ON JIM BAKER'S NON-PROSECUTION FOR LEAKING

The WaPo provides details on something that right wing propagandists had used to slam FBI General Counsel Jim Baker (who, the article notes, is being reassigned within FBI). The leak investigation into Baker must pertain to the Yahoo scan.

> For months, Baker had become caught up in what some law enforcement officials considered a particularly frustrating probe of a leak involving the FBI, the National Security Agency and stories that appeared about a year ago involving surveillance techniques for a particular email provider, according to people familiar with the matter.
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> Some NSA officials were concerned that too much had been revealed about a classified program in an effort to correct a prior report, these people said.
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> "Jim was distressed about it but was confident he hadn't leaked anything'' and would be cleared, one U.S. official said.
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> A respected veteran prosecutor was assigned to the case, but people close to the matter said the investigation had petered out recently and charges were not expected to be filed.
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> The leak probe frustrated some law enforcement officials, who said officials were caught up in it only because they had tried to prevent misinformation about surveillance capabilities from spreading among the public and lawmakers. Others said the very existence of the investigation was

> mostly due to a disagreement between two agencies, according to people familiar with the matter.

The story that the government had obtained authority to scan all of Yahoo's emails for some signature tied to either a foreign government or a terrorist organization (or most likely, Iran, which the US considers both) was first broken by Reuters, which claimed the scan happened under Section 702. But as I laid out here, Charlie Savage (who has written an entire billion page book on such matters) reported, more plausibly, that it was done under a targeted FISA order. Not only did the discrepancy in stories raise concerns about how Section 702 was being applied, but it led a lot of surveillance critics who had heretofore not understood things they were lobbying about to newly examine what the term "facility" meant.

From the context, it seems likely that Baker was trying to correct initial reports that the scan occurred under Section 702, which probably had a salutary effect on this year's debate; no one has raised questions about that Yahoo scan (though surveillance critics *have* proven that they didn't internalize the lesson of the exchange to learn that the government has long interpreted facility more broadly than they understood).

If all that's right, the spooks should be happy that Baker corrected the record. Heck, Baker could probably point to my work for proof that the definition of "facility" was actually known to people he hasn't ever spoken with.

> [S]tarting in 2004 and expanded in 2010, "facility" — the things targeted under FISA — no longer were required to tie to an individual user or even a location exclusively used by targeted users.
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> When Kollar-Kotelly authorized the Internet dragnet, she distinguished what she was approving, which did not require

> probable cause, from content surveillance, where probable cause was required. That is, she tried to imagine that the differing standards of surveillance would prevent her order from being expanded to the collection of content. But in 2007, when FISC was looking for a way to authorize Stellar Wind collection — which was the collection on accounts identified through metadata analysis — Roger Vinson, piggybacking Kollar-Kotelly's decision on top of the Roving Wiretap provision, did just that. That's where "upstream" content collection got approved. From this point forward, the probable cause tied to a wiretap target was freed from a known identity, and instead could be tied to probable cause that the facility itself was used by a target.
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> There are several steps between how we got from there to the Yahoo order that we don't have full visibility on (which is why PCLOB should have insisted on having that discussion publicly). There's nothing in the public record that shows John Bates knew NSA was searching on non-email or Internet messaging strings by the time he wrote his 2011 opinion deeming any collection of a communication with a given selector in it to be intentional collection. But he — or FISC institutionally — would have learned that fact within the next year, when NSA and FBI tried to obtain a cyber certificate. (That may be what the 2012 upstream violation pertained to; see this post and this post for some of what Congress may have learned in 2012.) Nor is there anything in the 2012 Congressional debate that shows Congress was told about that fact.
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> One thing is clear from NSA's internal cyber certificate discussions: by 2011,

> NSA was already relying on this broader sense of "facility" to refer to a signature of any kind that could be associated with a targeted user.
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> The point, however, is that sometime in the wake of the 2011 John Bates opinion on upstream, FISC must have learned more about how NSA was really using the term. It's not clear how much of Congress has been told.
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> The leap from that — scanning on telephone switches for a given target's known "facility" — to the Yahoo scan is not that far. In his 2010 opinion reauthorizing the Internet dragnet, Bates watered down the distinction between content and metadata by stripping protection for content-as-metadata that is also used for routing purposes. There may be some legal language authorizing the progression from packets to actual emails (though there's nothing that is unredacted in any Bates opinion that leads me to believe he fully understood the distinction). In any case, FISCR has already been blowing up the distinction between content and metadata, so it's not clear that the Yahoo request was that far out of the norm for what FISC has approved.
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> Which is not to say that the Yahoo scan would withstand scrutiny in a real court unaware of the FISC precedents (including the ones we haven't yet seen). It's just to say we started down this path 12 years ago, and the concept of "facilities" has evolved such that a search for a non-email signature counts as acceptable to the FISC.

Of course, the better option is to stop playing word games and explain to everyone what facility actually means, and point out that that

interpretation has been in place since 2007.

All that said, this is yet another example where a cherished government official can engage in behavior that others go to prison for. As I've pointed out, for example, the Jeffrey Sterling case codified the precedent that someone can go to prison for four minutes and 11 seconds of phone conversations during which you provide unclassified tips about classified information they know.

> The Fourth Circuit just codified the principle that you can go to prison for four minutes and 11 seconds of phone calls during which you tell a reporter to go find out classified details you know about.

That's probably pretty close to what Baker got investigated for. Obviously, doing so as a General Counsel is a different function than as a whistleblower. And whatever conversations Baker had probably took place in DC, so outside of the Fourth Circuit where that precedent stands.

I have no doubt that non-prosecution, if I've gotten the facts of the case correct, is the correct decision. But so should it be for others in similar situations, others treated differently because they're not part of the FBI.

More importantly, the government's so-called transparency should be such that experts like the surveillance critics who didn't know how facility is used don't have to get leaks to understand basic facts about the surveillance they discuss.