9/11 world, but critics have pointed out that it has been used to spy on American citizens who are in contact with foreign nationals without a court warrant.

Senator Mike Lee (R., Utah) and other FISA detractors argue this violates the Fourth Amendment, which prevents the government from conducting unreasonable searches and seizures of Americans. This is why Congress has been pushing for the reform of Section 702, previously set to expire at the end of 2023.

In December, the Senate and House extended the expiration deadline to April as part of the fiscal year 2024 National Defense Authorization Act.

Eddington believes the FBI is using the statute to abuse the Fourth Amendment rights of Americans who pose little to no threat. According to a report from the Office of the Director of National Intelligence, the FBI conducted about 3.4 million warrantless searches on Americans' private communications in 2021. A year later, an FBI official claimed the number of U.S.-person-related queries dropped down to just over 200,000, according to the Seattle Times. These searches were done without finding any significant threat, Eddington said.

He also noted that the Justice Department's internal audits of Section 702 are kept secret, meaning the public and Congress can't compare the agency's alleged reductions in violations to the actual number of violations recorded. Only summaries of the audits have been released.

Eddington expects U.S. district judge Tanya Chutkan to decide on Cato's FOIA request sometime in March. However, he expects pushback along the way.

"Opposing counsel at DOJ has told us they intend to oppose our motion; we're simply waiting to see it and how Judge Chutkan rules," Eddington told National Review.

The Justice Department did not respond to a request for comment.