

## CDT Issue Brief: Intelligence Committees' FISA 702 Bills Permits Continued Abuse of US Person Queries

Recently, members of the House Permanent Select Committee on Intelligence (HPSCI) issued a [report on FISA 702](#), setting forth the outline of a FISA 702 reauthorization bill, while the Chair and Vice Chair of the Senate Select Committee on Intelligence (“SSCI”) [just introduced a similar bill](#), albeit with a shocking 12 year extension. The Intelligence Committees’ bills fail to address the serious problems with FISA 702, most notably the use of US person queries to improperly pull up Americans’ communications without a warrant. They prohibit warrantless queries only for a select set of circumstances that practically never occurs, and do not require warrants for the broad range of queries that have led to [a litany of abuse](#).

The Intelligence Committees’ bills would prohibit or require court approval only for US person queries that are conducted for an “evidence of a crime only” purpose.<sup>1</sup> Such queries are designed *only* to return evidence for criminal investigations, and are not designed in whole or in part to return foreign intelligence information. But this type of query practically never occurs: Last year the FBI conducted over 200,000 US person queries—including an estimated 8,000 noncompliant queries—yet only 16 of those 200,000 queries were classified as for an “evidence of a crime-only purpose,” ***meaning these restrictions would apply to less than one-hundredth of one percent of the FBI’s US person queries.***<sup>2</sup>

The Intelligence Committees bills generally seek to regulate querying through internal self-policing by the FBI and other agencies, an approach that has [repeatedly failed](#). Notably, ***new internal rules implemented between June 2021 and March 2022 have been proven insufficient by the continued occurrence of thousands of improper US person queries in the past year***, including publicly documented queries of a US senator, a state senator, a state judge alleging civil rights abuses by a local police chief, and multiple individuals an analyst had met through an online dating service.

The HPSCI bill also creates a purported prohibition on improper queries, but this policy would also have virtually no real-world impact. The prohibition only applies if the explicit “purpose” of the query is for a malicious cause such as stifling dissent. So long as a query’s ostensible purpose is recorded as an effort to obtain foreign intelligence information, it would be exempt from this prohibition, just as it would be exempt from a requirement for court approval.

Detailed below, the Intelligence Committees’ bills would also fail to prevent many of the most notorious publicly disclosed abuses of FISA 702, because they would continue to permit warrantless queries:

### **Example 1: Querying Hundreds of Civil Rights Protesters.**

In 2020, FBI personnel conducted US person queries of over 140 Black Lives Matter protesters.<sup>3</sup> The [FBI claimed its queries](#) of Black Lives Matter protesters would return foreign intelligence. Therefore these queries would not be classified as “evidence of a crime only queries,” and the Intelligence Committees’ bills would not prohibit such queries nor subject them to court oversight.

### **Example 2: Querying Campaign Donors.**

The FBI conducted a batch query of 19,000 donors to a Congressional campaign, [ostensibly due to concern](#) that the campaign was a target of foreign influence.<sup>4</sup> Therefore these queries would not be classified as “evidence of a crime only” queries, and the Intelligence Committees’ bills would not prohibit such queries nor subject them to court oversight.

### Example 3: Querying Members of Congress and Other Lawmakers.

The FBI has conducted queries of at least one [US Congressman](#), one [US Senator](#), and a [state Senator](#). The FBI claimed the lawmakers were targets of foreign intelligence operations.<sup>5</sup> Therefore these queries would not be classified as “evidence of a crime only” queries, and the Intelligence Committees’ bills would not prohibit such queries nor subject them to court oversight.

### Example 4: Querying a Local Political Party.

According to a [2021 compliance report](#), the FBI conducted a query of a “local political party.” The ostensible purpose of this query was to assess possible connections to foreign intelligence. Therefore the Intelligence Committees’ bills would not prohibit such queries nor subject them to court oversight because they would not be classified as “evidence of a crime only” query.

In addition to these examples, in recent years the FBI has conducted improper US person queries of a state judge alleging civil rights violations by a local police chief, journalists, and political commentators. While the limited information on these incidents in publicly-released FISA Court opinions and compliance reports does not detail the purported purpose of these queries, so long as returning foreign intelligence was listed as a purpose of the query (even if not the primary purpose), they also could be conducted under the Intelligence Committees bills without any judicial approval.

The SSCI bill also heightens the risk of abuse by extending FISA 702 for a shocking 12 years, more than double the length it has ever been allowed to operate previously. By not only leaving the status quo largely in place, but also giving the FBI and other intelligence agencies an unfettered free hand for more than a decade, the bill would facilitate even greater reckless conduct and abuse going forward.

The Intelligence Committees’ bills fail to create any meaningful safeguards that would prevent improper US person queries and halt the repeated and ongoing misuse of FISA 702. They are not an acceptable response to address ongoing harms to civil rights and civil liberties, or to stave off risk of political weaponization of surveillance and federal law enforcement. Members of Congress should reject these bills, and only support legislation reauthorizing FISA 702 if it includes a consistent warrant requirement for US person queries, such as the [Government Surveillance Reform Act](#).

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## Endnotes

- 1 Specifically, the SSCI bill prohibits queries that are “solely designed to find and extract evidence of criminal activity,” while the HPSCI report states its bill will require a warrant when queries are conducted “for the purpose of Evidence of a Crime only.”
- 2 See, Joint Statement of Privacy Groups, *Section 702 of FISA: A “Foreign Intelligence” Law Turned Domestic Spying Tool*, June 12, 2023. <https://perma.cc/7GC4-VAWQ>; See also, Office of the Director of National Intelligence, *Statistical Transparency Report Regarding use of National Security Authorities Annual Statistics for Calendar Year 2022*, April 2023. [https://www.dni.gov/files/CLPT/documents/2023\\_ASTR\\_for\\_CY2022.pdf](https://www.dni.gov/files/CLPT/documents/2023_ASTR_for_CY2022.pdf).
- 3 According to the Privacy and Civil Liberties Oversight Board this was not an isolated incident; between November 2020 and December 2021, “non-compliant queries related to civil unrest numbered in the tens of thousands.” The Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, September 28, 2023. <https://tinyurl.com/PCLOB702>.
- 4 Compliance review by the Department of Justice National Security Division later determined that a mere 8 of the 19,000 donors queried ties to foreign influence activities.
- 5 See, Memorandum Opinion and Order (FISA Ct. Apr. 11, 2023), available at <https://perma.cc/HE2X-6SCD>. See also, Charlie Savage, *New York Times*, “F.B.I. Feared Lawmaker Was Target of Foreign Intelligence Operation,” April 13, 2023. <https://www.nytimes.com/2023/04/13/us/politics/fbi-darin-lahood.html>.