

UNCLASSIFIED



U.S. House of Representatives
Permanent Select Committee on
INTELLIGENCE

FISA Section 702 Debate
U.S. Person Queries into FISA Section 702 Collection

ALLEGATION: FISA Section 702 allows the government to carry out warrantless “backdoor searches” of Americans’ communications.

FACT: It takes more than a bumper sticker slogan to explain, but there is no “backdoor” and the government does not target U.S. persons under FISA Section 702. Here’s the truth:

- FISA Section 702 permits the Government to target non-U.S. persons located outside the United States who are likely to communicate or possess foreign intelligence information.
- **The law expressly forbids the Government from using FISA Section 702 to target U.S. people.** For example, even if obtaining the communications of a foreign terrorist results in the incidental collection of a U.S. person talking with the foreign terrorist, with limited exception, under FISA, the Government must get a specific court order based on probable cause to intentionally collect U.S. person communications. The Government must follow FISA Court-approved procedures to protect the identity of the U.S. person and limit how the communication may be used.
- When the Government receives communications of a non-U.S. person outside the United States—for instance, a terrorist operational commander located abroad—the Government will also receive the other side of the phone call or email. Sometimes, that person on the other end of the call may be inside the United States—for instance, the terrorist operative inside the United States who will carry out the attack. These can be the most important communications, as we want to know when overseas terrorists are calling into the United States to conduct attacks.
- **The target of the collection, however, remains the foreign person overseas.** The collection of the other side of the phone call is considered “incidental.” It remains lawful because the target of the collection was the non-U.S. person outside the United States, and the information is carefully handled pursuant to FISA Court-approved procedures.

- **Just as police officers don't have to close their eyes to evidence of a crime they don't expect to find when they search a house, NSA doesn't have to blind itself to the other side of a conversation when it monitors an overseas terrorist.**
- Under certain circumstances, the Government may use a phone number, e-mail address, or name of a U.S. person to quickly review communications it already lawfully acquired through FISA Section 702.
 - **It is important for the Government to be able to look at its own databases to help stop terrorist attacks against the United States.** For example, if FBI discovered a U.S. person planning an attack on a mall in the United States, looking for the name of that U.S. person in FBI's lawfully collected Section 702 information could uncover foreign terrorist co-conspirators talking with the U.S. person about the mall, and potentially other terrorism targets in the United States or abroad. **Similar to other law enforcement entities, it would be a costly mistake to stop the Government from reviewing its lawful collection to stop a potential attack that would result in the deaths of innocent Americans.**

ALLEGATION: The government violates Americans' constitutional rights when the agencies conduct these types of queries.

FACT: When the Government looks into its own database of lawful collection using U.S. person information, it is not a Fourth Amendment "search." The Government is not collecting any new information. Rather, the Government is simply reviewing the database of **foreign** communications it **already has in its possession**.

This act is similar to police officers looking through an evidence locker to see if evidence from past crimes might help solve an open case. The police do not violate anyone's constitutional rights because they are simply reviewing evidence *already in their lawful possession*, not carrying out a new search.

ALLEGATION: FISA Section 702 allows the government to intentionally collect Americans' phone calls and e-mails without a warrant.

Fact: Again, this is not true: FISA Section 702 already explicitly prohibits the government from intentionally going after a U.S. person and requires the government to follow the Fourth Amendment. Under FISA, to intentionally obtain the calls and emails of a U.S. person, the government must get an individual court order based on probable cause, with limited exception.

ALLEGATION: Congress should limit U.S. person queries to bring the Intelligence Community in line with traditional law enforcement practices.

Fact: In reality, changing U.S. person query practices would give *more* legal protections to terrorists than other criminals. If, for instance, the government has a court-approved wiretap on a drug dealer's cell phone and records a conversation where a second drug dealer talks about committing a murder, the police can use that phone call as evidence against the second drug dealer in a murder trial. Removing or making the IC's ability to conduct U.S. person queries would stop the government from doing the same for terrorists.

ALLEGATION: Changing the Government's ability to conduct U.S. person queries in FISA Section 702 will not harm the United States' national security.

Fact: **It would significantly and unnecessarily harm the United States' national security and put American lives at risk.** It would prevent the government from quickly linking overseas terrorist plots to attackers inside the United States. Take, for example, the 2009 New York subway plot. FISA Section 702 collection targeted against an al-Qai'da terrorist overseas revealed that the terrorist was in contact with an unknown person inside the United States—Najibullah Zazi, who had prepared backpacks of explosives to set off in the New York City subway. If the Government did not have the ability to conduct U.S. person queries, the Government would have been prohibited from running a query through its database of FISA Section 702 communications to see if any other al-Qa'ida operatives overseas were in contact with Zazi.