

FISA “REFORM” AND REAUTHORIZATION ACT: A WOLF IN SHEEP’S CLOTHING

Despite its name, the FISA Reform and Reauthorization Act is not a reform bill. It is an anti-reform bill in disguise. Not only does it fail to rein in warrantless surveillance of Americans under Section 702; it would actually *expand* surveillance in critical respects, effectively rewarding the FBI for years of misconduct and thus encouraging even more flagrant abuse in the future.

Failure to restrict warrantless searches or prevent abuses

- **Most of the provisions under Title I, misleadingly titled “Restriction of FBI Queries,” would merely codify the status quo**—for instance, longstanding restrictions on the types of Section 702 data the FBI obtains from the NSA; prohibitions on discrimination that already exist in the Constitution; and changes the FBI made in 2021 and 2022 to its training, approval, data access, and accountability procedures.

We already know that these measures are inadequate. Even *after* the FBI implemented changes to its procedures, **violations are continuing to occur at a rate of 4,200 per year**, as [reported](#) by the FISA Court. The shocking abuses are also continuing, including recent 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.

- The bill’s marquee “reform” is a prohibition on “evidence-of-a-crime only” queries—i.e., queries in which there is no intent to seek foreign intelligence. **This provision is carefully designed to do nothing.** The FBI almost *never* labels its queries “evidence-of-a-crime only.” In 2022, out of over [200,000 queries](#), there were only [two instances](#) in which the FBI accessed Section 702 data as a result of evidence-of-a-crime only searches that would be covered by this prohibition.

Not surprisingly, **this prohibition would have done nothing to prevent the most egregious abuses we’ve seen.** Queries for communications of [Black Lives Matter protesters](#) and tens of thousands of others involved in “[civil unrest](#),” over [19,000 donors to a congressional campaign](#), [members of Congress](#), and [a local political party](#) were all labeled “foreign intelligence” queries. And because the prohibition does not apply to the NSA or CIA, it obviously would not prevent known abuses like NSA agents’ queries for [online dating prospects](#) and [potential tenants](#).

Expansions of surveillance

- **The bill dramatically expands surveillance of immigrants** by allowing entirely suspicionless searches of Section 702 data for the communications of *all people seeking to travel to the United States*, whether on student or work visas or as tourists and business travelers. People should be able to vacation, study, or work in the United States without exposing their private emails and text messages to U.S. government scrutiny. There are already plenty of vetting mechanisms in place to ensure that travelers to the U.S. don’t pose a threat to national security.
- The bill would **vastly expand the number and types of U.S. businesses who must assist the government in conducting Section 702 surveillance** by expanding the definition of “electronic communication service provider” to include entities that do not even have access to communications. Businesses far outside the tech sector, including **hotels, libraries, coffee shops**, and other businesses that provide wifi, could be compelled to structure such services to enable them to hand over communications—or entire communications streams—to the government without the ability to filter out domestic messages, threatening both the privacy of Americans and the stability of U.S. businesses.

In addition to these flaws, the bill *purports* to make it easier to combat narcotics trafficking, but in fact accomplishes nothing, by adding a superfluous new counternarcotics certification. While there is currently no certification specifically dedicated to counternarcotics, **the broad existing certifications [already permit surveillance to prevent international narcotics trafficking, including fentanyl](#).**

Presented by the Brennan Center for Justice, Center for Democracy and Technology, and Electronic Privacy Information Center. Questions? Contact goiteine@brennan.law.nyu.edu.