

THE ORANGE COUNTY
REGISTER

Time to end the FBI's FISA follies

Patrick Eddington

May 25, 2023

Late last Friday, the Office of the Director of National Intelligence (ODNI) released a heavily redacted April 2022 Foreign Intelligence Surveillance Court (FISC) opinion and order dealing with the highly controversial FISA Section 702 intelligence collection program, which is set to expire on New Year's Eve 2023. The report detailed several abuses of the program committed by the FBI.

For instance, between late 2016 and early 2020, an FBI component trolled the Section 702 database for information on "individuals listed in local police homicide reports, including victims, next-of-kin, witnesses, and suspects," despite the lack of any connection to a hostile foreign actor or an actual federal crime.

Another FBI element searched the Section 702 database in June 2020 for information on 133 people connected "with civil unrest and protests between approximately May 30 and June 18, 2020." That, of course, was the peak period of street protests against the murder of George Floyd by officers of the Minneapolis Police Department. It was a fresh example of the FBI looking for information on people engaged in First Amendment-protected activities.

Yet another FBI employee ran "13 queries of individuals suspected of involvement in the January 6, 2021 Capitol breach...to determine whether these individuals had foreign ties." and another FBI employee ran some "23,132 separate queries using U.S. person terms" in order "to find evidence of possible foreign influence, although the analyst conducting the queries had no indications of foreign influence related to the query terms used."

If this sounds a lot like the findings of former Special Counsel John Durham that the FBI had no legitimate basis to open an investigation of the Trump campaign, it's because it is very much like it.

Most outrageously, the April 2022 FISC opinion notes one FBI analyst conducted a batch query for over 19,000 donors to a congressional campaign. The FISC opinion noted that the analyst who ran the query "advised that the campaign was a target of foreign influence, but [the Department of Justice's National Security Division] determined that only eight identifiers used in the query had sufficient ties to foreign influence activities to comply with querying standard."

It was outside the FISC's purview to ask whether the congressional candidate received a defensive briefing from the FBI about the alleged foreign influence operation. It *is* within the purview of multiple congressional committees to ask that and other related questions about this episode, and they should do so immediately.

Defense contractors were the subject of some 467 queries, despite the fact that "there was no specific information indicating that the named companies were being targeted by foreign adversaries."

There are many other examples of such surveillance and investigative overreach in the FISC opinion, but by now you probably get the idea.

So, were any government officials sanctioned for these violations? No.

While Judge Rudolph Contreras occasionally offered criticisms or admonishments to the FBI and the National Security Agency (NSA) – which also had its share of violations of Section 702 – Contreras’s solution to the problems he catalogued was to impose still more reporting requirements on the FBI and NSA.

Given that these and related violations have been going on almost since the day the FISA Section 702 provision was signed into law in 2008, how the imposition of additional reporting requirements will in any way prevent further violations of the law – and unauthorized domestic spying on Americans – remains a great mystery.

Contreras did offer that, given the history of FBI compliance violations in accessing stored Section 702 data, “it may become necessary to consider other responses, such as substantially limiting the number of FBI personnel with access to unminimized [i.e., raw, unredacted] Section 702 information.”

Setting aside the question of whether or not FISA Section 702-derived data has ever been responsible for stopping an attack on the United States (and there is no well documented example in the public record of that being the case), there’s a much better way to ensure FBI compliance with FISA Section 702 in the future: require FBI agents to get a probable cause-based warrant from a federal judge to access said data.

This is, after all, the standard required by the Fourth Amendment – and it has been the lowering of that standard by the Congress in 2008 via enactment of FISA Section 702 that has made these serial FBI and NSA violations of the rights of Americans possible in the first place. Absent such a reform, opponents of FISA Section 702 should do all they can to ensure it ends at 12:01am on January 1, 2024.

Former CIA analyst and ex-House Senior Policy Advisor Patrick Eddington is a senior fellow at the Cato Institute.