Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

United States v. Hasbajrami and the Warrant Requirement for Certain FISA 702 Queries

March 26, 2026

Section 702 of the Foreign Intelligence Surveillance Act (FISA) (50 U.S.C. § 1881a) governs domestic electronic surveillance targeting non-U.S. persons outside the United States. Under the statute, the Attorney General (AG) and the Director of National Intelligence (DNI) "may authorize jointly, for a period of up to 1 year ... , the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." Section 702 requires that the AG and DNI, before implementing an authorization, seek approval from the Foreign Intelligence Surveillance Court (FISC) by providing the court with a certification detailing the following government procedures and attesting that they are in accordance with statutory requirements: (1) targeting procedures by which the government will seek to acquire information; (2) minimization procedures by which the government will minimize collecting U.S. person information; and (3) the querying procedures by the which the government will search collected data accord with statutory requirements. Querying can be "searching unminimized material by using a query 'term' or 'identifier,' similar to an internet search engine." Section 702 prohibits "intentionally target[ing]" persons located in the United States or a "United States person" located outside the United States, and it requires that targeting, acquisition, and querying procedures comply with the Fourth Amendment (i.e., prohibitions against unreasonable searches and seizures). Section 702 is set to expire on April 20, 2026.

In *United States v. Hasbajrami*, the U.S. District Court for the Eastern District of New York held that the Fourth Amendment requires the federal government to procure a warrant to search (i.e., query) information collected under Section 702 using a query term associated with a U.S. person (known as a U.S. person query term or identifier), even where the initial interception of information was lawfully conducted. Current practices as outlined above do not require procuring a warrant before conducting Section 702 queries using U.S. person terms. The district court in *Hasbajrami* found that querying data acquired under Section 702 using a U.S. person term or identifier constitutes a search under the Fourth Amendment and therefore presumptively requires a warrant. Under the court's analysis, the incidental or inadvertent acquisition of a U.S. person's communication under Section 702 does not automatically permit the government to search among the acquired communications without a warrant. The government must, therefore, seek court approval and establish probable cause for each query in which a U.S. person term is employed unless an established exception to the warrant requirement applies. Members of Congress and various advocacy groups have debated over the years whether Section 702 should include a

Congressional Research Service
https://crsreports.congress.gov
LSB11411

warrant requirement for querying. The district court's decision in *Hasbajrami*, which is currently on appeal for the second time before the U.S. Court of Appeals for the Second Circuit (Second Circuit), has attracted attention because it is the first court to reach such a conclusion.

This Legal Sidebar describes Section 702, the procedural history of *Hasbajrami*, the district court's February 2025 holding, and considerations for Congress.

Summary of Section 702 of FISA

FISA establishes a legal framework under which the government can seek and receive court authorization to conduct surveillance to collect foreign intelligence information in the United States. Targeting and acquisitions must generally be approved by courts *individually* (i.e., the government must seek separate court authorizations to surveil each target). Section 702 of FISA also allows the government to conduct domestic electronic surveillance of non-U.S. persons located abroad *programmatically*. Under Section 702, rather than needing to receive court approval for each target, the government can seek and receive court authorization to conduct electronic surveillance and queries within specified parameters for up to one year. The statute does not require the government to seek either a court authorization or warrant to query Section 702 data, regardless of whether a U.S. person term is used. (For an additional discussion on FISA, see this In Focus.)

United States v. Hasbajrami's Procedural Background

Initial Proceedings Before the District Court

The defendant, a lawful permanent resident, was arrested in the United States on September 6, 2011, trying to board a flight to Turkey en route to Pakistan. He was charged with attempting to provide material support to a terrorist organization. Pursuant to the statute, the government disclosed during the prosecution that it had collected the defendant's electronic communications and other evidence under FISA and that it intended to introduce such evidence at trial. Under FISA, a lawful permanent resident is considered a "United States person." After the government's disclosure, the defendant pleaded guilty to attempting to provide material support to terrorists in violation of 18 U.S.C. § 2339A and was sentenced to 180 months in prison.

After sentencing, and while the defendant was serving his prison sentence, the government revealed, "for the first time that some of the evidence it had previously disclosed from FISA surveillance was itself the fruit of earlier information obtained without a warrant pursuant to Section 702." If the evidence collected against the defendant had been collected under other FISA surveillance provisions, the government, to have obtained a court order from the FISC, would have been required to demonstrate probable cause to believe that the "target of the electronic surveillance is a foreign power or an agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." The defendant moved to withdraw his guilty plea and to suppress Section 702 evidence. The district court allowed the defendant to withdraw his guilty plea, but denied the defendant's motion to suppress. The judge determined that the incidental collection of U.S. persons' communications with lawfully targeted non-U.S. persons abroad does not trigger the warrant requirement. He eventually pled guilty, reserving his right to appeal the judge's decision to the Second Circuit.

Appeal to Circuit Court

On appeal to the Second Circuit, the defendant argued that the district court erred in denying his motion to suppress because the government's surveillance under Section 702 had violated the Fourth Amendment. He contended that government surveillance of U.S. person communications required a warrant and that the evidence collected under Section 702 should thus be suppressed.

In relevant part, the Second Circuit held that the government incidentally collecting communications of a U.S. person under Section 702 without a warrant does not run afoul of the Fourth Amendment, and that evidence resulting therefrom does not need to be suppressed at trial. The court specifically explained that

> the government may lawfully collect, without a warrant and pursuant to Section 702, the e-mails of foreign individuals located abroad who reasonably appear to constitute a potential threat to the United States and, once it is lawfully collecting those e-mails, it does not need to seek a warrant, supported by probable cause, to continue to collect e-mails between that person and other individuals once it is learned that some of those individuals are United States citizens or lawful permanent residents, or are located in the United States.

This is so, the court continued, "even if the government would have needed, but did not have, a warrant or probable cause had it sought to collect the e-mails of the American third party in the first instance." The court further held that, absent the warrant requirement, incidentally collecting e-mails under Section 702 is reasonable.

The appellate court also determined that the subsequent querying of stored Section 702 information in databases using a U.S. person term or identifier "ha[s] important Fourth Amendment implications" that "counsel in favor of considering querying a separate Fourth Amendment event that, in itself, must be reasonable." The court based its view on several considerations. First, the court recognized that other federal courts have required the government to prove "additional probable cause or reasonableness assessments" to support a search of information or objects that the government had lawfully seized. The court cited the Supreme Court's decision in *Riley v. California*, which held that the government must obtain a warrant to search an individual's cellular phone even if the phone is lawfully seized during a search incident to arrest.

Second, the court assessed querying Section 702 data in the context of the government's incidental collection of information. The amount of information the government collects, given the "vast technological capabilities of the Section 702 program," the court explained, leads the program "to look more like a dragnet" with information stored and available for use by any domestic law enforcement agency, and such queries to look "more like a general warrant." The court reiterated its reliance on the Supreme Court's decision in *Riley*, which "expressed increasing concern about the interaction between Fourth Amendment precedent and evolving government technological capabilities."

Third, the court determined that, "as a practical matter, querying is problematic because it may make it easier to target wide-ranging information about a given United States person at a point when the government knows it is investigating such a person." The court reasoned that, in light of Section 702's prohibition against targeting a United States person via targeting a non–United States person abroad, allowing the government to access expansive collections of Section 702 data about a United States person indiscriminately "without any reason to believe that the individual is involved in any criminal activity . . . or even that any information about the person is likely to be in the database" is "at odds with the bedrock Fourth Amendment concept that law enforcement agents may not invade the privacy of individuals without some objective reason to believe that evidence of crime will be found by a search." The court further stated that, against this scenario and to ensure that the privacy interests of United States persons are protected, such querying of such information should be treated as a "Fourth Amendment event" and that the query itself should be reasonable.

Lastly, the Second Circuit observed that it was important to know "who is querying what database." The court juxtaposed hypotheticals involving the Federal Bureau of Investigation (FBI) querying its own databases of lawfully collected information and the FBI querying much larger databases of other intelligence agencies developed for foreign intelligence purposes. The court presented the former as "arguably analogous to traditional law enforcement techniques" involving an agency reviewing its own files, and the latter situation as raising different concerns and many different questions, including "[w]hat kinds of querying, subject to what limitations, under what procedures, are reasonable within the meaning of the Fourth Amendment" and "when (if ever) such querying of one or more databases, maintained by an agency of the United States for information about a United States person, might require a warrant."

The court determined that it could not answer these questions in this case given "the sparse record" and remanded the case to the district court. The appellate court instructed the district court to "conduct an inquiry into whether any querying of databases of Section 702-acquired information using terms related to Hasbajrami was lawful under the Fourth Amendment."

The Second Circuit's opinion was raised during a congressional debate regarding limitations on the government's ability to query Section 702 data using U.S. person terms.

Remand to District Court

On remand, the defendant argued that "querying a Section 702 database in connection with a U.S. person generally requires a warrant, even where the initial interception was lawfully conducted." The district court agreed and began its analysis by recounting the Supreme Court's statement that "the ultimate touchstone of the Fourth Amendment," which guards against unreasonable searches and seizures, "is 'reasonableness.'" Generally, the district court continued, a law enforcement search to discover evidence of criminal activity requires a judicial warrant to be reasonable; without a warrant, "a search is reasonable only if it falls within a specific exception to the warrant requirement."

Based on the Second Circuit's opinion and additional precedent, the district court found that querying information previously acquired under Section 702, which constitutes "a separate Fourth Amendment event," presumptively requires a warrant. Lawfully acquiring information or objects, the court remarked, does not permit the government to search the acquired evidence if doing so goes beyond the original search and seizure authorization. The court therefore held that the lawful initial acquisition of defendant's communications under Section 702 did not automatically allow the government to later query that information using a U.S. person term or identifier without a warrant. Holding otherwise, the court explained, "would effectively allow law enforcement to amass a repository of communications under Section 702—including those of U.S. persons—that can later be searched on demand without limitation," which would undermine the Fourth Amendment and the warrant requirement.

The district court then addressed whether, as the government argued, the foreign intelligence exception to the warrant requirement applied to querying. The court explained that this exception allows "warrantless surveillance of individuals in the United States for foreign intelligence investigations." The court further explained that, following the Supreme Court's 1972 determination in what has become known as the "Keith" decision (where the Court held that domestic surveillance for national security purposes requires a warrant under the Fourth Amendment), circuit courts—including U.S. Courts of Appeals for the Third, Fourth, and Fifth circuits—concluded that the question left unanswered by the Keith Court (i.e., whether the warrant requirement would apply if the government were seeking information regarding activities of foreign powers or agents) led to recognizing a "foreign intelligence exception" to the warrant requirement. This exception was further adopted by the Foreign Intelligence Surveillance Court of Review (FISCR) in 2008. In determining that the exception applies to Section 702 surveillance, the FISCR concluded that: (1) "the purpose behind the surveillances order pursuant to the directives goes well beyond any garden-variety law enforcement objective" and (2) "there is a high degree of probability

that requiring a warrant would hinder the government's ability to collect time-sensitive information and, thus, would impede the vital national security interests that are at stake."

The district court, applying precedent established by the FISCR, resolved that all of the queries that yielded Section 702 were subject to foreign intelligence exception analysis, and that the government bore the burden of establishing that any searches fell within any exception to the warrant requirement. (Any potential violation of the Fourth Amendment in conducting queries that did not yield Section 702 information were deemed harmless and therefore not subject to foreign intelligence exception analysis.) The court found that the first requirement established by FISCR was satisfied because protecting national security through Section 702 surveillance and querying "serve purposes that go beyond garden-variety law enforcement." The district court determined that the second requirement was "wanting" because "the Government has not articulated how obtaining a warrant would have hindered its objective." Since the queries occurred "over the course of many months," and there was no fast-moving investigation or threat of losing evidence, the court believed that "[i]t is simply inconceivable that the government's aims would have been frustrated by securing a warrant." Accordingly, the court concluded that the foreign intelligence exception did not apply in this case to exempt the queries conducted that returned Section 702 information from the warrant requirement and that "there can be no argument that these queries were harmless." The court further concluded that, even if the exception had applied, the queries conducted were unreasonable under the Fourth Amendment. That is, the court determined that, after balancing the substantial degree of intrusion in this case with the powerful public interest, the queries conducted in this case were unreasonable even if an exception to the warrant requirement applied.

Lastly, the district court assessed that to remedy a violation of the Fourth Amendment, the court must determine whether it must exclude the improperly obtained evidence under the exclusionary rule—the rule that improperly obtained evidence must be excluded at trial—or whether the good faith exception to the exclusionary rule applies. The court explained that the Supreme Court's decision in *Davis v. United States* held that the good faith exception applies when government actors "act with an objectively reasonable good-faith belief that their conduct is lawful." The district court observed that federal agents in this case followed court-authorized minimization procedures when they conducted queries using terms associated with the defendant and that the queries took place in 2011, "long before agents could have been expected to know that the querying required a warrant." Accordingly, the court determined that the good faith exception to the exclusionary rule applies and that the evidence collected pursuant to querying Section 702 data using a U.S. person term or identifier would not be excluded. This case is currently pending appeal before the Second Circuit for a second time.

Considerations for Congress

There are a number of potential considerations for Congress in light of *Hasbajrami*. The district court's decision contradicts the FISC with regard to whether a warrant is required for the government to query Section 702 data using a U.S. person term or identifier. The district court's determination that querying stored Section 702 data using U.S. person terms presumptively requires a warrant differs from a holding by the FISC in 2024 that querying Section 702 information using a U.S. person term or identifier does not require a warrant because the "targeting, minimization, and querying procedures . . . are consistent with the requirements of the Fourth Amendment." If the Second Circuit affirms the district court's *Hasbajrami* determination, according to the FISC, a warrant would not be required to query Section 702 data using a U.S. person term, but any evidence collected under such surveillance could be excluded by a federal district court within the Second Circuit because a warrant was not procured.

The *Hasbajrami* opinion is the first federal court to hold that querying Section 702 data requires a warrant. The only other courts to rule on the constitutionality of querying Section 702 information using a

U.S. person term without a warrant held (in an unpublished opinion) that such querying "is not a separate search" under the Fourth Amendment and does not require a warrant.

Differing views have been expressed by government and private actors concerning whether the government should have to seek a warrant in order to query Section 702 data using U.S. person terms. Some argue that allowing the government to conduct these searches without court review provides an end run around the Fourth Amendment's protection against unreasonable government searches and the warrant requirement. Others object to such a requirement on the grounds that it could unduly limit government access to information that could be critical to national security. FBI Director Kash Patel, for example, testified during his confirmation hearing that "[h]aving a warrant requirement to go through [Section 702 information] in real time is just not comported with the requirement to protect American citizens." The Office of the DNI states that intelligence agencies "often run[] U.S. person queries . . . as the first step in evaluating and detecting potential threats to the homeland," at which point they "may not have probable cause" to procure a warrant. Still others argue that the existing querying procedures work as designed and that any query violations based on malice or ill or improper intent are rare. The district court's application of the foreign intelligence exception to the warrant requirement in *Hasbajrami* has also been criticized for potentially allowing the government to circumvent any warrant requirement to search Section 702 data using U.S. person terms. Commentators contend that the court was categorizing U.S. person queries as presumptively protecting national security interests, and that the government, going forward, could easily proffer reasons why procuring a warrant would unduly hinder it in acquiring time-sensitive data.

There are a number of different paths Congress can take in light of the *Hasbajrami* opinion. Congress could allow Section 702 to lapse. Without Section 702, the FISC would lack authority to programmatically authorize electronic surveillance of non-U.S. persons located abroad or querying procedures. Following expiration, the government would have to seek individual court orders under other portions of FISA to use domestic electronic communications systems to surveil non-U.S. persons abroad, and would likely have to seek individual court orders to query collected information using U.S. person terms. Congress could take no action with regard to querying and let courts develop interpretive precedent. Congress could also conduct oversight actions concerning querying under Section 702 to determine how it is implemented and whether legislative changes are appropriate.

Congress could additionally statutorily require an administrative warrant for Section 702 queries using U.S. person terms, with fewer opportunities for exceptions (thus raising the bar set by courts). The Fourth Amendment operates as a floor for protecting individual rights. Congress cannot override Fourth Amendment requirements, but it can legislate more robust protections. For example, Congress could create a foreign intelligence exception that is narrower than that applied by the district court in *Hasbajrami*. Recent bills introduced in the 119th Congress (S.3893, S.4082, and H.R.7901) propose requiring a warrant for the government to access U.S. person information procured under Section 702.

Author Information

Andreas Kuersten
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.