THE CURIOUS TIMING OF FBI'S BACK DOOR SEARCHES

The very first thing I remarked on when I read the Yahoo FISCR opinion when it was first released in 2009 was this passage.

> The petitioner's concern with incidental collections is overblown. It is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful.9 See, e.g., United States v. Kahn, 415 U.S. 143, 157-58 (1974); United States v. Schwartz, 535 F.2d 160, 164 (2d Cir. 1976). The government assures us that it does not maintain a database of incidentally collected information from non-targeted United States persons, and there is no evidence to the contrary. On these facts, incidentally collected communications of non-targeted United States persons do not violate the Fourth Amendment.(26 in original release; 30 in current release)

The government claimed to FISCR that it did not maintain a database of incidentally collected information from non-targeted US persons.

Barring some kind of neat parse, I didn't buy the claim, not even in 2009.

Since then, we've found out that — barring some kind of neat parse — I was absolutely right. In fact, they are doing back door searches on this data, especially at FBI.

What I'm particularly intrigued by, now, is the timing.

FISCR said that in an opinion dated August 22, 2008 — over a month after the July 10, 2008

passage of the FISA Amendments Act. I have not yet found evidence of when the government said that to FISCR. It doesn't appear in the unredacted part of their Jun 5, 2008 Merits brief (which cites Kahn but not Schwartz; see 49-50), though it might appear behind the redaction on 41. Of note, the April 25, 2008 FISC opinion doesn't even mention the issue in its incidental collection discussion (starting at 95), though it does discuss amended certifications filed in February 2008.

So I'm guessing the government made that representation at the hearing in June, 2008.

We know, from John Bates' rationale for authorizing NSA and CIA back door searches, such back door searches were first added to FBI minimization procedures in 2008.

> When Bates approved back door searches in his **October 3, 2011 opinion**, he pointed to FBI's earlier (and broader) authorities to justify approving it for NSA and CIA. While the mention of FBI is redacted here, at that point it was the only other agency whose minimization procedures had to be approved by FISC, and FBI is the agency that applies for traditional FISA warrants.
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> > [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 definitions

> > 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 aggregate, is less likely to result in the acquisition of nonpublic information regarding non-consenting United States persons.
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> So since 2008, FBI has had the ability to do back door searches on all the FISA-authorized data they get, including taps targeting US persons.

The FBI Minimization procedures submitted with the case all date to the 1990s, though a 2006 amendment changing how they logged the identities of US persons collected (note, in 2011, John Bates was bitching at FBI for having ignored an order to reissue all its minimization procedures with updates; I can see why he complained).

> As described in the Government's response of June 16, 2006, identities of U.S. persons that have not been logged are often maintained in FBI databases that contain unminimized information. The procedures now simply refer to "the identities" of U.S. persons, acknowledging that the FBI may not have previously logged such identities.

But there's reason to believe the FBI minimization procedures — and this logging process — was changed in 2008, because a

government document submitted in the Basaaly Moalin case — we know Moalin was wiretapped from December 2007 to April 2008, so during precisely the period of the Yahoo challenge, though he was not indicted until much later — referenced two sets of minimization procedures, seeming to reflect a change in minimization during the period of his surveillance (or perhaps during the period of surveillance of Aden Ayro, which is how Moalin is believed to have been identified).

That is, it all seems to have been happening in 2008.

The most charitable guess would be that explicit authorization for back door searches happened with the FAA, so before the FISCR ruling, but after the briefing.

Except in a letter to Russ Feingold during early debates on the FAA, Mike Mukasey and Mike McConnell (the latter of whom was involved in this Yahoo fight) strongly shot down a Feingold amendment that would have required the government to segregate all communications not related to terrorism (and a few other things), and requiring a FISA warrant to access them.

> The Mukasey-McConnell attack on segregation is most telling. They complain that the amendment makes a distinction between different kinds of foreign intelligence (one exception to the segregation requirement in the amendment is for "concerns international terrorist activities directed against the United States, or activities in preparation therefor"), even while they claim it would "diminish our ability swiftly to monitor a communication from a foreign terrorist overseas to a person in the United States." In other words, the complain that one of the only exceptions is for communications relating terrorism, but then say this will prevent them from getting communications pertaining to terrorism.

> Then it launches into a tirade that lacks any specifics:
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> > It would have a devastating impact on foreign intelligence surveillance operations; it is unsound as a matter of policy; its provisions would be inordinately difficult to implement; and thus it is unacceptable.
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> As Feingold already pointed out, the government has segregated the information they collected under PAA—they're already doing this. But to justify keeping US person information lumped in with foreign person information, they offer no affirmative reason to do so, but only say it's too difficult and so they refuse to do it.

Even 5 years ago, the language about the "devastating impact" segregating non-terrorism data might have strongly suggested the entire point of this collection was to provide for back door searches.

But that letter was dated February 5, 2008, before the FISCR challenge had even begun. While not definitive, this seems to strongly suggest, at least, that the government planned — even if it hadn't amended the FBI minimization procedures yet — to retain a database of incidentally data to search on, before the government told FISCR they did not.

Update: I forgot a very important detail. In a hearing this year, Ron Wyden revealed that NSA's authority to do back door searches had been closed some time during the Bush Administration, before it was reopened by John "Bates stamp" Bates.

> Let me start by talking about the fact that the House bill does not ban warrantless searches for Americans'

> emails. And here, particularly, I want to get into this with you, Mr. Ledgett if I might. We're talking of course about the backdoor search loophole, section 702 of the FISA statute. This allows NSA in effect to look through this giant pile of communications that are collected under 702 and deliberately conduct warrantless searches for the communications of individual Americans. *This loophole was closed during the Bush Administration*, but it was reopened in 2011, and a few months ago the Director of National Intelligence acknowledged in a letter to me that the searches are ongoing today. [my emphasis]

When I noted that Wyden had said this, I guessed that the government had shut down back door searches in the transition from PAA to FAA, but that seems less likely, having begun to review these Yahoo documents, then that it got shut down in response to the hospital confrontation.

But it shows that more extensive back door searches had been in place before the government implied to the FISCR that they weren't doing back door searches that they clearly were at least contemplating at that point. I'd really like to understand how the government believes they didn't lie to the FISCR in that comment (though it wouldn't be the last time they lied to courts about their databases of Americans).