

FBI's New Internal Procedures Continue to Allow Warrantless Surveillance of Americans Under Section 702

On June 13, 2023, the FBI [announced](#) internal procedural changes that are intended to increase accountability for violations of internal rules governing U.S. person queries. The changes include a “three strikes” policy for FBI agents who violate rules (although the Department retains discretion to decide what to do after the third strike) and provisions to include FISA compliance in the performance evaluations of leaders of FBI field offices.

This is not a serious response. The government wants to rely exclusively on the same kind of internal safeguards that have completely failed to protect Americans’ privacy time and time again, and has failed to meaningfully engage with the concerns expressed by lawmakers and the American public.

Simply put, this response is completely out of touch with both the level of abuse perpetrated by intelligence agencies and other serious threats to our privacy, like government agents tracking us through data brokers.

The undersigned organizations have been working through a bipartisan coalition to enact truly comprehensive privacy protections for people in the United States.

The following context illustrates why the FBI’s most recent policy change is inadequate to protect Americans’ constitutional rights:

Warrantless backdoor searches. The FBI’s changes do nothing to stop warrantless searches of Section 702-acquired data to find Americans’ communications. Any “reforms” to backdoor searches that do not involve a requirement to obtain a warrant or FISA Title I order are dead on arrival given the staggering history of abuse of this practice.

Previous internal oversight measures, which the government repeatedly touted as robust, failed to prevent [flagrant abuses](#), including 113 warrantless searches aimed at Black Lives Matter protesters; 19,000 searches for the communications of donors to a single congressional campaign; tens of thousands of searches relating to the January 6th attack on the U.S. Capitol; and a backdoor search for information about a sitting U.S. congressman. The government’s own internal oversight found all of these to be unlawful under agencies’ own existing rules.

The government then implemented additional training and oversight measures in 2021 and 2022, which it claimed would prevent the “widespread violations” the FISA Court had found. But the government’s own data showed that these changes were insufficient. According to the FBI’s [recent internal audit](#), after the FBI’s changes, the rate of non-compliance is four percent. With the FBI conducting roughly 200,000 backdoor searches annually, that means the FBI will be conducting over 8,000 backdoor searches each year that violate its own internal rules.

Coming back to the table with yet more changes to internal oversight procedures shows that the government is not serious about Section 702 reform. Promises of even perfect compliance with internal agency policies cannot replace warrants issued by a court on a showing of probable cause under any circumstances, and they are particularly inadequate given the government’s track record of violations. Congress must reject this empty solution.

Other problems with Section 702, FISA, and related surveillance. The government to date has completely failed to address the many other problems with Section 702 and FISA, as well as the legal loopholes that allow warrantless surveillance of Americans [without any statutory authorization](#). The government has offered nothing to address:

- **The flawed workings of the FISA Court.** The FISA Court suffers from a lack of adversariality in its proceedings. Although Congress in 2015 provided for the use of amici curiae in certain FISA Court proceedings, amici are still excluded from too many cases, and even when they do participate, they lack access to necessary information. Moreover, the government's submissions to the FISA Court have been filled with errors and omissions.
- **The barriers the government has thrown up to judicial review of electronic surveillance by regular federal courts.** Congress expressly provided for challenges to unlawful surveillance in both criminal prosecutions and civil litigation, but the government has thwarted them by failing to provide notice to criminal defendants and by invoking standing and state secrets privilege doctrines to shut down lawsuits, like in [Wikimedia v. NSA](#).
- **The data broker loophole.** Federal agencies are evading legal protections for Americans' privacy by buying data from data brokers that would otherwise require a warrant, court order, or subpoena to obtain, even as a [government review group reveals](#) how disturbingly widespread and threatening this practice already is.
- **Foreign intelligence collection of Americans' information without legislative and judicial safeguards.** Most foreign intelligence collection takes place overseas and wholly outside the constraints and judicial oversight mechanisms of FISA, even though it pulls in [massive amounts of Americans' communications](#) and other Fourth Amendment-protected data.
- **The overbroad scope of surveillance.** The government's ability under Section 702 to target ordinary private citizens of other nations who pose no threat to the United States has led to European courts striking down data transfers agreements, leaving U.S. companies in legal and economic peril (as shown by [Meta's recent record \\$1.3 billion fine](#) for improper data transfers).
- **"Abouts" collection (collecting communications not only to or from targets, but about them).** The NSA paused this controversial practice, which inevitably results in the collection of purely domestic communications, in 2017, but it has not ruled out restarting it.

The time for the government to get serious about reform has long passed. After months of delay, the government's only response is internal procedural changes that fall far short of the comprehensive privacy protections for Americans that are needed. Congress should not reauthorize Section 702 without major reforms to protect people in the United States from warrantless surveillance. These reforms should include, at a minimum:

- Requiring a warrant (for criminal investigations) or FISA Title I order (for foreign intelligence investigations) to search Section 702 data for Americans' communications.
- Enacting the Leahy-Lee amendment to strengthen the role of amici in FISA Court proceedings and help ensure the accuracy of government submissions (the Senate approved this amendment in 2020 by a vote of 77-19).

- Strengthening judicial review by clarifying the notice requirement, legislating standing criteria, and specifying that FISA's procedures for handling national security information in litigation override any conflicting procedures under the state secrets privilege.
- Prohibiting the purchase of Americans' data that would otherwise require a warrant, court order, or subpoena to obtain.
- Extending FISA's privacy protections to Americans' communications and other Fourth Amendment-protected information that is acquired through overseas surveillance.
- Narrowing the pool of permissible foreign targets to those who are likely to have information relevant to threats against the United States or its interests.

Signed by:

American Civil Liberties Union
Americans for Prosperity
Asian American Scholar Forum
The Brennan Center for Justice at NYU School of Law
Center for Democracy and Technology
Defending Rights & Dissent
Demand Progress
Due Process Institute
Electronic Privacy Information Center
Freedom of the Press Foundation
Project for Privacy and Surveillance Accountability
Project On Government Oversight
National Association of Criminal Defense Lawyers