

FISA SECTION 702 ISSUE BRIEF: The FBI's Misuse of FISA 702 In the Past Indicates That Its Procedural Reforms Will Not Break Its Pattern of Misuse In the Future

Over the last several years, the FBI has repeatedly adopted internal reform measures, ostensibly to head off its own abuse of FISA Section 702—in particular how it conducts US person queries—but then continued to abuse the statute in the wake of those reforms. The FBI conducted an estimated 8,000 noncompliant US person queries in 2022. Improper US person queries in recent years have focused on Black Lives Matter protesters, thousands of political donors, journalists, a local political party, and a Member of Congress.¹ Recently the FBI and Department of Justice (DOJ) announced yet another set of new internal rules, and argued that, this time, these measures would prevent noncompliance and alleviate the need for significant reform to FISA 702 (and in particular, the need for a warrant rule for US person queries).² However, over the past decade, the FBI and DOJ made similar promises that new internal rules and training would address misuse of FISA Section 702, and have repeatedly failed to deliver:

Promises to Prevent Misuse With Training, Re-Training, & Revised Minimization Procedures:

- According to the [9th Semiannual Compliance Assessment](#) (dated 2013), the Office of Director of National Intelligence (ODNI) and DOJ stated that the FBI had “substantially expanded its training program” as part of a broader effort to ensure compliance.
- The [14th Semiannual Compliance Assessment](#) (dated 2016) stated that the “FBI also provided additional, formalized retraining to relevant personnel to remind them of the appropriate Section 702 query requirements.”
- After incidents involving violations of Section 702 minimization procedures in the reporting period between June and November 2017, *the FBI “addressed this matter through revisions to the FBI’s Section 702 minimization procedures,” according to the DOJ and ODNI.*³

Result: More Misuse

- In 2018, the FISA Court [reported](#) that the FBI conducted thousands of improper US person queries. These included batch queries of more than 70,000 people with access to FBI systems and facilities, as well as queries on individuals providing tips, people reporting crimes, and victims of crimes. The FISA Court reported that in December 2017, the FBI conducted over 6,800 US person queries *in a single day*, and that during the same month, it improperly reviewed information from 1,600 US person queries.
- That same FISA Court opinion described FBI personnel as displaying “fundamental misunderstandings” of the Bureau’s own rules and procedures for US person queries, and declared there was a “large number of queries evidencing a misunderstanding of the querying standard — or indifference to it.”

Further Promises to Prevent Misuse With Additional Internal Review & Oversight of Querying Procedures:

- In response to noncompliant queries reported between 2015 through 2018, the FBI in September 2018 added a requirement to its Querying Procedures to consult with an FBI attorney regarding queries whose justification was based on querying an entire group, rather than based on the need to query specific persons.
- According to the [19th Semiannual Compliance Assessment](#) (dated 2019), the oversight team from the National Security Division (NSD) at DOJ and ODNI noted that “continued oversight and training, as well as FBI’s [redacted] tool, will continue to help facilitate both the identification of review team compliance incidents and assist in the prevention of any future incidents.”
- The [20th Semiannual Compliance Assessment](#) (dated 2020) stated that the oversight team worked with the FBI to refocus training, with emphasis on complying with querying standards, and the National Security Division also conducted joint training for legal personnel on FBI’s querying procedures and additional query training at FBI field offices. The FBI also issued guidance on the query standard and how to apply it, and instructed each FBI field office to hold trainings on this guidance. *The joint oversight team consistently stated that it believes that*

¹ See, Joint Statement for the Record from Civil Rights and Civil Liberties Groups to the Senate Judiciary Committee, “[Section 702 of FISA: A “Foreign Intelligence” Law Turned Domestic Spying Tool](#),” June 12, 2023.

² “[FBI Deputy Director Highlights Bureau’s New FISA Query Accountability Procedures](#)”, FBI.gov (June 13, 2023).

³ [19th Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of FISA \(Dec. 2019\)](#) at 54.

these “continuing efforts will help facilitate both a better understanding of, and compliance with, the query requirements.”

Result: More Misuse

- Despite these new measures, FBI querying skyrocketed out of control. The ODNI [reported](#) that the FBI conducted over 1.3 million US person queries in 2020 and nearly 3.4 million in 2021.
- Compliance reviews of FBI conduct in [2019](#) and [2020](#) discovered improper US person queries on the identifiers of “multiple current and former United States Government officials, journalists, and political commentators,” as well as misuse of Section 702 to query on an identifier of a U.S. Congressman, a local political party, crime victims, and FBI maintenance and repair workers.
- In 2021 the government notified the FISA Court of compliance incidents involving queries on identifiers associated with over 100 Black Lives Matter protesters, as well as a batch query of 19,000 donors to a Congressional campaign.⁴

Promises to Prevent Misuse With New Procedures, and More Approvals and Training:

- Effective June 29, 2021, the FBI modified internal rules for systems “on which the vast majority of FBI queries of unminimized FISA-acquired information occur” so that users would have to intentionally “opt-in to running a query.”⁵
- As of June 2021, FBI personnel were required to receive approval from an FBI attorney to perform a “batch” job that includes 100 or more queries.⁶
- During this same period, the FBI adopted new internal settings for evidence-of-crime-only queries to no longer default to a negative answer, requiring users to affirmatively indicate whether or not a U.S.-person query term was used to retrieve only evidence of a crime.⁷
- The [21st](#), [22nd](#), and [23rd Semiannual Compliance Assessments](#) (all dated 2021) discuss similar remedial measures about training and guidance in response to the significant increase in noncompliance incidents.⁸ *In these assessments, the joint oversight team expressed optimism that “these changes should result in significant compliance improvements.”*

Result: More Misuse

- Despite a drop in total number of queries, improper FBI queries still occur on a shocking scale: In 2022, based on its number of queries and noncompliance rate, FBI personnel engaged in over 8,000 improper queries, an average of *over 20 every day*.⁹
- In an [April 2022 opinion](#), the FISA Court declared that “compliance problems with the FBI’s querying of Section 702 information have proven to be persistent and widespread,” and that there was “an apparently continued lack of a common understanding of how to apply the querying standard, as evidenced by queries that NSD found to have violated the standard, but that the FBI – sometimes at the management level – insisted were proper.”

The FBI and DOJ have repeatedly said that misuse of the FBI’s power to query Section 702 data can be addressed with internal reforms, such as training, re-training, higher levels of required approval and changes to minimization procedures. These reforms have repeatedly failed to deliver the protections promised. Now, the FBI and DOJ are again telling Congress that internal querying reforms that have been put in place will address current misuse. But they offer no reason to expect any better result than internal measures have provided in the past. Congress should reject these assurances and require external review of US person queries— by a judge assessing whether there is probable cause — to head off further misuse of Section 702.

⁴ Memorandum Opinion and Order (FISA Ct. Apr. 21, 2022).

⁵ *Id.* at 37.

⁶ *Id.* at 39.

⁷ *Id.* at 38.

⁸ The most recent compliance assessment dated December 2021 also discusses these “historic remedial measures” in addition to more recent training and guidance by the FBI in 2021.

⁹ See, Joint Statement for the Record from Civil Rights and Civil Liberties Groups to the Senate Judiciary Committee, “[Section 702 of FISA: A “Foreign Intelligence” Law Turned Domestic Spying Tool](#),” June 12, 2023.