

How to Fix the FBI

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SUMMARY

The FBI's chilling record of politicized abuses and the executive branch's continuing misuse of federal intelligence authorities to target the exercise of free speech and other constitutional rights of Americans gives Congress clear and compelling grounds for enacting forceful reforms, starting with the FBI. In fact, the time is ripe for Congress to consider a complete reconstruction of the FBI, defining the scope of its jurisdiction, refocusing its mission on traditional law enforcement, and putting it under effective control. Short of that comprehensive reform, Congress must, at the very least, put in place the minimum set of proposed reforms outlined in this paper, and reauthorization of the Foreign Intelligence Surveillance Act's Section 702 offers a perfect vehicle for doing so.

KEY TAKEAWAYS

The executive branch's misuse of federal intelligence authorities gives Congress clear and compelling grounds for enacting forceful reforms, starting with the FBI.

Congress should define the scope of the FBI's jurisdiction, refocus its mission on traditional law enforcement, and put it under effective control.

At the very least, Congress must adopt a minimum set of critical reforms necessary to safeguard America's freedoms.

Select a Section 1/0

The liberty of the American people is under threat from politicized national security agencies, exemplified by the abuses of the Federal Bureau of Investigation. Congress must act to restrain and reform the FBI and mitigate this threat to our cherished freedoms.

There is good reason to rethink the entire idea of the FBI at a fundamental level—to start over from scratch and reconstruct the Bureau in a new form, one refocused on its core law enforcement responsibilities, brought under effective control and oversight, and subject to the structural restraints needed to protect the constitutional rights of Americans.

After laying out the need for fundamental reform, this paper describes the general elements that would be involved in rebuilding the FBI and offers options for Congress's consideration. We at The Heritage Foundation stand ready to assist with the foundational research and analytical work needed to flesh out the components of a serious plan for the Bureau's reconstruction.

Whether or not Congress decides to advance a comprehensive package for reimagining the FBI, there still remains an urgent imperative for Congress to act without delay to end the weaponization of the FBI and the misuse of intelligence authorities. We describe below the minimum set of reforms we believe must be enacted. The push this year for legislation reauthorizing Section 702 of the Foreign Intelligence Surveillance Act (FISA)¹

U.S.C. § 1881a, <https://www.law.cornell.edu/uscode/text/50/1881a> (accessed June 26, 2023).

provides a useful opportunity for congressional action. Any reauthorization of Section 702 must include meaningful reforms.

The Need for Reform

Once America's premier domestic law enforcement agency, dedicated to protecting the American way of life from organized crime and terrorist conspiracies, the FBI has now become an adversary of freedom in the eyes of many Americans, misappropriated for partisan political purposes, abusing its national security powers for the suppression of free expression and religious dissent and for the harassment of law-abiding citizens.

After 9/11, the FBI took on a new prime directive: to detect unfolding plots and prevent the next terrorist attack before it happens, not just to investigate evidence of suspected crimes after the fact. That was an understandable reaction to the intelligence lapses of the pre-9/11 years, when the FBI had been deliberately walled off from the latest foreign threat-assessment information collected by federal intelligence agencies, even information about suspicious activities in the U.S.

But in the years since 9/11, the Bureau has expanded the scope and use of its own intelligence-gathering powers in dangerous ways, directing them increasingly at political

movements that threaten the Washington establishment and at the exercise of constitutionally protected rights by ordinary Americans.

The recently published Durham Report²

Special Counsel John H. Durham, Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns, May 12, 2023, <https://www.justice.gov/storage/durhamreport.pdf> (accessed June 26, 2023). Cited hereafter as Durham Report.

officially confirms what was already widely known: Without any proper or credible predicate, the FBI launched a partisan political effort to derail the 2016 presidential campaign of Donald Trump while simultaneously acting to protect Trump's Democratic rival, Hillary Clinton, from serious legal jeopardy.

Under the cloak of a "counterintelligence" investigation codenamed Crossfire Hurricane, FBI Director James Comey, Deputy Director Andrew McCabe, and the FBI's leadership team employed the Bureau's powerful intelligence-gathering authorities to target the Trump election campaign. Relying on frivolous and unsubstantiated claims of collusion between Russia and the Trump campaign, including the wildly ludicrous fantasies set out in the so-called Steele Dossier, an opposition-research product commissioned by Democratic Party operatives (which may itself have been Russian influenced), Director Comey and the FBI advanced the Russia collusion narrative through deliberate leaks of information to the media, misleading statements to Congress and the public, and a falsified application for secret FISA surveillance of Trump associate Carter Page.³

See *ibid.*, pp. 9–12, 17–18, 46–68, 73, and 99–243; Editorial, "Why the Durham Report Matters to Democracy," *The Wall Street Journal*, May 16, 2023, <https://www.wsj.com/articles/john-durham-report-special-counsel-fbi-donald-trump-hillary-clinton-russia-peter-strzok-christopher-steele-d4a01d4e> (accessed June 26, 2023). See also Eric Tucker, "Ex-FBI Lawyer Admits to False Statement During Russia Probe," *Associated Press*, August 19, 2020, <https://apnews.com/article/election-2020-b9b3c7ef398d00d5dfee9170d66cefec> (accessed June 26, 2023); John Solomon, "FBI Email Chain May Provide Most Damning Evidence of FISA Abuses Yet," *The Hill*, December 5, 2018, <https://thehill.com/hilltv/rising/419901-fbi-email-chain-may-provide-most-damning-evidence-of-fisa-abuses-yet> (accessed June 26, 2023); John Solomon, "Collusion Bombshell: DNC Lawyers Met with FBI on Russia Allegations Before Surveillance Warrant," *The Hill*, October 3, 2018, <https://thehill.com/hilltv/rising/409817-russia-collusion-bombshell-dnc-lawyers-met-with-fbi-on-dossier-before/> (accessed June 26, 2023); Editorial, "The FBI Knew RussiaGate Was a Lie—But Hid That Truth," *New York Post*, June 11, 2022, <https://nypost.com/2022/06/11/the-fbi-knew-russiagate-was-a-lie-but-hid-that-truth> (accessed June 26, 2023).

In a December 2019 report, the Inspector General of the U.S. Department of Justice (DOJ) excoriated Comey and the FBI for their conduct of Crossfire Hurricane, particularly the FISA application targeting Carter Page.⁴

U.S. Department of Justice, Office of the Inspector General, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation, Oversight and Review Division Report No. 20-012, December 2019, <https://www.justice.gov/storage/120919-examination.pdf> (accessed June 26, 2023).

The Durham Report has now amplified those damning indictments.

The Durham Report also exposes the political bias and double standards applied by the FBI in giving favorable treatment to Hillary Clinton and her campaign. Just when he was

ramping up the Crossfire Hurricane investigation in the summer of 2016, Director Comey took upon himself the unilateral authority to make (and to announce publicly) the ultimate decision not to prosecute Clinton for her mishandling and deletion of sensitive State Department emails,⁵

See press release, “Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton’s Use of a Personal E-Mail System,” Federal Bureau of Investigation, July 5, 2016, <https://www.fbi.gov/news/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system> (accessed June 26, 2023) Stephen Collinson and Tal Kopan, “FBI Director: Hillary Clinton ‘Extremely Careless’ but No Charges Recommended,” CNN, updated July 6, 2016, <https://www.cnn.com/2016/07/05/politics/fbi-director-doesnt-recommend-charges-against-hillary-clinton/index.html> (accessed June 26, 2023).

a usurpation of prosecutorial power by the FBI director that violated DOJ’s well-established policies and lines of authority.⁶

“Comey’s decision to depart from longstanding Department practice and publicly announce the FBI’s declination recommendation without coordinating with the Department was an unjustified usurpation of authority.... [B]y making this public announcement about the FBI’s charging recommendation...he effectively made the decision for the prosecutors because it would thereafter have been virtually impossible for them to make any other decision.” U.S. Department of Justice, Office of the Inspector General, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election, Oversight and Review Division Report No. 18-04, June 2018, p. 244, <https://www.justice.gov/file/1071991/download> (accessed June 26, 2023).

Durham also reports that in 2016, FBI leadership, demonstrating its political bias, put the brakes on four criminal investigations opened by FBI field offices into potential foreign influence on the Clinton Foundation and gave the Clinton campaign a special “defensive briefing” about the risk of infiltration by Russian actors that was denied to Trump.⁷

See Durham Report, pp. 9–10, 56 (footnote 236), 70–73, 77, 79–81, and 298.

As the report states:

The speed and manner in which the FBI opened and investigated Crossfire Hurricane during the presidential election season based on raw, unanalyzed, and uncorroborated intelligence reflected a noticeable departure from how it approached prior matters involving possible attempted foreign election interference plans aimed at the Clinton campaign.⁸

Ibid., p. 9.

Meanwhile, John Brennan, the Obama Administration’s director of the Central Intelligence Agency (CIA), briefed President Obama, Vice President Biden, Attorney General Loretta Lynch, and FBI Director Comey on information available to the Intelligence Community indicating that candidate Clinton had approved a plan “to vilify Donald Trump by stirring up a scandal claiming interference by the Russian security services” in the election.⁹

Ibid., pp. 81 and 85.

Shockingly, Comey did not ensure that that information was passed along to all of the FBI agents who were actively pursuing the Trump–Russia collusion investigation he had greenlighted.¹⁰

Ibid., pp. 87–88 and 97.

Thus, most of the FBI investigators Comey and McCabe unleashed on the Trump campaign were never told that the U.S. government had reason to know the claims on which the investigation was based may have been stirred up by the Clinton campaign.

Even after Trump was elected, Comey and other senior Obama Administration officials continued their efforts to undermine the new President and weaken his Administration. Intercepted conversations between the Russian ambassador and incoming National Security Adviser Michael Flynn were leaked to *The Washington Post* with the intent of driving Flynn out of government. The leaks succeeded, forcing Flynn's departure within a few weeks of President Trump's inauguration. To date, no one has been held accountable for those leaks. Comey also engaged in leaks of confidential conversations with the President to the news media in order to pressure DOJ leadership to appoint a special counsel to carry on the investigation into assertions of Russian collusion with Trump.¹¹

See Stephen Collinson, "James Comey Hoped Leak Would Lead to Special Counsel on Russia," CNN, updated June 8, 2017, <https://www.cnn.com/2017/06/08/politics/james-comey-testimony-donald-trump/index.html> (accessed June 26, 2023).

The abuses persisted long after Comey's team was gone. In the lead up to the 2020 presidential election contest between President Trump and his Democratic challenger Joe Biden, the FBI warned Twitter and Facebook to be on the watch for an expected dump of Russian disinformation designed to influence the election. It was in part because of those warnings that the social media platforms suppressed dissemination of the *New York Post's* exposé of the Hunter Biden laptop even though the FBI had had custody of the laptop for many months and had already determined that its contents were true and authentic.¹²

See Jesse O'Neill, "FBI Pressured Twitter, Sent Trove of Docs Hours Before Post Broke Hunter Laptop Story," New York Post, December 19, 2022, <https://nypost.com/2022/12/19/fbi-reached-out-to-twitter-before-post-broke-hunter-biden-laptop-story/> (accessed June 26, 2023); Michael Shellenberger @shellenberger, "Twitter Files: Part 7, The FBI & the Hunter Biden Laptop," Twitter, December 19, 2022, 11:09 AM, <https://twitter.com/shellenberger/status/1604871630613753856> (accessed June 26, 2023); Catherine Herridge and Graham Kates, "Copy of What's Believed to Be Hunter Biden's Laptop Data Turned Over by Repair Shop to FBI Showed No Tampering, Analysis Says," CBS News, November 21, 2022, <https://www.cbsnews.com/news/hunter-biden-laptop-data-analysis/> (accessed June 26, 2023). See generally video of hearing on "The Twitter Files," Committee on the Judiciary, Select Subcommittee on the Weaponization of the Federal Government, U.S. House of Representatives, March 9, 2023, <https://judiciary.house.gov/committee-activity/hearings/hearing-weaponization-federal-government-twitter-files> (accessed June 26, 2023).

Then 51 former senior national security officials chimed in with a very public letter intended to benefit Joe Biden's campaign by convincing the leading news outlets and major social media platforms to treat the laptop story as a Russian lie. Recently released emails reveal that this effort was organized by former Acting CIA Director Michael Morrell, and it played off the intelligence community credentials of former CIA Director Brennan and dozens of others to give candidate Biden "a talking point to push back on Trump on this issue," which Joe Biden used effectively in the presidential debates.¹³

See Natasha Bertrand, "Hunter Biden Story Is Russian Disinfo, Dozens of Former Intel Officials Say," Politico, October 19, 2020, <https://www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo-430276> (accessed June 26, 2023); John Solomon, "'Premeditated and Admitted Lie': Intel Pros Slam Biden Laptop Letter After Bombshell Revelation," Just the News, updated May 5, 2023, <https://justthenews.com/accountability/political-ethics/ex-cia-boss-wrote-colleague-hunter-biden-laptop-letter-talking> (accessed June 26, 2023); Paul Sperry, "Shock Poll: 8 in 10 Think Biden Laptop Cover-Up Changed Election," Tipp Insights, August 24, 2022, <https://tippinsights.com/shock-poll-8-in-10-think-biden-laptop-cover-up-changed-election/> (accessed June 26, 2023) (finding 79

percent of Americans believe a truthful interpretation of the laptop's origins would have changed the election's outcome more in favor of Trump).

Further, relying on bogus sources like the Hamilton 68 website, the FBI pressured social media companies to report and suppress many more social media accounts as “Russian influenced” than the companies themselves believed was justified.¹⁴

See Joseph A. Wulfsohn, “Latest Twitter Files Show Media, Dems Relied on Single Source Alleging ‘Russian Bot’ Activity: ‘It Was a Scam,’” Fox News, January 28, 2023, <https://www.foxnews.com/media/latest-twitter-files-show-media-dems-relied-single-source-alleging-russian-bot-activity-scam> (accessed June 26, 2023); Allie Griffin, “Latest ‘Twitter Files’ Show FBI Bullied Executives Over Not Reporting ‘State Propaganda’ Enough,” New York Post, December 18, 2022, <https://nypost.com/2022/12/18/latest-twitter-files-show-fbi-questioned-executives-over-users-spouting-state-propaganda/> (accessed June 26, 2023).

Since 2020, the FBI has expanded its efforts to pressure social media platforms to censor domestic speech. FBI agents have flagged social media content as “misinformation” or “disinformation”—often targeting posts raising concerns about election integrity or questioning the Biden Administration’s pronouncements on COVID-19 and the COVID vaccines. Recently disclosed documents show how the FBI, along with elements of the Department of Homeland Security (DHS), enlisted the cooperation of the social media platforms and nonprofit and academic organizations to block, downgrade, or “shadow ban” the offending social media accounts.¹⁵

See Matt Taibbi, “Capsule Summaries of All Twitter Files Threads to Date, with Links and a Glossary,” Racket News, January 4, 2023, <https://www.racket.news/p/capsule-summaries-of-all-twitter> (accessed June 26, 2023); Matt Taibbi @mtaibbi, “Thread: The Twitter Files, Part Six: Twitter, the FBI Subsidiary,” Twitter, December 16, 2022, 4:00 PM, <https://twitter.com/mtaibbi/status/1603857534737072128> (accessed June 26, 2023); Adam Klein, “The Problem With ‘Disinformation,’” City Journal, July 15, 2022, <https://www.city-journal.org/the-problem-with-disinformation> (accessed June 26, 2023).

In addition, the FBI has aided Attorney General Merrick Garland’s campaign to investigate parental protests at school board meetings as potential cases of “domestic terrorism.”¹⁶

See Memorandum from Attorney General Merrick Garland to Director, Federal Bureau of Investigation; Director, Executive Office for U.S. Attorneys; Assistant Attorney General, Criminal Division; and United States Attorneys, “Subject: Partnership Among Federal, State, Local, Tribal, and Territorial Law Enforcement to Address Threats Against School Administrators, Board Members, Teachers, and Staff,” October 4, 2021, <https://www.justice.gov/ag/page/file/1438986/download> (accessed June 26, 2023); Letter from Representative Jim Jordan, Ranking Member, Committee on the Judiciary, U.S. House of Representatives, to The Honorable Christopher A. Wray, Director, Federal Bureau of Investigation, November 18, 2021, <https://www.documentcloud.org/documents/21116065-540729288-2021-11-18-jordan-to-wray-re-threat-tag-1> (accessed June 26, 2023) (detailing the FBI’s use of counterterrorism procedures against concerned parents at local school board meetings).

It also has directed its resources toward the arrest of pro-life protesters (many exercising their sincere religious beliefs) at abortion clinics under the Freedom of Access to Clinic Entrances (FACE) Act¹⁷

See, for example, press release, “Eleven Charged with FACE Act Violations Stemming from 2021 Blockade of Mount Juliet Reproductive Health Clinic,” U.S. Department of Justice, U.S. Attorney’s Office, Middle District of Tennessee, October 5, 2022, <https://www.justice.gov/usao-mdtn/pr/eleven-charged-face-act-violations-stemming-2021-blockade-mount-juliet-reproductive> (accessed June 26, 2023); Kaelan Deese, “DOJ Official Touts Prosecution of Anti-Abortion Advocates While Vandalized Pregnancy Centers Await Justice,” Washington Examiner, December 14, 2022, <https://www.washingtonexaminer.com/news/justice/doj-official-admits-to->

prosecuting-pro-life-advocates (accessed June 26, 2023); FACE Act, 18 U.S.C. § 248, <https://www.law.cornell.edu/uscode/text/18/248> (accessed June 26, 2023).

while at the same time failing to take action against violent activists on the political left like Antifa rioters.¹⁸

See Aruna Viswanatha and Sadie Gurman, “Almost Half of Federal Cases Against Portland Rioters Have Been Dismissed,” *The Wall Street Journal*, updated April 15, 2021, <https://www.wsj.com/articles/almost-half-of-federal-cases-against-portland-rioters-have-been-dismissed-11618501979> (accessed June 27, 2023); Just the News Staff, “Antifa-Led Portland Rioter Charged with Assault Police [sic] Has Case Dismissed After Community Service,” *Just the News*, updated December 30, 2021, <https://justthenews.com/government/courts-law/antifa-led-portland-rioter-charge-assault-police-has-case-dismissed-after> (accessed June 27, 2023).

The Bureau has also diverted agents to the investigation of the January 6 riots at the expense of other pressing law enforcement priorities like child trafficking.¹⁹

See Miranda Devine, “FBI Hero Paying the Price for Exposing Unjust ‘Persecution’ of Conservative Americans,” *New York Post*, September 21, 2022, <https://nypost.com/2022/09/21/fbi-hero-paying-the-price-for-exposing-unjust-persecution-of-conservative-americans/> (accessed June 26, 2023).

The Biden Administration has lost track of some 85,000 child migrants who were allowed entry into the U.S. as unaccompanied minors, and there is no doubt many of these children are being trafficked within our country as sex slaves or slave laborers.²⁰

See Testimony of Tara Lee Rodas, Health and Human Services Whistleblower and Federal Inspector General Employee, Presented to the Subcommittee on Immigration Integrity, Security, and Enforcement of the House Committee on the Judiciary, April 26, 2023, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/rodas-testimony.pdf> (accessed June 27, 2023); Hannah Dreier, “As Migrant Children Were Put to Work, U.S. Ignored Warnings,” *The New York Times*, April 17, 2023, <https://www.nytimes.com/2023/04/17/us/politics/migrant-child-labor-biden.html> (accessed June 27, 2023); Hannah Dreier, “Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.,” *The New York Times*, updated February 28, 2023, <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html> (accessed June 27, 2023).

Stopping these outrages and arresting the perpetrators of these horrible crimes should be the highest priority for FBI investigators.

In a similar vein, the FBI’s Richmond, Virginia, field office recently issued an intelligence bulletin identifying what it called “radical-traditionalist Catholic” churches as potential hate groups, based on claims from the Southern Poverty Law Center (SPLC), even though the FBI had officially renounced reliance on the SPLC’s “hate group” accusations.²¹

See Tyler O’Neil, “Whistleblower Docs: FBI Cites Southern Poverty Law Center in Report on ‘Radical-Traditionalist Catholic Ideology,’” *The Daily Signal*, February 8, 2023, <https://www.dailysignal.com/2023/02/08/whistleblower-docs-fbi-cites-southern-poverty-law-center-in-report-on-radical-traditionalist-catholic-ideology/>.

This intelligence bulletin was rescinded by FBI headquarters the day after it was publicly disclosed by a whistleblower.²²

See Tyler O’Neil, “Exclusive: Latin Mass Churchgoers Witnessed Suspicious Activity After FBI’s ‘Radical-Traditionalist Catholic’ Memo,” *The Daily Signal*, April 30, 2023, <https://www.dailysignal.com/2023/04/30/exclusive-fbi-agents-appear-place-traditional-catholic-church-surveillance-sources-say/> (“After a whistleblower published the memo on Feb. 8, the FBI’s national office rescinded it on Feb. 9.”).

Further, in a push to alter the culture within its ranks and advance “diversity, equity, and inclusion” goals, the Bureau has reportedly relaxed its standards of fitness and appearance,

introducing personnel policies that have caused the disaffection and loss of valuable agents who embodied the traditional virtues of the FBI.²³

See Kerry Pickett, "FBI Insiders Say Agents Who Took a Knee During BLM Protests Were Rewarded," The Washington Times, September 29, 2022, <https://www.washingtontimes.com/news/2022/sep/29/fbi-insiders-say-agents-who-took-knee-during-blm-p/> (accessed June 27, 2023).

In a recent congressional hearing, the Select Subcommittee on the Weaponization of the Federal Government highlighted how the FBI has retaliated against special agents who complained about the Bureau's misguided priorities and who made the difficult decision to come forward as whistleblowers.²⁴

Video of "Hearing on the Weaponization of the Federal Government," Committee on the Judiciary, Select Subcommittee on the Weaponization of the Federal Government, U.S. House of Representatives, May 18, 2023, <https://judiciary.house.gov/committee-activity/hearings/hearing-weaponization-federal-government-2> (accessed June 27, 2023).

On the FISA front, beyond its abuse of FISA surveillance in the Crossfire Hurricane investigation of the Trump campaign, the FBI has also repeatedly abused its access to the data collected through the FISA Section 702 program for the purpose of acquiring information about American citizens or lawful permanent residents of the U.S. (collectively known as "U.S. persons" under FISA) even though Section 702 was designed for national security surveillance of foreign threats to the U.S.

While Section 702 surveillance is targeted only at the communications of foreigners who are reasonably believed to be located outside the United States, the non-targeted end of those communications can be in the U.S., so the surveillance may therefore incidentally capture information about U.S. persons. Heretofore, the FBI has been allowed to query the Section 702 database for U.S.-person information in connection with counterintelligence and counterterrorism investigations and certain other criminal matters related to national security.

However, materials recently unsealed by the federal district court judges assigned to sit on the Foreign Intelligence Surveillance Court (FISC or FISA court) reveal that the FBI has improperly queried the database more than 278,000 times, including to gather information about U.S. persons who were crime victims, suspected January 6 rioters, people arrested at Black Lives Matter protests, and even 19,000 donors to a congressional candidate.²⁵

See Devlin Barrett, "FBI Misused Surveillance Tool on Jan. 6 Suspects, BLM Arrestees and Others," The Washington Post, May 19, 2023, <https://www.washingtonpost.com/national-security/2023/05/19/fbi-digital-surveillance-misuse-jan6-blm/> (accessed June 27, 2023) ("FBI misused surveillance tool").

In fact, before this most recent disclosure of unsealed FISC materials, it was already well known that FBI personnel had repeatedly failed to comply with court-ordered procedures to limit searches for information about Americans in the 702 database.²⁶

See, for example, U.S. Department of Justice and Office of the Director of National Intelligence, Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and Director of National Intelligence, Reporting Period: June 1, 2019–November 30, 2019, September 2021, p. 5,

<https://www.intelligence.gov/assets/documents>

[/702%20Documents/declassified/23rd_Joint_Assessment_of_FISA_for_Public_Release.pdf](#) (accessed June 27, 2023) (noting a “large number of query errors” by the FBI despite the “focused and concerted effort by FBI personnel to comply with the requirements of Section 702”).

Moreover, although the FBI committed to various remedial measures to address its poor record of compliance, including new guidance on when the FBI could query the database,²⁷

Press release, “FBI Releases FISA Query Guidance,” April 24, 2023, <https://www.fbi.gov/news/press-releases/fbi-releases-fisa-query-guidance> (accessed June 27, 2023).

those measures do not appear to have been successful. In an April 2022 opinion unsealed and publicly released on May 19, 2023, a federal judge sitting on the FISA court expressed exasperation with the FBI’s continued abuses of the 702 database and warned that if the abuses did not stop, the court would be forced to order the FBI to change its practices.²⁸

See Barrett, “FBI Misused Surveillance Tool on Jan. 6 Suspects, BLM Arrestees and Others.”

Earlier declassified FISC opinions from 2019 and 2020 revealed that FBI personnel had searched Section 702 information for a variety of other improper purposes, including investigating people who visited an FBI office to perform maintenance, college students who applied for the FBI Collegiate Academy, and people seeking to participate in FBI’s Citizens Academy program for local community leaders.²⁹

Memorandum Opinion and Order Regarding Section 702 2019 Certification, Foreign Intelligence Surveillance Court, December 6, 2019, pp. 66–67,

https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2019_702_Cert_FISC_Opinion_06Dec19_OCR.pdf (accessed June 27, 2023); Memorandum Opinion and Order Regarding Section 702 2020 Certification, Foreign Intelligence Surveillance Court, November 18, 2020, pp. 39–40,

https://www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_FISC%20Cert%20Opinion_10.19.2020.pdf (accessed June 27, 2023).

There were also reports that the FBI had specifically queried the name of a Member of Congress, Representative Darin LaHood (R–IL), which, along with the recent revelation that the FBI queried the database for information about political donors, raises the very troubling specter that Section 702 is misused for partisan purposes.³⁰

See press release, “LaHood Addresses Need for FISA Reform,” Office of Representative Darin LaHood, March 9, 2023,

<https://lahood.house.gov/2023/3/lahood-addresses-violations-and-need-for-fisa-reform> (accessed June 27, 2023).

This disturbing record of abuses should dispel any question about the need for forceful reforms of the FBI at the earliest opportunity.

Reimagining the FBI from the Ground Up

As the preceding recitation of facts establishes, there is a compelling case for Congress to undertake a comprehensive plan to reconstruct the FBI from its foundations and to consider as part of that plan the possibility of limiting and focusing the FBI’s authorities

and placing strong structural controls on the Bureau for the preservation of American liberty.

Today, the FBI exercises virtually unconstrained authority to investigate potential violations of any one of the vast and growing panoply of federal crimes, other than those whose enforcement is assigned by statute exclusively to another agency.³¹

See “The Attorney General’s Guidelines for Domestic FBI Operations,” September 29, 2008, pp. 7–9, <https://www.justice.gov/archive/opa/docs/guidelines.pdf> (accessed June 27, 2023).

The Framers of our Constitution presumed that law enforcement would continue to be, as it was in 18th century America, almost entirely a state responsibility. They never would have conceived of a federal law enforcement authority with the FBI’s sweeping mandate.

In addition to its criminal law enforcement jurisdiction, the FBI has authority to address all manner of threats to national security, including international terrorism and foreign espionage, as well as broad authority to conduct intelligence gathering and intelligence analysis and planning as a member of the Intelligence Community.³²

See *ibid.*, pp. 8–10 and pp. 29–30. See also 28 U.S.C. § 532 note, <https://www.law.cornell.edu/uscode/text/28/532> (accessed June 27, 2023) (establishing the FBI directorate of intelligence and authorizing intelligence activities by the FBI); 50 U.S.C. § 3003(4)(H), <https://www.law.cornell.edu/uscode/text/50/3003> (accessed June 27, 2023) (defining “intelligence community” to include the “intelligence elements” of the FBI).

Combined with this wide-open field of authority, though nominally subject to supervision by the Attorney General (with a foot in the Intelligence Community), the FBI maintains a strong culture of independence in its governance and decision-making, largely free to develop and approve its own agenda and priorities.³³

See Federal Bureau of Investigation, “About: Mission and Priorities: FBI Strategy,” <https://www.fbi.gov/about/mission> (accessed June 27, 2023) (“The FBI strategy enables Bureau leaders and managers to define and pursue objectives crucial to mission success, prioritize resources to achieve those objectives, track progress along the way, address gaps when identified, and, most importantly, deliver consistent results.”).

Included in the FBI’s broad discretion is the ability to decide for itself whether to initiate so-called “assessments” for the purpose of monitoring individuals, organizations, groups, or activities.³⁴

See “The Attorney General’s Guidelines for Domestic FBI Operations,” pp. 17–20.

Assessments are supposed to have an authorized purpose and must be approved by a supervisor, but their launch requires no “particular factual predication.”³⁵
Ibid., p. 17.

In other words, there need be no factual basis to believe the subject of interest is violating the law or threatening national security for the FBI investigators to begin gathering information on the subject and closely monitoring and tracking his or its activities. The rationale behind assessments is that:

[D]etecting and interrupting criminal activities at their early stages, and preventing crimes from occurring in the first place, is preferable to allowing criminal plots and activities to come to fruition. Hence, assessments may be undertaken proactively with such objectives

as detecting criminal activities; obtaining information on individuals, groups, or organizations of possible investigative interest, either because they may be involved in criminal or national security-threatening activities or because they may be targeted for attack or victimization by such activities; and identifying and assessing individuals who may have value as human sources.³⁶

Ibid.

Methods of investigation approved for use in assessments include monitoring the subject online and through publicly available sources, examining records and information collected on the subject by other government agencies, using informants and other human sources, interviewing people who may be familiar with the subject, putting the subject under observation and surveillance not requiring a court order, accepting any information on the subject that is voluntarily offered by any entity, and obtaining grand jury subpoenas for telephone and email records.³⁷

Ibid., p. 20.

In contrast to assessments, “predicated investigations,” which include “preliminary investigations” or more formal “full investigations,” do require some factual basis to initiate and involve more senior approval and oversight.³⁸

Ibid., pp. 20–22.

Although assessments may develop into predicated investigations, there is no requirement that they do so within any prescribed time frame, and some assessments may continue indefinitely.

As for intelligence gathering, the FBI’s expansive mandate to collect and analyze intelligence—ostensibly for foreign intelligence purposes but largely involving surveillance occurring in the United States and often focused on U.S. persons and the activities of Americans—involves few clear limits. As long as the FBI judges that the surveillance relates to a matter “of foreign intelligence interest responsive to foreign intelligence requirements” or “may obtain” such foreign intelligence, the FBI has discretion to pursue the intelligence gathering through informal assessments, preliminary investigations, or full investigations.³⁹

Ibid., pp. 19 and 21.

The FBI’s license to carry out “strategic intelligence analysis” is extremely broad: The FBI is authorized to develop overviews and analyses of threats to and vulnerabilities of the United States and its interests in areas related to the FBI’s responsibilities, including domestic and international criminal threats and activities; domestic and international activities, circumstances, and developments affecting the national security; and matters relevant to the conduct of the United States’ [*sic*] foreign affairs. The overviews and analyses prepared under this Subpart may encompass present, emergent, and potential threats and vulnerabilities, their contexts and causes, and identification and analysis of means of responding to them.⁴⁰

Ibid., p. 29.

In undertaking legislation to reconstitute the FBI, Congress should consider narrowing the Bureau's jurisdiction and refocusing its mission on those major law enforcement and national security challenges that are beyond the capacity of state and local law enforcement to resolve and that are not addressed by any other federal agencies. In addition, now that we are more than two decades out from the atrocities of 9/11, Congress may wish to consider anew whether it is necessary for the FBI to retain its current broad intelligence-gathering mandate or whether it would be more appropriate to move the intelligence functions out of the FBI and relocate them elsewhere, perhaps within DHS.

The following outline describes in general terms the major elements we believe ought to be considered in putting together a plan for a complete makeover of the FBI.

Element No. 1: Consider restricting the new Bureau's jurisdiction and eliminating redundancies with other federal law enforcement agencies. Congress should decide whether the newly constituted Bureau⁴¹

To emphasize the clear demarcation from the past abuses of the FBI and the launching of a newly constituted entity in a form more aligned with the principles of federalism and our constitutional values, Congress could give the entity a new name. We refer to it here as simply the "Bureau" or "new Bureau."

must continue to exercise general authority to investigate all federal crimes or whether it would be more appropriate to limit the scope of the Bureau's investigatory jurisdiction.

We recognize that there are strong arguments in favor of retaining a general criminal investigatory capability under the supervision of the Justice Department—arguments based on the need for flexibility, efficiency, adaptability, and nimbleness. Congress may well conclude that such a capability should be maintained in some form. However, in approaching these questions in the bright light of recent abuses, we believe Congress should give serious consideration to whether it would be better from a civil liberties perspective to restrict the scope of the Bureau's mandate by eliminating redundancies between the Bureau's jurisdiction and that of other federal agencies, as well as by focusing what remains of the new Bureau's mission on large-scale crimes and threats to national security that require a federal-level response.

A starting goal could be to achieve minimal or no overlap between the investigatory and enforcement jurisdictions of the new Bureau and, for example, the Drug Enforcement Agency (DEA); the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); U.S. Immigration and Customs Enforcement (ICE) of DHS; the Financial Crimes Enforcement Network (FinCEN) of the Treasury Department (which handles financial crimes and money laundering and has broad administrative subpoena authority); the investigatory agents of the Internal Revenue Service (IRS); the Secret Service; the U.S. Marshals Service; the Bureau of Prisons; the 93 U.S. Attorney's Offices (which conduct grand jury investigations, among other things); the various litigating divisions of DOJ (including the Civil Rights, Tax, Antitrust, and Environment and Natural Resources Divisions), which handle certain aspects of criminal investigations and prosecutions, usually in conjunction with U.S. Attorney's Offices; and potentially other enforcement components of the federal government.

Weeding out these redundancies would go a long way toward containing the free-ranging power of the Bureau. But it would not go all the way.

In addition to eliminating redundancies, Congress should also consider whether to refocus what remains of the Bureau on large-scale enterprise crimes and national security matters that are beyond the ability of state and local law enforcement to address. These could include, for example, organized crime syndicates; large-scale conspiracies to commit violent crimes, including transnational terrorism; child pornography and human trafficking enterprises; public corruption and broad-based fraud schemes; espionage crimes by foreign powers; and widespread cyber-crimes. This reform would be most in line with the foundational principles of federalism that animate the genius of our constitutional republic.

Element No. 2: Consider moving the intelligence function elsewhere and establishing by law distinct components within the Bureau, each focused on clear federal law enforcement priorities. Currently, the FBI assembles investigatory teams and employs assets as needed from across the organization to focus on particular matters of priority, often conjoining criminal investigations with national security matters and intelligence gathering.⁴²

See, e.g., “The Attorney General’s Guidelines for Domestic FBI Operations,” p. 6 (The FBI’s “major subject areas of information gathering activities under these Guidelines—federal crimes, threats to the national security, and foreign intelligence—are not distinct, but rather overlap extensively.”).

In taking on the task of redesigning a new Bureau to replace the FBI, Congress should decide whether the Bureau must retain the flexibility to do so or whether it would be more consistent with liberty and our values of freedom and a limited federal government to chart a different course.

One option would be for Congress to define by statute the Bureau’s different law enforcement focuses and establish discrete components for each. For example, Congress could establish defined components within the Bureau for confronting organized crime, violent conspiracies, child pornography and human trafficking, public corruption and fraud, espionage and cyber-crimes, and state and local support. As the Framers of our Constitution understood brilliantly, assigning different government functions to structurally distinct entities is one effective way to check tendencies toward administrative overreach and the dangerous accumulation of power.

At the same time, the separation of focus and functions in a law enforcement agency should not be so rigid as to give rise to problems of stovepiping that could enable criminal activities that demand a federal response to escape effective investigation. The agency needs to be able to deploy its investigatory assets as required to respond to the shifting courses of criminal conduct. These are considerations that Congress should weigh carefully.

Whether or not Congress decides to organize the bureau’s areas of responsibility into different subcomponents, Congress should give serious consideration to moving the intelligence-gathering function out of the agency entirely. Perhaps, for example, Congress

could move the FBI's directorate of intelligence functions to a new bureau of intelligence in DHS, thereby removing DOJ's new law enforcement bureau from the list of agencies that comprise the Intelligence Community.

Here again, though, caution is warranted. If Congress does decide to remove intelligence functions from the Bureau, it must take care not to recreate the wall of separation between foreign-intelligence collection and law enforcement that contributed to our vulnerabilities on 9/11. Intelligence agencies must remain able to pass information in real time to the Bureau about the threatening activities of foreign agents that may be occurring in the U.S., so that the Bureau can pursue appropriate follow-up action without unnecessary delay.

Element No. 3: Consider limiting the tools of investigation used by the Bureau and prohibit efforts to suppress free speech, religious liberty, and other constitutional rights. Congress should consider restricting or possibly even eliminating the new Bureau's authority to conduct assessments of U.S. persons without a factual predication (in other words, to monitor the activities of Americans without any evident connection to a possible crime). Similarly, Congress should consider restricting the Bureau's ability to stimulate or induce citizens into engaging in criminal activity without predication. Congress may decide it is appropriate to require a clear factual predicate and senior-level signoffs for initiating each investigation or sting operation in accordance with standards approved by the Attorney General and consistently applied without partisan purpose or political favoritism.

In any event, given the abuses enumerated above, there is every reason for Congress to enact a firm statutory prohibition on any effort by the Bureau to burden or suppress, directly or indirectly, the expression of constitutionally protected speech, the free exercise of religious convictions, the lawful actions of parents to exercise control of their children's education, or any other lawful exercise of constitutional rights by Americans. This latter reform should be table stakes in any legislative package for redesigning the Bureau.

Element No. 4: Consider enhancing the Bureau's support for and partnership with state and local law enforcement. In our system of federalism, the vast preponderance of law enforcement is properly carried out at the state and local levels. A major function of the new Bureau should therefore be to provide technical assistance to and support for state and local law enforcement. Congress should consider whether it is necessary and appropriate to enhance the Bureau's resources for this purpose so that the Bureau's tools and expertise can be employed to improve the performance and effectiveness of law enforcement at the local level—that is to say, the ability of local agencies to enforce state and local laws.

This purpose is distinct from simply enlisting the state agencies or forming federal–state partnerships for the enforcement of federal law. On that front, Congress should consider providing for state attorneys general and representatives of state and local law enforcement to participate in an advisory council to recommend law enforcement priorities for the Bureau, subject to the approval of the Attorney General.

Element No. 5: Consider eliminating from the Bureau unnecessary administrative support functions. There is good reason for Congress to remove from the Bureau all administrative support offices whose functions can be provided efficiently for the Bureau by the Justice Department. These would include, for example, the general counsel's functions and the functions of the offices of public affairs and legislative affairs.

Element No. 6: Consider moving the Bureau's director into the DOJ chain of command for more effective management and control and repealing the 10-year term of office. The days of J. Edgar Hoover are long past, and no federal law enforcement bureau should be a power unto itself, able to act on a rogue basis without presidential supervision. The new Bureau should be located firmly within the Attorney General's chain of command, and the director's 10-year term of office should be repealed.

One possibility for management reform and control would be to move the Bureau and its director under the general supervision of the Assistant Attorney General for the Criminal Division and, with respect to counterintelligence and counterterrorism investigations and other investigations relating to national security, under the specific supervision of the Assistant Attorney General for the National Security Division. That is one of several significant structural FBI reforms proposed in Chapter 17 of *Mandate for Leadership 2025: The Conservative Promise*, a joint production of The Heritage Foundation and a coalition of more than 60 conservative public interest organizations.⁴³

See Paul Dans and Steven Groves, eds., *Mandate for Leadership 2025: The Conservative Promise* (Washington: The Heritage Foundation, 2023), <https://www.project2025.org/policy/>. The Department of Justice chapter is available at https://thf_media.s3.amazonaws.com/project2025/2025_MandateForLeadership_CHAPTER-17.pdf.

Placing the Bureau under AAG supervision within the DOJ chain of command would ensure effective leadership control, would reflect its proper placement within the Justice Department's management hierarchy, and would put its activities in better sync with the two DOJ divisions most responsible and accountable for criminal law enforcement and national security-related investigations.

In addition, Congress should consider requiring DOJ management approval for certain types of investigations, whether related to criminal law enforcement or national security, and should ensure that the new Bureau does not decide its own law enforcement and investigation agenda and priorities. These are good-government reforms that advance the Constitution's design for strong presidential supervision and control of the executive branch and thereby help to guarantee more effective political accountability. They do not mean, and we are not suggesting, that the investigatory actions and criminal law enforcement policies of the Bureau or of the Justice Department as a whole should ever be employed for partisan political purposes. Doing so is anathema to the rule of law, to our system of impartial justice, and to the best traditions of our nation.

Element No. 7: Consider revamping the bureau's personnel standards and practices. Any fully realized reform plan should include a wholesale review of the Bureau's personnel and personnel practices and would benefit from the inclusion of requirements for new, more stringent ethical standards and employee screenings. It should be a goal to

reimpose historical FBI standards of fitness, character, training, and appearance to ensure that the Bureau's personnel will embody the highest standards of professionalism.

As part of these reforms, Congress might wish to consider barring the Bureau from hiring anyone who has previously been a federal employee. The Bureau should not function or see itself as just another component of the leviathan of the federal administrative state. We need the special agents of the Bureau to be dedicated patriots who understand and represent the perspectives of the people in the heartland of America, not the narrow perspective and self-serving priorities of the power establishment in Washington.

Element No. 8: Consider shifting headcount and resources from Washington to the field offices and consider moving the Bureau's headquarters out of the national capital area. One effective means of reform could be for Congress to increase staffing and resources in the field offices of the new Bureau while significantly reducing headcount in the Washington offices as well as canceling plans for a new headquarters building. Congress should also consider moving the Bureau's headquarters out of the national capital area—for example, to the large complex currently operated by the FBI on 1,600 acres at the Redstone Arsenal in Huntsville, Alabama.⁴⁴

See Federal Bureau of Investigation, "About: The FBI at Redstone," <https://www.fbi.gov/about/huntsville#About-Redstone%20Arsenal> (accessed June 26, 2023); Shannon McDonald and Morgan Brennan, "Rockets and Intelligence: The FBI Is Building a \$1 Billion Campus in Huntsville, Alabama," CNBC, November 14, 2019, <https://www.cnbc.com/2019/11/14/rockets-and-intelligence-the-fbi-is-building-a-1-billion-campus-in-huntsville-alabama.html> (accessed June 26, 2023) (describing the 1,600-acre Huntsville complex as the FBI's "HQ2").

Element No. 9: Consider creating a new Inspector General (IG) for the Bureau. A new IG dedicated to the Bureau could be particularly useful in ensuring proper oversight of the new Bureau's compliance with all applicable requirements, limitations, and protections envisioned by Congress.

Element No. 10: Consider requiring a comprehensive IG review and report cataloging and exposing all prior abuses. This comprehensive review could be conducted jointly by the IG for DOJ and the new Bureau's IG, and it could be required to encompass all questionable past actions by the FBI or any component of DOJ to monitor or gather intelligence on the activities of Americans in the absence of any predicated connection to a potential crime, as well as any use of FISA authorities, specifically including the Section 702 collection, to gather information on the domestic activities of Americans having no evident connection to a foreign threat, such as the January 6 rioters.

Element No. 11: Consider requiring the Attorney General to isolate and purge all information improperly collected on Americans by the FBI or other components of DOJ. The completion of this purge could be made the subject of a report to Congress with a signed certification from the Attorney General and the Inspectors General for DOJ and the new Bureau.

One final note: Any truly effective plan for addressing the federal government's hyperactive tendency to monitor and attempt to influence or suppress the lawful conduct

of American citizens should include measures to achieve true border security and vigorous interior immigration enforcement. One important way to mitigate the rising threats to our liberties and to the social fabric of our nation is to forestall the introduction of new malign influences from foreign sources by preventing and controlling illegal immigration. In particular, Congress should consider enacting prohibitions on entry into the U.S., access to U.S. markets, and ownership of land within the U.S. of persons who have connections to the Chinese Communist Party or to the Latin drug trafficking and human smuggling cartels.

The Minimum Actions Required to End the Abuses

Regardless of whether Congress undertakes the complete reconstruction of the FBI as described above, Congress must not refrain from enacting at the earliest possible date the minimum set of critical measures that are needed to restore control of the FBI and put an end to the misuse of intelligence authorities.

At the very least, these reforms must include measures to insulate the FBI from the 702 program and reform the FISA process; to prohibit the federal government from targeting free speech, religious liberties, political dissent, and parental rights; and to bring the FBI under the effective supervision of the President and the Attorney General within the management hierarchy of the Justice Department.

First, with regard to FISA reform, Congress must:

- **Prohibit the FBI from participating directly in Section 702 surveillance and from querying the 702 collection on its own authority.** The FBI is a domestic law enforcement bureau first and foremost, not a national defense agency. The collection of foreign intelligence under FISA Section 702 need not be an FBI activity and can be insulated from the FBI without doing significant harm to national security.

Section 702 authorizes a broadscale program of surveillance targeted at foreign nationals who are outside the United States.⁴⁵

See 50 U.S.C. § 1881a.

By its terms, Section 702 does not allow for any surveillance targeted at U.S. persons or even at foreigners known to be in the U.S.⁴⁶

Under FISA, any foreign intelligence surveillance targeted at an American citizen or lawful permanent resident of the U.S. requires an individualized court order, supported by probable cause and separately approved by the FISC, no matter where in the world the U.S. person happens to be located at the time of the surveillance. See 50 U.S.C. §§ 1881b–1881c, <https://www.law.cornell.edu/uscode/text/50/1881b> (accessed June 26, 2026) and <https://www.law.cornell.edu/uscode/text/50/1881c> (accessed June 26, 2023).

Although the surveillance typically occurs on electronic communications facilities in the U.S. (taking advantage of the fact that a large portion of international communications passes through our country), because of its foreign-threat focus, the 702 collection need not be and usually is not conducted by FBI investigators. Rather, the collection program is primarily operated by other components of the U.S. Intelligence Community.

In contrast to 702, traditional FISA, which is used directly by the FBI and can target persons in the U.S. for foreign intelligence surveillance, requires the government to obtain an individualized court order from an Article III federal judge supported by probable cause to believe the person in question is an agent of a foreign power or a terrorist,⁴⁷

See 50 U.S.C. §§ 1801, <https://www.law.cornell.edu/uscode/text/50/1801> (accessed June 26, 2023), and 1804–1805, <https://www.law.cornell.edu/uscode/text/50/1804> (accessed June 26, 2023) and <https://www.law.cornell.edu/uscode/text/50/1805> (accessed June 26, 2023).

with each court order typically involving a lengthy application to establish the necessary showing of probable cause.

Because Section 702 does not involve individualized court approvals, it allows for surveillance of a much wider array of foreign targets than is allowed by traditional FISA. In 2022, for example, the 702 program was used to monitor 246,073 foreign targets,⁴⁸

Figure 4, “Section 702 Targets (Recall That Only Non-U.S. Persons Are Targeted),” in Office of the Director of National Intelligence, Office of Civil Liberties, Privacy, and Transparency, Annual Statistical Transparency Report Regarding the Intelligence Community’s Use of National Security Surveillance Authorities, Calendar Year 2022, April 2023, p. 18, https://www.intel.gov/assets/documents/702%20Documents/statistical-transparency-report/2023_ASTR_for_CY2022.pdf (accessed June 16, 2023).

while the government obtained only 337 court orders for traditional FISA surveillance.⁴⁹

Ibid., p. 12,

We stress again what we emphasized above in discussing the possibility of relocating the FBI’s directorate of intelligence: In removing the FBI from direct involvement in 702, Congress must be sure to avoid erecting a dangerous new wall between foreign-intelligence collection and law enforcement. Intelligence agencies must remain able to pass information gathered using 702 to the FBI in detailed intelligence reports that allow immediate understanding of the national security significance of the information and prompt, effective law enforcement action. The FBI’s follow-up may involve a further investigation of the identified threats using traditional law enforcement measures or traditional FISA authorities with individualized approvals from the courts.

- **Require the FISA court to appoint an amicus in all politically sensitive cases involving U.S. persons.** As part of the reforms of the USA FREEDOM Act in 2015, the FISC is required to appoint an *amicus curiae*, or “friend of the court,” to provide an additional viewpoint in all matters that present a “novel or significant interpretation of the law.”⁵⁰

U.S.C. § 1803(i)(2)(A), <https://www.law.cornell.edu/uscode/text/50/1803> (accessed June 26, 2023).

Congress should expand that provision to require an amicus for all FISA applications that target U.S. persons for surveillance in politically sensitive investigations as defined by existing DOJ directives. The additional scrutiny from an amicus would ensure that the FISC receives the benefit of full briefing of an application when civil liberties concerns are at their greatest while not impeding traditional FISA applications targeting foreign spies or terrorists.

- **Require that extensions of traditional FISA surveillance must be heard by the same FISA court judge.** The surveillance of Carter Page was initially approved by FISC Chief Judge Rosemary Collyer and then reauthorized three times by three different judges.⁵¹

See U.S. Department of Justice, Office of the Inspector General, Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation, pp. 7 and 156.

These renewals required all the approving judges to familiarize themselves with complex facts, frequently on a short deadline, which can lead to a presumption to defer to the government’s request without questioning the need for continued surveillance. In 2019, Representative Chris Stewart (R-UT) introduced a bill that would require the same judge who issued the original order for surveillance to consider any requests to extend that surveillance.⁵²

H.R. 5396, FISA Improvements Act of 2019, 116th Congress, introduced December 11, 2019, Section 2(e), <https://www.congress.gov/116/bills/hr5396/BILLS-116hr5396ih.pdf> (accessed June 26, 2023).

Although this requirement would create an increased logistical burden for the FISC as many of its judges reside outside the Washington, D.C. area, this burden can be overcome if Congress provides additional resources for FISC judges to make use of secure videoconferencing capabilities at their home judicial duty stations.

- **Reform the prong of traditional FISA that was abused in 2016 and 2017 to target Carter Page.** Under traditional FISA, Americans can be targeted for surveillance only if the government demonstrates probable cause that they knowingly engaged in terrorism or clandestine intelligence activities. If the latter, there is a second requirement: The clandestine intelligence activities must involve an actual or imminent violation of federal law.⁵³

U.S.C. § 1801(b)(2), <https://www.law.cornell.edu/uscode/text/50/1801> (accessed June 26, 2023).

In the Carter Page FISA applications, the government argued that there was probable cause that Page's activities constituted aiding, abetting, or conspiring with Russian intelligence services to violate prohibitions on acting as an unregistered foreign agent.⁵⁴

Verified Application to the U.S. Foreign Intelligence Surveillance Court, Docket No. 16-1182, "In re Carter W. Page, a U.S. Person," October 21, 2016, pp. 32–33,
<https://www.judiciary.senate.gov/imo/media/doc/FISA%20Warrant%20Application%20for%20Carter%20Page.pdf>
(accessed June 26, 2023).

There is an element of circularity to this use of the statute: According to the government, Page helped the Russians to engage in clandestine intelligence activities that involved breaking federal law, and the laws the Russians would break were bans on acting as a foreign agent without registration.⁵⁵

See 18 U.S.C. § 951, <https://www.law.cornell.edu/uscode/text/18/951> (accessed June 26, 2023) (prohibition on acting as an agent of a foreign power without notifying the attorney general); 22 U.S.C. § 612, <https://www.law.cornell.edu/uscode/text/22/612> (accessed June 26, 2023) (same).

As a result, the second element of the FISA prong that applies to Americans—the added requirement that their activities aid in the violation of a federal law—collapsed into the first element.

This infrequently used provision is susceptible to abuse because it allows the government to bootstrap the first part of the two-part FISA test for Americans into the second. Congress should exclude violations of foreign agent registration laws from the category of federal laws that allow for surveillance of an American so that a Carter Page-type FISA application can never happen again.

For each of the four FISA reforms described immediately above, Congress's consideration of the executive branch's request for the reauthorization of FISA Section 702 (which is scheduled to expire at the end of this year) provides a ready-made opportunity for congressional action. Reauthorization must be paired with meaningful reforms.

We take it as a given that Section 702 remains a critical tool for protecting our nation from the greatest external threats we face today, such as the malign encroachments of Communist China⁵⁶

See James J. Carafano, Michael Pillsbury, , Jeff M. Smith, and Andrew J. Harding, eds., "Winning the New Cold War: A Plan for Countering China," Heritage Foundation Special Report No. 270, March 28, 2023, https://www.heritage.org/sites/default/files/2023-03/SR270_0.pdf.

and the insidious transborder activities of the Latin cartels.⁵⁷

See press release, "VIDEO: Cornyn Presses Biden Intel Chiefs on Fentanyl Trafficking," Office of Senator John Cornyn, March 8, 2023, <https://www.cornyn.senate.gov/news/video-cornyn-presses-biden-intel-chiefs-on-fentanyl-trafficking/> (accessed June 26, 2023) (quoting exchange between Senator Cornyn and CIA Director Burns on the use of Section 702 to "illuminate" and disrupt trafficking networks).

The 702 program accounts for well over half of the most important foreign intelligence relied upon by senior U.S. policymakers,⁵⁸

See Dustin Volz, “FBI Warrantless Searches of Americans’ Communications Declined Sharply, Spy Agency Says,” The Wall Street Journal, updated April 28, 2023, https://www.wsj.com/articles/fbi-warrantless-searches-of-americans-communications-declined-sharply-spy-agency-says-1aa267b6?st=an3c8p2mu3s24mr&reflink=desktopwebshare_permalink (accessed June 26, 2023) (quoting the public remarks of NSA General Counsel April Doss).

and we accept that future Presidents will continue to require the real-time threat-assessment capabilities enabled by 702. As Congress considers the important question of reauthorizing 702 this year, it must insist, at a minimum, on the FISA reforms urged above, including insulating the FBI from 702, as a condition of reauthorization.

Second, whether or not Congress reforms the structure and functions of the FBI, there remains the urgent need for Congress to enact important prohibitions, limitations, and protections to halt the politicization and misuse of the federal government’s investigatory powers and intelligence authorities. In particular, Congress must:

- **Prohibit all federal agencies from taking any action to support the censoring of so-called domestic disinformation or the targeting, harassment, or suppression of religious beliefs or the lawful exercise of parental rights.** This prohibition must cover any direct or indirect efforts by any federal agency to suppress constitutionally protected speech, the free exercise of religious liberty, or other constitutionally protected rights, including by contracting for or indirectly supporting or promoting such pressure tactics. Congress should disband and outlaw any ill-conceived anti-free speech entities like the Disinformation Governance Board at DHS and should refuse to appropriate funds for any similar efforts in the future.

In this age of woke ideology and cancel culture, it is far too easy to imagine the FBI and other federal agencies misusing their powers and influence to stifle the circulation of views in opposition to the latest social and cultural dogmas of the ruling elite like transgender ideology and critical race theory. No agency of the federal government should ever again attempt, directly or indirectly, to police the free thought and lawful speech and beliefs of Americans or the natural demands of parents to have a say in their children’s education.

- **Codify DOJ directives to improve oversight of politically sensitive FBI investigations.** Following the DOJ Inspector General’s report on Crossfire Hurricane, then-Attorney General Bill Barr issued two directives to reform the FBI’s process for pursuing surveillance in politically sensitive investigations⁵⁹

Memorandum from William P. Barr, Attorney General, to the Deputy Attorney General; the Director, Federal Bureau of Investigation; and the Assistant Attorney General for National Security, “Subject: Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation,” August 31, 2020, <https://www.justice.gov/ag/page/file/1311701/download> (accessed June 26, 2023).

and to create a new Office of Internal Auditing within the FBI.⁶⁰

Memorandum from William P. Barr, Attorney General, to the Deputy Attorney General; the Director, Federal Bureau of Investigation; the Inspector General, Department of Justice; the Assistant Attorney General for National Security; and the Assistant Attorney General for Administration, "Subject: Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation," August 31, 2020, <https://www.justice.gov/ag/page/file/1311696/download> (accessed June 26, 2023).

Congress should codify similar directives to ensure that such reforms have teeth and stay in place through changes of leadership at DOJ. In doing so, Congress should consider going further than Attorney General Barr by placing the new office responsible for auditing the FBI's surveillance activities outside the FBI itself, either within the DOJ hierarchy or, with regard to foreign intelligence-related investigations, under the direction of the Director of National Intelligence.

- **Ensure rigorous oversight of compliance and stiff penalties for violations.** Congress should establish a new Inspector General for the FBI, dedicated to overseeing compliance with the above prohibitions and protections. Congress should also provide for effective remedies for violations, including not just administrative discipline for violators, but also the prospect of civil damages for private citizens whose rights are infringed by violations and the potential for criminal liability.
- **Require DOJ to investigate intelligence leaks that could be construed as being directed at political opponents.** To deter future abuses, Congress should require that DOJ investigate all unauthorized disclosures of intelligence related to the communications of domestic political figures. Congress should further require that DOJ seek the communications records of journalists who publish the classified information involved in any such leaks so that these investigations can be effective.⁶¹

See Dustin Carmack, "The Justice Department Is Justified In Using All the Tools At Its Disposal to Hunt Down Leakers," Daily Caller, June 21, 2021, <https://dailycaller.com/2021/06/21/carmack-the-justice-department-is-justified-in-using-all-the-tools-at-its-disposal-to-hunt-down-leakers/> (accessed June 26, 2023).

- **Consider reforming the Hatch Act so that it applies to senior Intelligence Community officials after they leave government service for as long as those officials continue to possess a security clearance.** Such a prohibition would prevent former intelligence officials from taking part in electoral politics with the implication that their continued access to classified information gives them special knowledge or insight, and it should include effective penalty provisions.

Finally, with or without a comprehensive rebuilding of the FBI, Congress should enact several of the structural reforms we have described above as a means to ensure that the FBI is brought under effective control within the chain-of-command hierarchy of the Justice Department under the supervision of the Attorney General. These should include, at a minimum, the following three reforms:

- **Reorganize the FBI's reporting structure.** Putting the FBI under the supervision of the Assistant Attorney General for the Criminal Division and, with regard to

national security matters, the Assistant Attorney General for the National Security Division would ensure improved management control.

- **Streamline the FBI's headquarters functions.** In any reform legislation, Congress should eliminate unnecessary administrative support offices within the FBI, reduce headquarters staff, and move the Director's office into the main Justice Department building. Congress should also reduce the general staffing and resources of the FBI headquarters operations in favor of shifting more staffing and resources to the FBI's field offices and cancel the new headquarters building sought by the Biden Administration.
- **Repeal the 10-year term of office for the FBI Director.** This reform would encourage each new President to appoint his own leadership team for the FBI, thereby improving political accountability for all FBI activities.

Conclusion

The FBI's chilling record of politicized abuses and the executive branch's continuing misuse of federal intelligence authorities to target the exercise of free speech and other constitutional rights of Americans gives Congress clear and compelling grounds for enacting forceful reforms, starting with the FBI. In fact, it is time for Congress to consider a complete reconstruction of the FBI, defining the scope of its jurisdiction, refocusing its mission on traditional law enforcement, and putting it under effective control. Short of that comprehensive reform, Congress must, at the very least, put in place the minimum set of proposed reforms we have described above. The reauthorization of FISA Section 702 offers a perfect vehicle for doing so.

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