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Top FBI Official Urges Agents to Use Warrantless Wiretaps on US Soil

An internal email from FBI deputy director Paul Abbate, obtained by WIRED, tells employees to search for "US persons" in controversial spy program's database that investigators have repeatedly misused.

By Dell Cameron

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A top FBI official is encouraging employees to continue to investigate Americans using a warrantless foreign surveillance program in an effort to justify the bureau's spy powers, according to an internal email obtained by WIRED.

Known as Section 702, the program is controversial for having been misused by the FBI to target US protesters, journalists, and even a sitting member of Congress. US lawmakers, nevertheless, voted to extend the program in April for an additional two years, while codifying a slew of procedures that the FBI claims is working to stop the abuse.

Obtained by WIRED, an April 20 email authored by FBI deputy director Paul Abbate to employees states: "To continue to demonstrate why tools like this are essential to our mission, we need to use them, while also holding ourselves accountable for doing so properly and in compliance with legal requirements." [Emphasis his.]

Added Abbate: "I urge everyone to continue to look for ways to appropriately use US person queries to advance the mission, with the added confidence that this new pre-approval requirement will help ensure that those queries are fully compliant with the law."

"The deputy director's email seems to show that the FBI is actively pushing for more surveillance of Americans, not out of necessity but as a default," says US representative Zoe Lofgren, a Democrat from California. "This directly contradicts earlier assertions from the FBI during the debate over Section 702's reauthorization."

Following publication, FBI spokesperson Susan McKee provided a statement from the bureau that mischaracterized WIRED's reporting, inaccurately claiming it "alleged that that the FBI instructed its employees to violate the law or FBI policies." The statement added that Abbate's email "emphasized Congress' recognition of the vital importance of FISA Section 702 to protect the American people and was sent to ensure that FBI personnel were immediately aware of, and in compliance with, the privacy enhancing changes the law has put in place."

Authorized under the Foreign Intelligence Surveillance Act (FISA), the 702 program permits the government to enlist American companies to eavesdrop on a variety of communications—calls, texts, emails, and possibly other forms of messaging—all without the need for a search warrant.

The key requirement for the program is that at least one of the recipients (the individual “targeted”) be a foreigner reasonably believed to be somewhere other than on US soil.

In a statement to Congress last year, FBI director Christopher Wray emphasized that the bureau’s focus was on “dramatically reducing” the number of times its agents scoured the 702 database for information on Americans.

The frequency with which the FBI runs US phone numbers or email accounts through the 702 database is hazy. The bureau first began reporting the figure publicly in 2021, releasing the total number of times that these searches took place. That number was 2.9 million. Since then, the FBI has “updated its counting methodology” to count only unique searches. (To wit, running the same phone number through the database multiple times a year now counts as a single search.) As a result, at least in part, the number dropped to 119,383 the following year. In 2023, under more stringent guidelines, it dropped further, to 57,094.

Last year, a review by the Justice Department found that the FBI’s compliance rate hovered around 98 percent, a figure that Wray and other FBI officials have touted frequently in defense of the program. Without knowing the exact number of queries, the number of noncompliant searches is impossible to calculate. At a minimum, the FBI conducted more a thousand searches in violation of its own policies, which are now law. Under its new system of counting, the figure could be much higher. Only the Justice Department knows.

In a statement earlier this year, the FBI claimed that many of these errors are the result of its employees failing to label whether a search, in fact, targeted a “US person.”

While the 702 program has been widely criticized by privacy and civil liberty proponents, the US House Intelligence Committee is throwing a party Wednesday night to celebrate the recent extension of the 702 surveillance program, multiple sources tell WIRED.

House Intelligence Committee chair Mike Turner and ranking member Jim Himes blasted out invitations announcing a “bipartisan celebration” of the 702 program’s continuation last week. The event, which the lawmakers have dubbed FISA Fest, is being held in a reception room in the US Capitol building Wednesday night.

A House Intelligence Committee spokesperson did not respond to a request for comment.

Turner and Himes were instrumental in preserving the FBI’s warrantless access to 702 data. In countless “briefings” since October, the pair urged members of their respective parties to avoid reining in the FBI’s authority too greatly. Instead, the new procedures designed by the bureau itself were touted by both lawmakers as a sufficient bulwark against further abuse.

Narrowly winning that battle last month, Himes and Turner worked to kill an amendment that would have forced FBI employees to get search warrants before reviewing the communications of Americans swept up by the program. (The amendment, opposed by the Biden White House, failed in a tie vote, 212-212.) Instead, the FBI’s procedures, now part of the 702 statute, require employees to affirmatively “opt in” before accessing the wiretaps. They must also seek

permission from an FBI attorney before conducting “batch queries” of the database. And queries for communications of elected officials, reporters, academics, and religious figures are now all deemed “sensitive” and require approval from higher up the chain of command.

Congress established Section 702 in 2008 to legitimize an existing surveillance program run by the National Security Agency (NSA) without congressional oversight or approval. The program, more narrowly defined at the time, intercepted communications that were at least partly domestic but included a target the government believed was a known terrorist. While bringing the surveillance under its authority, Congress has helped to steadily expand the scope of the surveillance to encompass a new slate of threats, from cybercrime and drug trafficking to arms proliferation.

While advocates for 702 surveillance often imply that Americans who are wiretapped are communicating with terrorists—a concoction that Turner himself repeatedly lent credence to this year—the allegation is dubious. Officially, it is the US government’s position that it is impossible to know which US citizens are being surveilled or even how many of them there are. The chief aim of the 702 program is to acquire “foreign intelligence information,” a term that encompasses not only terrorism and acts of sabotage but information necessary for the government to conduct its own “foreign affairs.”

Surveillance critics worry that the array of possible targets extends far beyond what is being characterized in unclassified settings. It is uncontroversial to suggest that the US government—like all governments with the power to spy—finds reasons to spy on foreign allies, businesses, even news publications. So long as the target is foreign, they have no privacy rights.

The limits of the 702 program remain murky, even to congressional members insisting that it should not be curbed further. The Senate Intelligence Committee chair, Mark Warner, acknowledged to reporters this week that language in Section 702 needs to be “fixed,” even though he voted last month to make the current language law.

FISA experts had warned for months that new language introduced by the House Intelligence Committee is far too vague in the way it describes the categories of businesses the US government can compel, fearing that the government would obtain the power to force anyone with access to a target’s online communications into snooping on the NSA’s behalf—IT workers and data center staff among them.

A trade group representing Google, Amazon, IBM, and Microsoft, among some of the world's other largest technology companies, concurred last month, arguing that the new version of the surveillance program threatens to “dramatically expand the scope of entities and individuals” subject to Section 702 orders.

“We are working on it,” Warner told The Record on Monday. “I am absolutely committed to getting that fixed,” he said, suggesting the best time to do so would be “in the next intelligence bill.”

Updated at 6:18 pm ET, May 8, 2024: Added comments from the FBI.