Dear Chair Franklin and Board Members DiZinno, Felten, LeBlanc, and Williams:

Thank you for inviting comment on the Privacy and Civil Liberties Oversight Board’s (the “Board”) Oversight Project to examine the surveillance program that the Executive Branch operates pursuant to Section 702 of the Foreign Intelligence Surveillance Act (FISA). The Board plays a critical role investigating intelligence activities that affect civil liberties of U.S. persons, exercising oversight, offering advice, and providing transparency to the public.

The Board’s examination of Section 702-related activities is an important opportunity to inform Congress and the public about the extent and significance of known violations of the applicable rules and laws, about unclear and unknown violations, and about a variety of other aspects of this surveillance that are necessary to inform impending, major policy decisions. This examination further provides a rare opportunity to make recommendations to intelligence agencies regarding their use of Section 702. Accordingly, we urge the Board to specifically investigate the following questions, disclose specific additional information, and issue the following recommendations.

I. The Board should release assessments comparing the volume of records CIA, FBI, NCTC, and NSA acquire pursuant to Section 702 and the records to which these agencies have access in exchange for anything of value absent a court order

Since the Board’s last report on Section 702, Congressional inquiries and investigative reporting have unearthed a disturbing and opaque practice: government agencies buying their way around the Fourth Amendment. One recent report revealed that “[m]ultiple branches of the U.S. military have bought access to a powerful internet monitoring tool that claims to cover over 90 percent of the world’s internet traffic, and which in some cases provides access to people’s email data, browsing history, and other information such as their sensitive internet cookies.”¹ Agencies engaging in this practice include, at least, the Department of Defense, Department of Homeland Security (including Customs and Border Protection and Immigration and Customs

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Enforcement), the Drug Enforcement Administration, the Federal Bureau of Investigation (FBI), the Internal Revenue Service, and the Secret Service.2

The FBI, which has multiple contracts with data brokers and modified its agreement with one in the immediate aftermath of the murder of George Floyd,3 has a particularly disturbing track record as it relates to Section 702, discussed further in Section III. As Congress and the public generally consider whether and with what changes Section 702 should be reauthorized next year, it will be critical to have a trusted, public assessments of:

(1) the volume of information the FBI is acquiring pursuant to Section 702 relative to the volume of information it is acquiring or acquiring access to in exchange for anything of value without a court order;
(2) the extent to which the FBI is purchasing records or access to records to which it has or could have access pursuant to Section 702; and
(3) the extent to which Section 702 produces for the FBI records to which it has access through the purchase of records or access to records.

This information would at least inform policymakers of the relative use and value of these two methods of acquiring information in certain contexts, including the extent to which the FBI may be circumventing privacy protections that would apply to data were it to be acquired under Section 702.

Further, the Board should assess to what extent the FBI’s purchase of records or access to records may inform its nomination decisions under Section 702 and how Section 702 information may guide its purchase of information or access to it — either of which could supercharge these practices and significantly change the civil liberties implications of reauthorizing Section 702.

Although the National Security Agency (NSA) has not been directly implicated in the purchase of records that would otherwise require a court order to compel the production of, the Department of Defense has.4 And although the Central Intelligence Agency (CIA) and National

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4 Joseph Cox, “Pentagon Surveilling Americans Without a Warrant, Senator Reveals,” Motherboard (Vice), May 13, 2021,
Counterterrorism Center (NCTC) have also not been directly implicated, other revelations relating to a still-secret report by the Board about CIA activities under Executive Order 12333 appear alarmingly consistent with the practice of purchasing records, in particular that the CIA’s activities occur “without any of the judicial, congressional or even executive branch oversight that comes with FISA collection.” To the extent that the CIA, NCTC and NSA similarly engage in the purchase of records or access to records that could be obtained pursuant to Section 702, the Board should make the same assessments identified above.

II. The Board should investigate and disclose additional information about a recently revealed Inspector General report into SIGINT misuse, recommend minimum punitive measures for misuse, and recommend additional transparency around such activity

On November 1, 2022, Bloomberg News revealed a 2016 report by the NSA Office of the Inspector General (IG) that examined misuse of SIGINT systems. While the Board should generally supplement the available public record on agencies’ violations of Section 702 minimization procedures, FISC orders, and statutes, the Board should also examine and disclose information about the activities at the heart of this report in particular, which the IG report says involve “the possible violation of Titles I and/or VII of the Foreign Intelligence Surveillance Act.” Title VII of FISA, as the Board is aware, includes Section 702, and the unredacted details underscore the likelihood of Section 702’s involvement.

The IG report described “substantiated” complaints from 2013 that an NSA analyst “had improperly tasked United States Person (USP) [redacted] phone numbers [redacted] for collection,” allegedly “without proper authorization and without a foreign intelligence purpose.” The whistleblower who alleged misuse further “claimed that the tasking records [redacted] had been improperly entered [redacted].” Alarmingly, officials with knowledge could not determine whether the activity violated the law because, “many of them told the OIG, they did not understand the work [redacted] performed.”


8 Id at 1-2.

9 Id.

10 Id.
The Inspector General concluded that the whistleblower’s allegations were “[s]ubstantiated,” and that the:

activities resulted in, or were at least reasonably likely to result in, the unauthorized collection of communications to or from USPs or persons in the United States, or both. The preponderance of the evidence supports the conclusion that, by doing so, and failing to report the non-compliant activity, [redacted] violated the classified annex of DoD Regulation 5240.1-R, Procedures Governing the ACTivities of DoD Intelligence Components that Affect United States Persons and its classified annex, NSA/CSS Policy I-23, United States Signals Intelligence Directive (USSID) SP0018, Legal Compliance and U.S. Minimization Procedures, and USSID SP0019, NSA/CSS Signals Intelligence Directorate — Oversight and Compliance Policy.12

In addition to the aforementioned possible violation of Title VII, the IG report also specifically stated that “[t]he overarching authorities [redacted] violated are Executive Order (EO) 12333, United States Intelligence Activities, and Department of Defense (DoD) Directive 5240.01, DoD Intelligence Activities.”13

As the Board is aware, under FISA a “person is guilty of an offense if he intentionally— (1) engages in electronic surveillance under color of law except as authorized by this chapter” or “(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this chapter.”14 This criminal act “is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both.”15

Despite the potentially severe civil liberties impacts and apparent criminality of the activities described in this report, the Inspector General’s recommendations were redacted, and the public remains in the dark as to what consequences, if any, stemmed from these actions — nearly seven years after the report was issued, and over nine years since the original allegations reached the OIG.

One of the doubts most pernicious to the public’s faith in the integrity of intelligence surveillance remains the unflinching lack of meaningful accountability for individuals involved in deliberate violations of civil liberties. Some of those instances involve disturbingly individualized invasions of privacy, like instances of LOVEINT, in which some of the people violating the rules in the interest of spying on romantic partners faced mere “administrative action.”16 Others involve programmatic surveillance at a scale so staggering it still eludes full public understanding, like that which occurred under massive and unconstitutional surveillance program codenamed

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11 Id at 2.
12 Id.
13 Id.
15 50 U.S.C. 1809(c).
Stellar Wind.\textsuperscript{17} Distrust is further fueled by lies and misleading statements, like when then-Director of National Intelligence James Clapper infamously testified to the Senate that the government does “not wittingly” collect records of millions of Americans — while the bulk telephone metadata dragnet was still operating in secret.\textsuperscript{18}

Three months after the original allegations at the center of the IG report, The Wall Street Journal reported: The “NSA said in a statement Friday that there have been ‘very rare’ instances of willful violations of any kind in the past decade, and none have violated key surveillance laws. ‘NSA has zero tolerance for willful violations of the agency’s authorities’ and responds ‘as appropriate.’”\textsuperscript{19} Although this now appears to be untrue on its face, the Board now has the unique opportunity to examine and disclose how the NSA responded to these substantiated allegations.\textsuperscript{20} The Board should also examine whether the whistleblowing source of the allegations, who was forced to take extraordinary steps to trigger any meaningful oversight of the activities in question,\textsuperscript{21} faced any adverse actions for reporting the SIGINT misuse.

Unfortunately, in the absence of information that only the Board can provide in time for the upcoming legislative debate around Section 702, the public has strong reason to believe even these “egregious”\textsuperscript{22} and “reckless”\textsuperscript{23} abuses eluded meaningful accountability, even though the IG concluded the activities, described by concerned colleagues as “blatantly improper,”\textsuperscript{24} “did in fact target and collect such communications” (of or about United States persons).\textsuperscript{25}

In the interest of assuring the public that individuals who abuse their access to Section 702 and Section 702 information are held accountable, the Board should further recommend that the CIA, FBI, NCTC, and NSA adopt mandatory minimum consequences for employees who misuse Section 702 and Section 702 information, that these minimums be made public, and that relevant actions taken against individuals be made public with only necessary redactions.

\textsuperscript{19} Gorman, supra note 16.
\textsuperscript{20} Notably, the person whom the Office of the Inspector General investigated responded to its tentative conclusions by writing, among other things, “OK, so if I am doing something, what of it?” IG Report app. N at 4.
\textsuperscript{21} See id at 12-37.
\textsuperscript{22} Id app. N at 17.
\textsuperscript{23} Id at 53.
\textsuperscript{24} Id app. C2 at 4.
\textsuperscript{25} Id at 48.
III. The Board should recommend a complete prohibition on warrantless U.S. person queries by the FBI

The FBI’s mission extends to both intelligence and law enforcement efforts, which renders its access to Section 702 information and its ability to nominate selectors for targeting potentially more concerning and more directly consequential to U.S. persons’ civil liberties than the CIA, NCTC, and NSA, at least as the impacts are likely to be felt by an individual U.S. person. In brief, the possibility of a counterintelligence agent tipping a law enforcement agent off based on information that will likely never face adversarial process in court, for instance, has profound policy implications — which sets the FBI apart from other agencies.

The FBI’s abject and well-documented failure to abide by the laws and rules that govern access to Section 702 information is therefore extremely disturbing, and this inability to comply with Congressionally and judicially mandated safeguards merits a prohibition on its use of U.S. person queries, which the Board should recommend as soon as possible.

U.S. person queries occur when the government knowingly searches unminimized information (including both communications content and noncontent) acquired pursuant to Section 702 using search terms that relate to a U.S. person. This presents acute civil liberties concerns that cannot be meaningfully ameliorated, and as practiced today can directly convert intelligence information into investigative material for law enforcement to use, even in cases that do not involve national security. The practice further flouts Congress's explicit original intent and the public’s general understanding of FISA, reflected in Section 702’s statutory title: “Procedures for targeting certain persons outside the United States other than United States persons.” In 2018, however, Congress stipulated limited circumstances in which the FBI may conduct these queries for exclusively criminal purposes, and required the government to establish procedures that “include a technical procedure whereby a record is kept of each United States person query term used for a query.” Importantly, the Annual Statistical Transparency Report issued by the Office of the Director of National Intelligence (ODNI) for 2021 began reporting the FBI’s use of U.S. person queries.

The CIA, NCTC, and NSA collectively conducted under 10,000 U.S. person queries of unminimized communications content obtained under Section 702 each year in 2019, 2020, and 2021. From December 2019 — November 2020 and December 2020 — November 2021, however, the FBI conducted up to 1,324,057 and 3,394,053 U.S. person queries, respectively. Although there are some variations in how each agency tracks these queries, none come close

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29 ODNI Transparency Report at 19.
30 Id.
31 Id at 21.
to explaining the extreme discrepancy — or to mitigating the massive civil liberties impacts the FBI’s use of U.S. person queries results in.\textsuperscript{32}

Dramatically exacerbating the volume of FBI’s use of U.S. person queries — which in 2014 the Board described as a matter of “routine practice” “[w]hen an FBI agent or analyst initiates a criminal assessment or begins a new criminal investigation related to any type of crime”\textsuperscript{33} — is the fact that the FBI has apparently never complied with the statutory requirement to obtain a FISA Court order. As the ODNI describes:

Congress required FBI to obtain an order … before accessing the contents of Section 702-acquired communications when:

(1) the communications were retrieved using a U.S. person query term;
(2) the query was not designed to find and extract foreign intelligence information; and
(3) the query was performed in connection with a predicated criminal investigation that does not relate to national security.\textsuperscript{34}

These overlapping facts are deeply alarming and depict a system that is disturbingly ripe for abuse — and the most recently publicly available opinions from the FISA Court reveal this abuse is already happening. To take one of the most disturbing publicly known instances of misuse:

[B]etween 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.\textsuperscript{35}

In other words, in one three-month period a single FBI analyst unlawfully queried Section 702 information 124 times, violating an unknown number of people’s privacy — specifically U.S. persons who were trying to work with the FBI as community leaders, U.S. persons performing

\textsuperscript{32} Id at 19-22.
\textsuperscript{34} ODNI Transparency Report at 22.
services for the FBI, and U.S. persons who were victims of crimes. This is unconscionable, and it is all the more alarming considering such errors were not isolated and appear to have been discovered during oversight reviews of only seven\textsuperscript{36} — out of 56\textsuperscript{37} — field offices.

To borrow the FISA Court’s phrasing, the issues identified and how they were identified “suggest that the FBI’s failure to properly apply its querying standard when searching Section 702-acquired information [is] more pervasive than was previously believed.”\textsuperscript{38} The current capacity of one rogue FBI agent to effect staggering civil liberties violations through the misuse of Section 702 information is too great, and the FBI’s history of refusing to comply with the law too long. The Board should recommend a complete prohibition on the FBI’s use of U.S. person queries, and should further recommend the timely completion and declassification of oversight reviews of all FBI field offices’ use of Section 702 information.

IV. The Board should investigate and disclose how many times and under what circumstances Section 702 information has been and may be used in criminal contexts, and to what degree it is used to pressure U.S. persons to act as informants

The government’s use of Section 702-acquired information in criminal contexts and for the purposes of recruiting informants remains opaque. Simply put, Congress and the public cannot have an adequately informed policy debate around this controversial authority’s reauthorization in the absence of transparency into how it may be or has been used against them or their neighbors.

Meaningful transparency into the use of Section 702 information must reflect both the degree to which it is used in criminal contexts, including for lead or tip purposes, and for the purposes of coercing U.S. persons into acting as informants. In the absence of both, policymakers can have no reliable sense of whether Section 702 information and Section 702-derived information does not show up in criminal contexts because the FBI successfully wields it to pressure individuals into serving as informants in efforts to avoid being criminally prosecuted, or whether its use in criminal contexts is frequent or rare. Both have massive impacts on U.S. persons’ civil liberties.

Existing transparency requirements provide virtually no insight into either of these uses. Even if, for instance, the FBI fully complied the law that governs its agents’ access to Section 702 information — which, as previously discussed, it does not — it would still fail to reflect these actual uses of information, because the law (similar to relevant FISA Court orders) only requires tracking when a query is made “in connection with a predicated criminal investigation … that does not relate to the national security of the United States.”\textsuperscript{39}

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\textsuperscript{36} November 2020 FISC Opinion at 43.
\textsuperscript{37} See FBI Field Offices, Dep’t of Justice, January 3, 2022, [https://www.justice.gov/jmd/fbi-field-offices](https://www.justice.gov/jmd/fbi-field-offices).
\textsuperscript{38} November 2020 FISC Opinion at 39.
\textsuperscript{39} 50 U.S.C. 1881a(f)(2).
It would be difficult to overstate the significance for a U.S. person’s civil liberties of the potential use of Section 702 information in criminal contexts and its relation to pressuring individuals to act as informants.\(^4\) As one point of context, the FBI searched Keith Gartenlaub’s house in January 2014, as The Washington Post reported, “searching for evidence that Gartenlaub, an information technology manager at Boeing, had leaked computer information about the defense contractor’s C-17 military transport plane to people acting on behalf of China.”\(^5\) Instead of charging him with being a spy, the government charged him with “possession and receipt of child pornography,” securing a conviction that December.\(^6\) Notably, Gartenlaub continues to deny these charges, appeal his conviction, and has asserted he believes he was targeted because his wife is Chinese American and because he has family in China — as millions of U.S. persons do.\(^7\) The Washington Post has further found significant evidence that government claims used to secure the warrant in question were deeply flawed.\(^8\) In any event, at Gartenlaub’s initial court appearance, “prosecutors indicated a willingness to reduce or drop the child pornography charges if he would tell them about the C-17, said Sara Naheedy, Gartenlaub’s attorney at the time.”\(^9\) Meanwhile, like others who have had FISA-derived evidence used against them, he is unable to meaningfully review or effectively challenge the underlying application or information therein, turning foundational concepts of the American justice system on their head.\(^10\)

Although Gartenlaub’s case is not publicly known to involve Section 702, it demonstrates the tremendous impact the potential permeation of information acquired pursuant to and derived from Section 702 could have on U.S. persons’ civil liberties, in particular at the nexus of criminal prosecutions and coercion of informants, now and in the future. The Board has the opportunity to help identify or put to rest the growing concerns among U.S. persons that FISA surveillance could be unfairly used against them.

The Board should examine and provide the public with the greatest amount of information possible about: the rules that govern criminal uses of Section 702 information against U.S. persons, including the use of any information that the government derived from Section 702 information or that the government would not have but-for Section 702; the frequency with which


\(^{42}\) Id.


\(^{44}\) Id.

\(^{45}\) Nakashima, supra note 41.

\(^{46}\) See Nakashima, supra note 43.
is occurs; and the extent to which this information is used to coerce U.S. persons into acting as informants.

V. The Board should investigate and disclose the degree to which acquiring a U.S. Person or person in the United States’s communications or information is permitted before triggering the “reverse targeting” threshold

In January 2018, speaking in support of reauthorization of Section 702, then-Majority Leader McConnell said on the Senate floor: “Make no mistake--section 702 does not allow the targeting of American citizens, nor does it permit the targeting of anyone, no matter their nationality, who is known to be located here in the United States.”47 This distinction has been key to Congress’s willingness to authorize surveillance pursuant to Section 702 since its initial passage.

Although Section 702 prohibits “intentionally target[ing] a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States,”48 the public deserves clarity as to what this threshold means in practice, including as it may relate to the FBI’s nomination of selectors and the FBI’s receipt of “unminimized and unevaluated data.”49

To accurately consider the impacts on their constituents and neighbors, policymakers and the public need to know if the reverse targeting prohibition is, in practice, implemented as a prohibition on targeting for the sole purpose of obtaining the communications of or information about a U.S. person, or if it is permissible for this to be a primary purpose, among other possibilities. The public, in turn, has a right to know at what point surveillance of U.S. persons is a permissible intended outcome of Section 702 targeting, if not the only intended outcome, especially considering the practical impossibility of identifying and challenging FISA surveillance in criminal contexts.

The Board should further disclose information about how this prohibition is implemented on a more practical level. It would help inform policymakers and the public, for instance, to know what percentage of selectors nominated by the FBI were subsequently reviewed and determined to be violative of the reverse targeting prohibition, how many targets have been reviewed for this purpose, and by whom. However, this information would be misleading in the absence of additional information about what degree of intentionality is permitted-in-practice by the reverse targeting prohibition.

48 50 U.S.C. 1881a(b)(2).
The Board should also examine and disclose information about how often two related scenarios occur: the NSA disclosing to the FBI that a target has entered the United States, as provided for by the NSA’s minimization procedures, and the waiver of destruction requirements for information acquired pursuant to Section 702. In the latter case, if the NSA determines that targeting a selector has “unintentionally acquired domestic communications, or has acquired communications that must be treated as domestic communications,” NSA minimization procedures require the purge of those communications. However, the Director of the NSA may approve a written “Destruction Waiver” with “sufficient facts to allow the Director to make an appropriate decision on a communication-by-communication basis.” The frequency of this practice is important for Congress and the public to understand in the interest of assessing to what degree destruction waivers permit the retention of information that the government may not be permitted to acquire if it had accurate information at the outset.

VI. Conclusion

This Board’s timely investigation of these issues, issuance of recommendations, and broader examination of Section 702 represents a unique opportunity to inform Congress and the public about key questions of civil liberties impacts on U.S. persons ahead of the debate over whether and, if so, with what reforms to reauthorize Section 702 of FISA. We appreciate the opportunity to offer these comments on that critical work.

Respectfully submitted,

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51 Nat’l Security Agency Training, supra note 48 at 67.

52 Id.