

WHEN THE FISA COURT BECOMES THE EXOTIC SURVEILLANCE SHOP

I'm still updating yesterday's post collecting everything we might know about the government's demand to Lavabit that led Ladar Levison to shut it down.

I'd like to consider the implications of Levison's hint that the order or warrant he got came not solely from the FBI – as a National Security Letter would – but from the FISA Court.

LADAR LEVISON: I think it's important to note that, you know, it's possible to receive one of these orders and have it signed off on by a court. You know, we have the FISA court, which is effectively a secret court, sometimes called a kangaroo court because there's no opposition, and they can effectively issue what we used to consider to be an NSL. And it has the same restrictions that your last speaker, your last guest, just talked about.

(The restrictions in question pertain to the gag and risk of prison that came with the National Security Letter Nicholas Merrill received.)

Several of us on Twitter today brainstormed what kind of FISA order this might involve: possibilities include using a physical FISA search to get keys from Lavabit's users, using the Internet dragnet precedents to use FISA's Pen Register/Trap and Trace provision to get the keys, treating the keys as "tangible things" under Section 215 and demanding them that way, or possibly just a traditional electronic surveillance warrant. They also might have issued a protection order requiring Lavabit to archive things that users otherwise might be able to delete, as they have in a prior case.

But the implication is that all happens under the FISA Court and not (as, for example, the government's demand for Twitter information on WikiLeaks associates did in that investigation) the Eastern District of VA court.

And that, to me, seems as problematic as the gag and the apparently exotic request.

Consider: presumably the target of this order is Edward Snowden and alleged accomplices of his, though hints about the order suggest the government demanded information on all of Lavabit's users to get to the information on Snowden. Snowden has already been charged in a criminal complaint (which has been released, but is still not docketed). Snowden has been charged with several crimes, not just probable cause that he's an agent of a foreign power (and while many in government have been trying to claim he's a defector to Russia since those charges, at the time he was charged there was no hint of his being a foreign agent).

In other words, this is now and seems to have always been a criminal investigation, not a foreign intelligence investigation (and it didn't start out as an old-style Espionage investigation, which would have been the appropriate application with Snowden to get into a foreign intelligence court).

So why is it in the "Foreign Intelligence Surveillance Act" court (if in fact it is)? Why isn't it in a Title III Court, with a nice hefty gag attached to it that would serve the same purpose as the legal gag tied to FISA orders?

Hell, why is it gagged anyway, since it had been publicly reported that Snowden was a Lavabit customer, and since the government itself has leaked that it is investigating and has charged Snowden?

The obvious answer is likely because the FISA Court is where the exotic precedents live – wacky interpretations of Pen Register/Trap and Trace statutes to allow bulk collection of stuff that might loosely be called Internet metadata

or of the word "relevant" to mean "whatever the government wants it to mean."

And that, it seems to me, presents a troubling new interpretation for the "significant purpose" language in FISA, which was passed after 9/11 to allow the government to use information collected under the guise of foreign intelligence for criminal prosecution purposes. The idea, then, was that the court is supposed to serve primarily as a foreign intelligence shop with the criminal use being incidental.

But the very vague outlines of the Lavabit demands appears to suggest the government has reversed that, using the FISA Court for investigative purposes that might easily be accomplished under Title III, except that the government is relying on exotic precedents that only exist in the secret FISA Court.

With so much secret about this order, we can't be sure, but it appears the government is using the FISA Court for this exotic theory when the appropriate venue should be a traditional Article III court.

You know? Courts that might find such exotic theories outrageous and might disclose the outlines of it to Snowden if he were ever put on trial.