

**Testimony Before The Senate Committee on Appropriations Subcommittee on Commerce,
Justice, Science, and Related Agencies
Federal Bureau of Investigation, Fiscal Year 2023**

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Chairwoman Shaheen, Ranking Member Moran, and Members of the Subcommittee, thank you for the opportunity to submit testimony. I write to you as former Representative for Virginia's 6th Congressional district, as former Chairman of the House Committee on the Judiciary, and today as Senior Policy Advisor for the Project for Privacy & Surveillance Accountability (PPSA). PPSA is a nonpartisan group of U.S. citizens who advocate for greater protection of our privacy and civil liberties in government surveillance programs.

I am here to urge you to direct the Federal Bureau of Investigation (FBI) to continue reporting, to Congress and the public on an annual basis, a single number that is critical to understanding the impact of warrantless, foreign intelligence surveillance on Americans. Specifically, PPSA calls on Congress to permanently establish transparency into how often the FBI knowingly searches through foreign intelligence databases to specifically find information about Americans and their communications. These so-called "U.S. person queries" are transforming one of the most powerful and invasive surveillance authorities — Section 702 of the Foreign Intelligence Surveillance Act (50 U.S.C. 1881a) — into a means of circumventing the Fourth Amendment by allowing FBI agents to review warrantlessly acquired communications of and records about Americans.

Section 702 has been increasingly controversial since its passage in 2008. The provision's title reflects the explicit purpose for which Congress passed it: to authorize the government to target "certain persons outside the United States other than United States persons." In other words, this authority was designed *only* to authorize the surveillance of non-Americans who are outside the United States. It was promoted as an authority designed to counter terrorism. Unfortunately, we now know the government has turned its back on both of these guiding principles, and that Section 702 is functioning very differently, and for very different purposes, than Congress intended.

Through declassified Foreign Intelligence Surveillance Court (FISC) opinions and other government disclosures, the public has since learned that Americans' information is also swept up as a consequence of warrantless Section 702 surveillance — what intelligence agencies call "incidental" collection. After this U.S. person information ends up in government databases, the

FBI searches it specifically for information about Americans and their communications. These U.S. person queries mean the FBI can warrantlessly obtain, review, and use the private communications of Americans who are in no way suspected of criminal activity or any wrongdoing.

One could be forgiven for assuming that the FBI would cross this line — searching foreign intelligence information, obtained under a warrantless authority, for information specifically protected by the Fourth Amendment — in only the most extreme cases, and only with strict adherence to applicable laws and rules. Sadly, this is not the case. As early as 2014, the Privacy and Civil Liberties Oversight Board disclosed that FBI agents search through this information as a matter of “routine practice.” But Congress and the public have only recently had access to the FISC opinions that reveal what this “routine practice” really looks like, and it is chilling. The following is an excerpt from a declassified, November 2020 FISC opinion:

NSD has reported a number of compliance incidents that were discovered during oversight reviews at FBI field offices, which suggest that the FBI’s failure to properly apply its querying standard when searching Section 702-acquired information was more pervasive than was previously believed. For example, between April 11, 2019, and July 8, 2019, a technical information specialist in the [redacted] who was conducting “limited background investigations” conducted approximately 124 queries of Section 702-acquired information using the names and other identifiers of: 1) individuals who had requested to participate in FBI’s “Citizens Academy” — a program for business, religious, civic, and community leaders designed to foster greater understanding of the role of federal law enforcement in the community; 2) individuals who needed to enter the field office in order to perform a particular service, such as a repair; and 3) individuals who entered the field office seeking to provide a tip or to report that they were victims of a crime.

In other words, looking only at instances where overseers actually caught improper use of Section 702-acquired information, we know FBI agents have used U.S. person queries to wrongfully spy on “business, religious, civic, and community leaders” who were voluntarily participating in the FBI’s *own* program and, even worse, *victims of crimes*.

The same FISC opinion, like others, goes on to describe the FBI’s systematic failure to obtain court orders before reviewing the contents of Americans’ communications, which Congress statutorily required in certain circumstances in January 2018. Congress established this requirement after an outpouring of public concern that Section 702 information — a foreign intelligence surveillance authority explicitly designed to target non-Americans located overseas — might wrongfully be used in criminal contexts. The cases in which the FBI failed to abide by

Congress's express requirement to get a court order before accessing the contents of communications even included "health-care fraud" that, the FISC took time to note, was not "related to national security." These and "a number of similar violations" were discovered during oversight reviews of seven — out of 56 — FBI field offices. Accordingly, without additional reporting from the FBI, the public cannot be certain about the full scope of these violations or their impact on Americans.

A report released by the Office of the Director of National Intelligence (ODNI) on April 29, 2022, is cause for grave concern. In it, the FBI disclosed a long-awaited number: how many times the FBI knowingly searched through Section 702 databases to find information about Americans and their communications. From December 2019 through November 2020, the FBI conducted these U.S. person queries up to 1,324,057 times. The government reports this as a maximum figure because of continued weaknesses in the FBI's ability to track their own agents' use of this information. Even more alarming, from December 2020 through November 2021, the FBI nearly tripled its U.S. person queries, conducting up to 3,394,053.

These are astounding figures, and the government's explanations create more concerns than they answer. The ODNI cites, for instance, a large number of FBI queries relating to foreign cyber actors. The FBI searched through this Section 702 information using "terms related to potential victims — including U.S. persons," and the ODNI report says this "accounted for the vast majority of the increase in U.S. person queries." But Congress and the public are left to ask: Why did the FBI conduct the other million or more U.S. person queries, and to what effect? How many innocent Americans' emails did the FBI read after these millions of searches? Is cybersecurity why Congress passed Section 702 into law, and does the increasing frequency of cybersecurity incidents mean the FBI's U.S. person queries will triple again, and again, and again?

As former Chairman of the House Committee on the Judiciary, I know better than most how challenging it can be to conduct oversight of the surveillance authorities Congress passes into law. I know firsthand that over time, the government may use those laws for purposes well beyond what Congress ever envisioned. And we have all seen the tendency of intelligence agencies to use these laws to sweep up more and more information for more and more purposes — especially when there isn't adequate transparency around their use.

Transparency around U.S. person queries will not stop any of this surveillance — but it will empower Congress and the public with the data necessary to better understand the impact of foreign intelligence surveillance on Americans' privacy.

Meanwhile, the ODNI report confirms that the FBI is finally counting how many times it searches this Section 702 data for information about Americans and their communications, as the

FISC has ordered them to. The report further confirms that this number of U.S. person queries can be released to the public in a manner consistent with national security.

That is why, on behalf of PPSA and a broad coalition of civil society groups, I support requiring the FBI to continue reporting how many times it knowingly searches for information about Americans and their communications on an annual basis by including the following bill text:

Report on Warrantless Searches of United States Person Information.

(a) Not later than 180 days after the date of enactment of this Act, and before May of each subsequent year, the Federal Bureau of Investigation shall deliver to the committees of jurisdiction, and make publicly available, a report detailing how many queries of information acquired under Section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a) using United States person selectors were performed during the preceding year.

(b) Definitions.—

Committees of jurisdiction.—In this section, the “committees of Jurisdiction” refer to the:

- House and Senate Committees on Appropriations
- House and Senate Committees on the Judiciary
- House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence

Thank you for the opportunity to address the Subcommittee.

Sincerely,

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