

## Section 702 Backdoor Searches: Myths and Facts

Section 702 authorizes warrantless surveillance and therefore may only be targeted at foreigners abroad. But the surveillance inevitably sweeps in Americans' communications. Despite Congress's mandate to "minimize" the retention and use of such communications, the FBI, NSA, CIA, and NCTC routinely search Section 702-acquired data for Americans' phone calls, emails, and text messages. The FBI conducted **200,000 of these "backdoor searches" in 2022 alone** and has engaged in what the FISA Court called "widespread violations" of the rules governing such searches.

Congress should close the backdoor search loophole by requiring the government to obtain a warrant before searching Section 702 data for Americans' communications. **An independent commission appointed by President Obama, which included former acting CIA director Michael Morrell and former chief counterterrorism advisor Richard A. Clarke, unanimously [recommended](#) this reform in 2013, and the House passed amendments along these lines in [2014](#) and [2015](#).** Yet myths about this basic, commonsense solution persist.

- ❖ **Myth: Every court to review Section 702 has found the program to be constitutional.**
- ❖ **Fact: Federal appellate judges have cast doubt on the constitutionality of backdoor searches.** Among the few regular federal courts that have been able to review this question, there is a split. Four district court judges agreed with the government that backdoor searches do not require a warrant because they do not constitute a separate Fourth Amendment event from the initial collection. However, four appellate court judges — including a [unanimous panel of the Second Circuit](#) — rejected the government's argument, concluding that backdoor searches are a separate Fourth Amendment event and thus require an independent Fourth Amendment analysis.

The Second Circuit remanded the case to the district court to conduct that analysis. Although the district court has not yet issued its ruling, the Fourth Amendment usually [requires](#) the government to get a warrant when searching Americans' communications, subject only to a few exceptions. The constitutionality of backdoor searches is thus far from settled.

- ❖ **Myth: The Fourth Amendment places no limits on searches of lawfully obtained data.**
- ❖ **Fact: Courts have frequently held that the Fourth Amendment requires the government to get a warrant to search lawfully obtained data.** As the Second Circuit [stated](#) in 2018: "[C]ourts have increasingly recognized the need for additional probable cause or reasonableness assessments to support a search of information or objects that the government has lawfully collected . . . lawful collection alone is not always enough to justify a future search." For instance, even when data is obtained with a warrant, [courts](#) have [ruled](#) that officials may conduct [searches](#) of the data only for the [evidence](#) specified in the warrant. If they come across evidence of a different crime and wish to expand the search, they must get *another* warrant, despite having lawful possession of the data.
- ❖ **Myth: The FBI's internal reforms have put an end to violations of the administrative rules governing queries.**
- ❖ **Fact: Thousands of violations are continuing to occur each year, including disturbing instances of abuse.** The government [reports](#) that the FBI's rate of compliance with its own rules for backdoor searches is now 98%. But a small percentage of a huge number is still a huge number. Two percent of 200,000 adds up to *4,000 queries every year* that violate the FBI's own low standard.

The FISA Court's April 2023 opinion confirms that these violations still include alarming abuses. Since the FBI's new procedures were implemented, the FBI has conducted baseless searches for the communications of a [U.S. senator](#), a [state senator](#), and a [state court judge](#) who contacted the FBI to report civil rights violations by a local police chief.

❖ **Myth: Warrants are neither necessary nor possible when the government wishes to conduct a “defensive” search to identify possible victims.**

❖ **Fact: There is no “victim” exception to the Fourth Amendment.** The need to protect victims is not unique to Section 702. Domestic law enforcement agencies are faced with this task every day, and they manage to keep the American public safe without resorting to hundreds of thousands of warrantless searches. Instead, they use techniques that comport with the Fourth Amendment.

Where probable cause of criminal activity exists, the government [can obtain a warrant](#) to search potential victims’ communications. If getting a warrant will take too long and a person’s safety is at stake, the government can invoke the “exigent circumstances” exception to the warrant requirement. And if the government lacks probable cause, it can get the potential victim’s consent for the search — something the FBI has [successfully done](#) many times.

❖ **Myth: Warrants are neither necessary nor possible when the government seeks foreign intelligence.**

❖ **Fact: FISA was enacted for this very purpose.** In the 1960s and 1970s, the FBI justified spying on anti-war protesters and civil rights activists, including Martin Luther King, Jr., by claiming that they were linked to foreign communist groups. Congress responded by enacting FISA, which bars surveillance of Americans for foreign intelligence purposes unless the government [shows probable cause to the FISA Court](#) that the American is acting as an agent of a foreign power. The FISA Court then issues a type of warrant known as a “FISA Title I order.”

Foreign intelligence queries of Americans’ communications can and should be subject to FISA’s probable-cause requirement. Otherwise, the worst abuses of Section 702 will continue: Backdoor searches targeting [racial justice protesters](#), [19,000 donors](#) to a congressional campaign, a [U.S. congressman](#), and a [local political party](#) were all justified as efforts to find foreign intelligence.

❖ **Myth: A warrant requirement for backdoor searches would harm national security.**

❖ **Fact: The “value add” of backdoor searches is small and would not be undermined by a warrant requirement.** The government has provided multiple examples in which *surveillance of foreign targets* helped in preventing or responding to cyberattacks, espionage, and fentanyl trafficking. By contrast, the government has been able to cite only a handful of instances in which *backdoor searches for Americans’ communications* have been useful. In each of those cases, it appears that the government could have obtained a warrant, gotten the consent of the subject of the search (in cases where the subjects were victims of malign foreign activity), or invoked the emergency exception — a point [confirmed](#) by the Chair of the Privacy and Civil Liberties Oversight Board.

❖ **Myth: A warrant requirement for backdoor searches would overwhelm the courts.**

❖ **Fact: A warrant requirement would create only a modest burden on courts.** The government [acknowledges](#) that the majority of the FBI’s 200,000 yearly backdoor searches are conducted at the “earliest moments” of an investigation, during the “[assessment](#)” phase — i.e., before there is even reasonable suspicion of wrongdoing. In such cases, where the search is little more than a fishing expedition, the FBI would not attempt to get a warrant. Moreover, in many of the cases where probable cause is present, the government will *already* have obtained a warrant or a FISA Title I order to conduct surveillance of the suspect. The number of additional warrant applications that will result from a backdoor search warrant requirement is thus far less than 200,000.

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