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Is the CIA Still Secretly Capturing Americans' Communications?

When it comes to surveillance reform, House and Senate members need to stop focusing on tinkering with one authority, no matter how important, and embrace an approach that brings all dubious or blatantly unconstitutional surveillance programs under scrutiny...and end those found to be at odds with the Bill of Rights.

NOVEMBER 26, 2023 • COMMENTARY

By **Patrick G. Eddington**

This article appeared in *The Orange County Register* on November 26, 2023.

Before 2023 ends, Congress must either reauthorize or let die the controversial Foreign Intelligence Surveillance Act (FISA) Section 702 program. Simply stated, FISA Section 702 is used to target digital communications passing through the infrastructure (i.e., “backbone”) of major telecommunications firms and the networks of internet service providers.

Defenders of the program, such as National Counterterrorism Center Director Christine Abizaid, **claim** that the 702 program is vital given that “the terrorist threat landscape is highly dynamic and our country must preserve [counterterrorism] fundamentals to ensure constant vigilance.” A lapse in 702 coverage would “raise profound risks” according to FBI Director **Chris Wray**.

Abizaid and Wray are being less than candid.

If the FISA Section 702 authority does lapse—either temporarily or permanently—the collection activity could potentially be resumed under Executive Order 12333, the daily operating guidance for executive branch spy components. We know this to be the case because years prior to the 9/11 attacks, the Central Intelligence Agency (CIA) was apparently conducting exactly the kind of internet “backbone” surveillance now carried out under FISA Section 702...with absolutely no judicial oversight.

The executive branch component that should have brought this fact to the public’s attention, the Privacy and Civil Liberties Oversight Board (PCLOB), had to be sued by the Cato Institute under the Freedom of Information Act (FOIA) in order to discover this critical fact.

The evidence for the program’s existence is contained in a CIA Inspector General (IG) **audit** dated August 7, 2002. The audit itself covered the period 1995–2000. Key facts about the program – who authorized it, when it began, whether it was terminated or is still running – may be contained in the many redacted sections of the IG report.

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What is clear is that the program both captured U.S. Person data (definitely overseas but possibly domestically) and, in terms of CIA personnel compliance with EO 12333 and CIA regulations, was a total mess. The program captured and retained U.S. Person data seemingly indefinitely, and retention was not necessarily tied to any actual terrorist threat or espionage investigation.

Even worse, despite the fact that literally millions of Americans live, work, and travel overseas, the CIA presumed a target was foreign when starting collection, only allegedly ending collection when it discovered the target

was in fact an American. On page five of the report, the CIA IG team admitted that it “was unable to review every regulated activity,” leaving open the possibility that the abuses may have occurred in other CIA intelligence collection activities that may have ensnared the communications of other Americans.

The fact that so many pages in this audit remain wholly redacted or even withheld in full, including specific issues involving program compliance with applicable law, executive orders, and regulations, only raises still more troubling questions about exactly how bad the abuses of this program were, and perhaps still are if it remains operational.

This CIA program is a reminder about how much we don't know about the scope and duration of U.S. government surveillance efforts that implicate or indeed violate the constitutional rights of U.S. citizens in the post-9/11 era.

We don't know how many other classified federal surveillance programs have been or are operating and the extent to which they may, or already have, violated the First or Fourth Amendment rights of Americans.

But just what we know about programs that have been publicized – including, among others, the **Drug Enforcement Agency** – should cause all

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Americans to demand renewed, probing, and broad Congressional oversight of such activities.

There is a way to get such an investigation started, and without the usual “Red Team vs. Blue Team” insanity that pervades Congress today. In that sense, two House members have already shown their colleagues the way.

Last year, Representatives Nancy Mace (R-SC) and Jamie Raskin (D-MD) **tasked** the Government Accountability Office (GAO) to investigate the Federal Bureau of Investigation’s (FBI) use of so-called “Assessments”—de facto investigations that can be opened on any person or organization *absent any criminal predicate*. As I’ve previously **written**, the “Assessment” authority has been abused repeatedly, to the detriment of the constitutional rights of Americans. That GAO investigation is underway, and it would be a simple matter for Congress to instruct GAO to expand its surveillance program inquiry along the lines described above.

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