ANY BETS FBI WAS ALREADY SEARCHING US PERSON DATA?

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In the department of news that got reported here two months ago, the WaPo is reporting on FISC's approval to let the government search through incidentally collected information. Its news hook is that the 2011 move reversed an earlier 2008 ban that the government had asked for.

> The court in 2008 imposed a wholesale ban on such searches at the government's request, said Alex Joel, civil liberties protection officer at the Office of the Director of National Intelligence (ODNI). The government included this restriction "to remain consistent with NSA policies and procedures that NSA applied to other authorized collection activities," he said.
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> But in 2011, to more rapidly and effectively identify relevant foreign intelligence communications, "we did ask the court" to lift the ban, ODNI general counsel Robert S. Litt said in an interview. "We wanted to be able to do it," he said, referring to the searching of Americans' communications without a warrant.

It may well be that the **NSA** was prohibited from searching on incidentally collected information, but not all parts of the government were. In his October 3, 2011 FISC opinion, John Bates pointed to some other minimization procedures allowing such searches to justify his approval for NSA to do so.

> This relaxation of the querying rules

> does not alter the Court's prior conclusion that NSA minimization procedures meet the statutory definition of minimization procedures. [2 lines redacted] contain an analogous provision allowing queries of unminimized FISA-acquired information using identifiers – including United States-person identifiers – when such queries are designed to yield foreign intelligence information. See [redacted] In granting [redacted] applications for electronic surveillance or physical search since 2008, including applications targeting United States persons and persons in the United States, the Court has found that the [redacted] meet the definition of minimization procedures at 50 U.S.C. §§ 1801 (h) and 1821(4). It follows that the substantially similar querying provision found at Section 3(b)(5) of the amended NSA minimization procedures should not be problematic in a collection that is focused on non-United States persons located outside the United States and that, in the aggregate, is less likely to result in the acquisition of nonpublic information regarding non-consenting United States persons.

We already had reason to believe other agencies do this, because when the Senate Intelligence Committee discussed it, they described the intelligence community generally wanting such searches.

> Finally, on a related matter, the Committee considered whether querying information collected under Section 702 to find communications of a particular United States person should be prohibited or more robustly constrained. As already noted, the Intelligence Community is strictly prohibited from using Section 702 to target a U.S.

> person, which must at all times be carried out pursuant to an individualized court order based upon probable cause. With respect to analyzing the information lawfully collected under Section 702, however, **the Intelligence Community** provided several examples in which it might have a legitimate foreign intelligence need to conduct queries in order to analyze data already in its possession. [my emphasis]

Bates' mention of targeting US persons strongly suggests FBI was the agency in question (though the CIA may as well). (If this practice weren't already permitted, I would bet it got approved in the aftermath of the Nidal Hasan attack, which might explain why so many more Americans who had communicated with Anwar al-Awlaki or Samir Khan were caught in stings after that point.)

So did Ronald Litt and Alex Joel tell Ellen Nakashima this to hide a much more intrusive practice at FBI (which they also oversee)?