



## Is FISA 702 A Domestic Surveillance Program?

The FISA 702 database is often mischaracterized as "foreign surveillance." The confusion is understandable: after all, the *F* in FISA stands for "foreign." But FISA has always allowed for surveillance of Americans as well. Since 1978, FISA has allowed the government to surveil *individual* Americans under [Title I of FISA](#), if first, the FISA Court ("FISC") issues an order approving that surveillance, based on what is intended to be a thoroughly vetted FISA application relating to that individual. Until 2008, FISA did not allow the *programmatic* collection of millions of Americans' communications without an individualized court order, or individualized suspicion of each person being involved in a crime or being an agent of a foreign power. Until 2008, FISA also did not allow subsequent querying of U.S. person communications in NSA databases by FBI, CIA or NCTC without a warrant. That's what collection under [FISA's Section 702](#) permits. It's Section 702 that is the focus of reformers' efforts, not any purely foreign intelligence authority.

Under FISA 702's structure, NSA identifies nearly [300,000 non-US persons as "targets."](#) Individual targeting decisions are not reviewed by any court. The standard for choosing a target is not involvement in terrorism or crime, or even being an agent of a foreign power. The standard is merely whether the target is reasonably presumed to be a non-US person located outside the United States (this can, however, include [U.S. persons using a VPN](#) or Tor to access the internet), who ["possess\[es\], receive\[s\], and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory."](#) Targets therefore likely include foreign diplomats, elected officials, civil servants and business owners or employees. These positions by their nature involve contacting many other people, often U.S. persons. The targets' U.S. contacts may sometimes include people planning violence on U.S. soil, but if that's so, the proposed FISA reforms' emergency exception language will generally allow for warrantless access.

So, when hawks insist FISA 702 doesn't *target* Americans, that's technically correct but misleadingly narrow; the FISA 702 program database does in fact contain millions of communications involving U.S. persons. FISA 702's foreign targets are [only the seeds for intelligence collection](#) under this authority. If a foreign national has "*foreign intelligence information*" and is communicating only with other foreign nationals, their communications may be handled under a different, more permissive non-statutory authority, called Executive Order 12,333; but all communications collected under FISA 702 are obtained from US companies, so there is a higher chance than with EO 12333 that such a communication involves a party that is a US person. Hawks call this "incidental" collection, but it is an intentional part of the program's design. Intentional selection of a *particular* foreign target *in order to access* a particular American's communications is unlawful; but it's currently lawful to have intentionally structured a *whole program* such that it "incidentally" collects the communications of millions of Americans without a warrant, themselves not suspected of any crime, included merely because they have communicated with foreign "targets" who need not be suspected of any crime. The latest ruling in the long-running *Hasbajrami* case reinforces the reformers' case that queries of U.S. persons under FISA 702 should require a warrant. CRS thoroughly discusses this case [here](#).

Speaker Johnson relies on the notion that RISAA, the FISA renewal passed in 2024, contained "56" [\[nominal, HPSCI-proposed\]](#) "reforms." In fact, RISAA expanded enormously the already-vast scope of NSA collection under FISA 702, through the ["immigrant expansion"](#), the ["counternarcotics expansion"](#) and the ["ECSP expansion."](#) Multiple administrations have [refused even to provide an estimate](#) of the number of Americans whose communications are collected in the FISA 702 database. Given these additional expansions, we have further reason to believe that millions of Americans' Fourth Amendment rights to security from government searches or seizures have been violated by FISA 702 collection, whether or not their communications actually come up in a search during a given year.

**This is why FISA reformers say FISA 702 is a domestic surveillance program, and argue that a warrant is needed by default, in non-emergencies, to query FISA 702 for the communications of U.S. persons.**