

702 REAUTHORIZATION BILL: WHY A BACK DOOR FIX FOR CRIMINAL SEARCHES IS MEANINGLESS

In this post, I explained how the House Judiciary Committee Section 702 reauthorization bill only closes the back door search loophole for “quer[ies] for evidence of a crime.” In addition, they let the government define what a “query reasonably designed for the primary purpose of returning foreign intelligence information” is, which means they’re basically punting on defining it themselves until 2023.

Given that treatment, the back door search fix is virtually useless, because for every search that might return the communications of an American, the government can always claim they’re considering recruiting the American as an informant.

Any communication queryable by back door search by definition involves a person of interest for a foreign intelligence reason

To understand why, first remember why FBI would get this information in the first place. They can only get raw 702 data if they have an active full investigation – and by definition, the targets of that that active full investigation are going to be targeted for the same reasons the target would be targeted by NSA, because they are of national security interest, pertaining to counterterrorism,

counterproliferation, and counterintelligence/nation-state hacking.

Thus, any American whose communications might come up in a back door search will – by definition – be someone talking to a target of interest. That doesn't mean they're talking to a "bad guy," as US national security professionals insist on speaking of adversaries. They're just someone who has foreign intelligence information related to one of those three-plus topics.

Since 2002, the government has insisted that any crime – including rape – can be foreign intelligence information

The precedent that determined the limits of the government's use of FISA-obtained information in criminal proceedings came in the 2002 *In Re Sealed* case challenge where the FISA Court of Review deemed the PATRIOT Act's adoption of "significant purpose" language in FISA targeting to permit the sharing of information for criminal purposes.

As part of that case, the government claimed it could use criminal information to recruit a foreign spy.

Thus, for example, where information is relevant or necessary to recruit a foreign spy or terrorist as a double agent, that information is "foreign intelligence information" if the recruitment effort will "protect against" espionage or terrorism.

[snip]

Whether the government intends to prosecute a foreign spy or recruit him

as a double agent (or use the threat of the former to accomplish the latter), the investigation will often be long range, involve the interrelation of various sources and types of information, and present unusual difficulties because of the special training and support available to foreign enemies of this country. [my emphasis]

During the hearing, FISCR judge Laurence Silberman tried to get Solicitor General Ted Olson to envision some kind of crime that couldn't be used for foreign intelligence purpose, suggesting rape. But even that, Olson argued, could be deemed foreign intelligence information, because the government could use evidence of rape to coerce someone to become an informant.

OLSON: And it seems to me, if anything, it illustrates the position that we're taking about here. That, Judge Silberman, makes it clear that to the extent a FISA-approved surveillance uncovers information that's totally unrelated – let's say, that a person who is under surveillance has also engaged in some illegal conduct, cheating –

JUDGE LEAVY: Income tax.

SOLICITOR GENERAL OLSON: Income tax. What we keep going back to is practically all of this information might in some ways relate to the planning of a terrorist act or facilitation of it.

JUDGE SILBERMAN: Try rape. That's unlikely to have a foreign intelligence component.

SOLICITOR GENERAL OLSON: It's unlikely, but you could go to that individual and say we've got this information and we're prosecuting and you might be able to

help us. I don't want to foreclose that.

JUDGE SILBERMAN: It's a stretch.

SOLICITOR GENERAL OLSON: It is a stretch but it's not impossible either. [my emphasis]

The previous year, in 2001, the government had used the threat of a rape prosecution against Abu Zubaydah's brother, Hesham Abu Zubaydah (who had had calls with his brother picked up on wiretaps), to convince him to become an informant. The FISC decision certainly didn't endorse approving individual FISA warrants to find proof of crimes that could be used to flip people. But neither did it place meaningful limits (and why should it, given that in those halcyon days all FISA orders were individualized).

In years since then, the government has repeatedly told the FISC they're using programmatic spying to find informants. In both 2006 and 2009 it said it would use the phone dragnet "to discover individuals willing to become U.S. Government assets." (see PDF 22 for citations to two Keith Alexander statements) That's also one way the FBI measured the efficacy of Stellar Wind.

The Gartenlaub case shows FBI will use kiddie porn to (attempt to recruit) foreign intelligence informants

This is one reason the Keith Gartenlaub case is so important, in which the government used a criminal warrant, then a FISA warrant, then another criminal warrant to obtain evidence that Gartenlaub had nine-year old kiddie porn on his hard drives. The government justified all those warrants based on the claim that Gartenlaub was

working with his Chinese in-laws – who always got described as influential in China – to steal Boeing information to share with China. Ultimately, they found no evidence of that.

I will eventually show evidence that the government *also* used Section 702 against Gartenlaub, probably (at a minimum) to obtain the Skype conversations he had with his in-laws, who would be targetable as influential Chinese citizens.

In any case, in association with the Gartenlaub case, the government changed both the individual FISA and the Section 702 minimization procedures to permit the sharing of data collected under FISA with the National Center for Missing and Exploited Children, meaning they can use FISA to obtain information on kiddie porn in the name of foreign intelligence collection.

After they indicted Gartenlaub, the government offered to drop the charges for information on the spying with China.

During his initial appearance in a federal courthouse in Santa Ana, Calif., the prosecutors indicated a willingness to reduce or drop the child pornography charges if he would tell them about the C-17, said Sara Naheedy, Gartenlaub's attorney at the time.

Even at that late date, after eighteen months, two criminal warrants, and a FISA warrant, the government was treating Gartenlaub's alleged kiddie porn possession as potential foreign intelligence information.

One purpose of assessments – and queries conducted under

them – is to assess people to become informants

Every description of back door searches is clear: FBI can use them at the assessment level (that is, when they're trying to figure out whether to open a full investigation).

[W]henver the FBI opens a new national security investigation or assessment, FBI personnel will query previously acquired information from a variety of sources, including Section 702, for information relevant to the investigation or assessment. With some frequency, FBI personnel will also query this data, including Section 702-acquired information, in the course of criminal investigations and assessments that are unrelated to national security efforts. In the case of an assessment, an assessment may be initiated "to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence information.

And FBI's Domestic Investigations and Operations Guide is equally clear: the FBI uses assessments to determine whether people would make good informants. For example, the DIOG describes this scenario – which sounds just like what happened to Professor Xiaoxiang Xi – among its scenarios for using assessments.

A field office has a Full Investigation open on a group of individuals from country X believed to be targeting engineers and high-tech workers involved in the production of semiconductor chips. Evidence in the Full Investigation suggests that the individuals from country X are

attempting to recruit the engineers and high tech workers to steal information regarding the semiconductor chips in exchange for money. During the investigation, an engineer who travels frequently to country X has been identified.

Information developed during the Predicated Investigation may be used to determine whether the engineer should be viewed as a subject of the investigation or a potential [Confidential Human Source]. If the engineer is determined to be a subject of the Full Investigation, a Type 5 Assessment may not be opened and the engineer needs to be opened as the target of a Full Investigation. If the primary focus of the FBI's interest is to determine whether the individual may be a potential source, a Type 5 Assessment should be opened to collect information necessary to determine whether the FBI should attempt to recruit the engineer as a CHS. (PDF 117)

Remember: the FBI can obtain any 702 data related to a full investigation like the one described here. And Chinese scientists suspected of IP theft would be clear targets under the Foreign Government certificate. So it is solidly within the realm of possibility that the government would target Chinese scientists, obtain conversations (like the one that Xi got targeted for) about semiconductors, and then find that information at a later time when researching the American whose communication got collected incidentally.

That's the problem with trying to fix the back door loophole while still permitting back door searches for foreign intelligence assessments: because it's not until the government pulls up the information at the assessment stage – and it may well be years later, as was the case for Gartenlaub – that the government decides whether

they're going to use it and its fruits as
foreign intelligence or criminal information.