

The Bank Secrecy Act Is A Bigger Threat Than FISA

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Last week the U.S. House reauthorized Section 702 of the Foreign Intelligence Surveillance Act, continuing a controversial foreign intelligence collection program. Still, reauthorization took some political arm twisting because several members wanted to add protection against warrantless surveillance under the FISA 702 program.

Section 702 authorizes the government to conduct (without a warrant) targeted surveillance of foreign persons located outside the United States. A potential problem is that the government risks catching U.S. citizens in a net of warrantless surveillance if the targeted foreign person communicates with an American.

It turns out the federal government has conducted tons of these warrantless searches—more than 200,000 in 2022 alone—of Americans’ phone calls, emails, and texts. As Rep. Andy Biggs (R-AZ) noted, the FBI “improperly searched 19,000 donors to a congressional candidate, Americans on both sides of the aisle attending political protests, journalists and political commentators, Members of Congress, other government officials, and more.”

Prior to becoming Speaker of the House, Rep. Mike Johnson (R-LA) appeared opposed to reauthorizing Section 702 without added protections for American citizens against warrantless surveillance. And although he admitted previously seeing “hundreds of thousands of abuses” of Section 702 by the FBI, Johnson recently flipped his position, deciding to vote for reauthorizing 702 without any added protections.

It's no surprise that privacy advocates are upset about this reauthorization. But while it’s good to see Congress at least debating these issues during the Section 702 reauthorization, it’s even better to see the House Judiciary Committee recognizing how the Bank Secrecy Act of 1970 enables warrantless searches of Americans’ financial records.

The BSA is an even bigger threat to the Fourth Amendment. Americans do not have to communicate with a foreign person or suspected terrorist to be wrapped up in BSA surveillance. People get wrapped up in BSA surveillance for simply spending their own money.

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Just as surveys suggest most Americans want Congress to strengthen privacy protections in Section 702 programs, surveys also suggests most Americans don't want the government monitoring their financial records.

That's encouraging news, because the framers included the Fourth Amendment to the Constitution so that Americans could be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Its inclusion was partially a response to the Stamp Act, a law passed by the English Parliament in 1765. After the Stamp Act was passed, British customs inspectors regularly ransacked American colonists' homes in search of contraband, even if they had no reason to believe the resident had violated the Stamp Act.

These are the "warrantless" searches that the colonists dreaded.

The nation's founders were not persuaded by the argument "if you're not doing anything wrong, you have nothing to fear." They understood that the people conducting those searches would be the same ones defining what "wrong" means, and that citizens would have no recourse if law enforcement changed the terms. They understood this so well, in fact, that securing protection against warrantless searches became a necessary condition for ratifying the Constitution.

And as a March 7th Judiciary Committee hearing demonstrated, the BSA has even starker implications for Americans than Section 702. Few realize it, but Fourth Amendment protection against warrantless searches no longer applies to Americans' financial records.

It's true. The BSA and the massive federal anti-money laundering framework that it spawned gives the government warrantless access to the financial records of any American with a bank account. (Actually, it's not just banks—the rule applies to transactions with all "financial institutions," broadly defined as companies ranging from jewelers to casinos.) And financial firms have been commandeered as an extended arm of law enforcement—they now report millions of customers' transactions to the federal government every year.

As I and my colleagues have long argued, the Fourth Amendment *should* apply to Americans' financial records. The time to fix this law is long overdue, and Congress can easily amend the BSA to restore this protection to Americans without unduly jeopardizing citizens' security and safety.

The Fourth Amendment is—and always was—about balance. It never guaranteed that Americans could get away with criminal activity by hiding behind a legal wall of privacy.

The whole idea was that anyone doing nothing wrong had no reason to fear government abuses. It was never intended to protect criminals, and fixing the BSA would merely restore the balance the Fourth Amendment is supposed to provide.

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