

Timeline of Selected Legal and Constitutional Violations in Programs Operated under Section 702

Below is a timeline of a small selection of the legal violations the government has committed in its collection, dissemination, and use of data under Section 702 since it was added to FISA in 2008 (for a more comprehensive list of violations between 2008-2017, see [this chart](#)). This timeline only includes violations that the government admitted to the Foreign Intelligence Surveillance Court (“FISC”) or, in one case, tacitly admitted by retroactively complying with a statutory requirement. Note: This timeline is not current past November 2020 because the government has not yet released all of the transparency documents that describe Section 702 compliance violations for the period beginning after November 2020.

A small fraction of the government’s total violations were addressable by making technical changes to the systems used for obtaining and handling Section 702 data, but most were not. More broadly, **the volume, nature, and severity of the violations and the government’s record of withholding key information from the FISC demonstrate that the current oversight regime and civil liberties protections for Section 702 programs are not sufficient to ensure those programs operate in accordance with the statute and the Constitution.**

NSA Admits to Collecting Wholly Domestic Communications

2008-2011: The NSA violated Section 702 and the Fourth Amendment by knowingly collecting “a very large number” of certain wholly domestic communications (including emails) and communications concerning Americans with no direct connection to a surveillance target, and then failing to apply appropriate minimization rules to those communications after collecting them.¹ Even though the NSA had been collecting this data since before Section 702 even became law, the government omitted that fact from its disclosures to the FISC and “materially misrepresented” the scope of its collections when annually asking the court to approve its Section 702 collection and minimization rules²—approval which expressly rested on the understanding that the offending collections were not occurring.³ The FISC found that the NSA’s actions violated both the statute and the Fourth Amendment. To bring its activities into compliance with the law, the NSA agreed in 2012 to add new minimization rules that put limits on how the data could be accessed and searched⁴ (although, as described below, NSA did not ultimately comply with them).

Department of Justice Fails to Give Required Notice to Criminal Defendants

2008-2013 (likely ongoing): The government violated FISA by failing to give statutorily required notice to criminal defendants who’d been prosecuted with evidence derived from surveillance under Section 702.⁵ This violation came to light not through FISC oversight processes but because the issue incidentally came up in oral arguments before the Supreme Court in October 2012. A small number of defendants were given this notice from 2013-2018, but we are not aware of DoJ providing any further Section 702 notices in the past 4 years.

NSA Commits “Widespread” Violations of Section 702 Minimization Rules and the Government Exhibits an “Institutional Lack of Candor” About it with the FISC

2012-2016: The NSA committed “widespread” violations of the minimization rules it had agreed to in 2012 to limit the impact of its Section 702 surveillance on Americans and address the constitutional and statutory problems with

¹ [REDACTED], FISA Ct. Oct. 3, 2011, at 73 [hereinafter Bates 2011 Opinion].

² [REDACTED], FISA Ct. Sep. 25, 2012, at 2.

³ Bates 2011 Opinion at 72.

⁴ [REDACTED], FISA Ct. Nov. 30, 2011.

⁵ Patrick C. Toomey, [Why Aren’t Criminal Defendants Getting Notice of Section 702 Surveillance — Again?](#), Just Security (December 11, 2015); [Notice of Intent to Use FISA Information](#), U.S. v. Al-Jayab, No. 1:16-cr-00181 (N.D. Ill. 2016).

its collections.⁶ Among other serious violations, the NSA routinely searched for Americans' communications in databases that were specifically prohibited from being searched for information on Americans. The government failed to discover the problem for years and then waited months to inform the FISC about its true scope, leading the court to decry the government's "institutional lack of candor."⁷ By this point, **the NSA had been operating its Section 702 program in violation of the Constitution and the statute for eight years.**

FBI Conducts Thousands of Unlawful Searches on Americans

2017-2019 (likely ongoing): The FBI violated the FISC-approved rules for handling Section 702-acquired data by conducting thousands of searches of that data for information on Americans without complying with the rules for conducting such searches.⁸ Among these were: thousands of searches using social security numbers; searches using identifiers for more than 70,000 "communication facilities" (such as email addresses) of people associated with the FBI; and searches on people who had come in to provide a tip or report that they were a victim of a crime, people who requested to participate in an FBI program to help inform community leaders about the FBI's work, and people who needed to enter an FBI office to perform services, like repairs.⁹ These were found after only a small fraction of the FBI's searches were audited. The FISC says 3 million searches were run in one FBI system alone in 2017, while less than 340,000 searches were audited by DoJ personnel.¹⁰ The FISC also held that these serious, repeated violations indicated that the FBI's search practices didn't comply with FISA or the Fourth Amendment.¹¹

FBI Violates Section 702's Extremely Limited Court Order Requirement

2018-2021 (likely ongoing): The FBI has comprehensively violated a statutory requirement, passed by Congress in 2018, to obtain an order from the FISC in certain circumstances before reading Section 702-acquired data about Americans in criminal investigations unrelated to national security. Although the compliance burden would be miniscule—the requirement applies only in extremely narrow circumstances that represent a tiny fraction of the FBI's annual searches of Section 702 data—as of November 2021, the FBI had never sought such an order,¹² despite admitting that it should have done so for more than 100 searches, including in investigations relating to domestic matters like health-care fraud, gangs, public corruption, and bribery.¹³

FBI Tries to Avoid Counting its Warrantless Searches of Americans

2018: The FBI attempted to side-step a statutory transparency requirement, put in place by Congress in 2018, that the government record each time its investigators searched through Section 702-acquired data for information on Americans.¹⁴ Despite a clear instruction from Congress—which was responding to longstanding public outcry about the impact of FISA surveillance on Americans' privacy—and unlike other agencies that use Section 702 data, the FBI proposed that it just keep a tally of all of its searches, which would have defeated the purpose of the transparency: to help measure the impact of Section 702 surveillance specifically on Americans.¹⁵ Both the FISC and the FISA Court of Review (to whom the FBI had appealed the matter) refused to approve the FBI's proposal and instead required it to comply with the terms of the statute by specifically counting its searches on Americans.¹⁶ In 2021, that figure was estimated by the FBI at up to 3.4 million.¹⁷

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⁶ [REDACTED], FISA Ct. Apr. 26, 2017.

⁷ Id. at 19.

⁸ [REDACTED], FISA Ct. Oct. 18, 2018, at 68-69 & 80 [hereinafter Boasberg 2018 Opinion].

⁹ Id. at 68-69; [REDACTED], FISA Ct. Dec. 6, 2019, at 65-69 [hereinafter Boasberg 2019 Opinion]; [REDACTED], FISA Ct. Nov. 18, 2020, at 39-40 [hereinafter Boasberg 2020 Opinion].

¹⁰ Boasberg 2018 Opinion at 72-74.

¹¹ Id. at 80.

¹² Boasberg 2019 Opinion at 69-72; Boasberg 2020 Opinion at 42; [Statistical Transparency Report, CY2020](#), Office of the Director of National Intelligence at 21 (Fig. 9); [Statistical Transparency Report, CY2021](#), Office of the Director of National Intelligence at 22 (Fig. 10).

¹³ Boasberg 2020 Opinion at 42.

¹⁴ Boasberg 2018 Opinion at 49.

¹⁵ Id. at 52.

¹⁶ Id. at 61-62; [In Re: DNI/AG 702\(h\) Certifications 2018](#) [REDACTED], FISA Ct. Rev. July 12, 2019.

¹⁷ Statistical Transparency Report, CY2021, Office of the Director of National Intelligence at 21 (Fig. 9).