Secret US court approved surveillance program despite continuing FBI constitutional violations

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27 April 2021

The FBI has repeatedly violated the law in conducting warrantless searches of email messages and other electronic communications of US citizens, according to a November 2020 certification report from the court established to oversee the surveillance program.

The Office of the Director of National Intelligence (ODNI), Avril Haynes, who was appointed by President Joe Biden and sworn in on January 21, released the redacted certification report from the Foreign Intelligence Surveillance Court (FISC) to the public on Monday. Significantly, while pointing to "widespread violations" by the FBI, FISC presiding judge James E. Boasberg approved the continuation of the program for the second year in a row.

In his 67-page ruling, Judge Boasberg recounts instances when FBI agents searched the electronic information of US citizens without getting the appropriate FISA court authorizations. However, he wrote, "While the court is concerned about the apparent widespread violations of the querying standard, it lacks sufficient information at this time to assess the adequacy of the FBI system changes and training, post-implementation."

For example, the judge's report found that the FBI made 40 secret queries and collected data not about foreigners—the purported purpose of the FISA law—but about American citizens for investigations of "healthcare fraud, transnational organized crime, violent gangs, domestic terrorism involving racially motivated violent extremists, as well as investigations connected to public corruption and bribery."

In another instance, Judge Boasberg reports that an FBI specialist conducting "background investigations" made 124 queries of raw NSA data using the names of individuals who were participating in an FBI "Citizens Academy," a program to increase awareness of the bureau's role in the community; those who needed to enter a field office to perform a service such as repairs; and others who were seeking to report tips or crimes.

If these are the violations being admitted by the court, the public has a right to know how many others of a more serious, criminal and deadly character have taken place. Clearly, the FISA court report—released nearly six months after it was submitted—is just the tip of the FBI warrantless surveillance iceberg.

The previous reports from 2017–2019 showed similar violations by the FBI, with tens of thousands of US citizens having their email and phone call data searched without warrants or approval by a FISA court. As NSA whistleblower Edward Snowden tweeted following the revelations last year, "The worst part? The government argues the existence of a warrantless, internet-scale mass surveillance program isn't the problem, merely the lawless way the FBI uses it against Americans, [because] 'of course' the other 93–97% of the human population have no rights."

One of the factors cited by the judge for approving the program again was the fact that the coronavirus pandemic limited the government's ability to adequately monitor compliance with rules set up in a 2018 renewal of the FISA law. Therefore, the court concluded that "the FBI's querying and minimization procedures meet statutory and Fourth Amendment requirements."

Meanwhile, the report summarizes and "clarifies" a convoluted set of procedures for the National Security Agency (NSA), Central Intelligence Agency (CIA) and

National Counterterrorism Center (NCTC) to work with the FBI in conducting domestic investigations such that "terrorists" and "terrorism networks" are adequately "targeted" and the monitoring of their electronic communications is sufficiently "minimized" and "segregated" from that of US citizens.

Behind the façade of rules and procedures that have been repeatedly ignored by the FBI is the language of Section 702 of the FISA Act of 1978. Originally passed in response to the Nixon administration's use of federal resources and law enforcement agencies to illegally spy on political organizations and individuals within the US, the purpose of FISA was to permit warrantless surveillance of foreigners that may include the communications of US citizens under very narrow circumstances that were specifically approved by a secret FISA court.

After the attacks of September 11, 2001, the administration of George W. Bush asserted that the executive powers of the president could override the FISA warrant requirement. At that time, the NSA began gathering the electronic communications of everyone on the planet—as revealed in 2013 by the former intelligence analyst and whistleblower Edward Snowden—in complete violation of the US Constitution. In 2008, Congress legalized the practice, enacting Section 702 of the FISA Amendments Act.

In 2018, Section 702 was amended to require an annual review by the FISA court of the procedures limiting how and when analysts may query the repository for information about Americans and how well the FBI is following these rules.

As explained by the *New York Times*, Section 702 "authorizes the government to gather, without warrants, the phone calls and internet messages of noncitizens abroad with assistance from American companies, like Google and AT&T—even when the foreign target is communicating with an American, raising the question of what the rules should be for Americans' messages that get swept in.

"The surveillance is carried out by the National Security Agency, but three other entities—the CIA, the National Counterterrorism Center and the FBI—also receive access to streams of 'raw' messages intercepted without a warrant for their analysts to use. Of those, the FBI is the only one that also has a law enforcement mission, heightening the stakes.

"The FBI receives only a small portion of the messages that the National Security Agency vacuums up: The bureau gets copies of intercepts to and from targets who are deemed relevant to a full and active FBI national security investigation. Presently, that amounts to about 3.6 percent of the National Security Agency's targets, a senior FBI official told reporters in a news briefing on Monday."

In other words, the US government has never stopped gathering all of the electronic communications of the entire world and it is continuing to do so, even in the aftermath of the Snowden revelations and the enactment of supposed reforms and restrictions by Congress.

The only thing that has changed is the Section 702 requirement that the FBI must get FISA court approval to query the data of US citizens, something that has been established for years now that the FBI does not do. Meanwhile, all of the data gathering and monitoring activity by the NSA exposed by Snowden continues and is expanding, and none of it is "minimized" or "segregated" in the slightest.

Speaking to the *Washington Post*, Julian Sanchez, a senior fellow at the Cato Institute, said, "We can continue playing compliance whack-a-mole, but at this point, it's reasonable to ask whether this sort of large-scale collection on a 'general warrant' model is inherently prone to these problems in a way that resists robust and timely oversight."

With the latest court document released by the ODNI, it is clear that the "general warrant" model—regardless of which party controls the White House or the Congress—is nothing but a cover for the ongoing violation of the basic rights guaranteed by the Fourth Amendment to the US Constitution against unreasonable searches and seizures.