

ANCIENT HISTORY: DECEMBER 2012 IN THE DRAGNET

PCL0B tells us that the FISA Court approved a new automated query system (versions appear to have been in development for years, and it replaced the automated alert system from 2009) in late 2012 that permitted all the 3-degree contact chains off all RAS-approved identifiers to be dumped into the corporate store at once where they can be combined with data collected under other authorities (presumably including both E0 12333 and FAA) for further analysis.

In 2012, the FISA court approved a new and automated method of performing queries, one that is associated with a new infrastructure implemented by the NSA to process its calling records. 68 The essence of this new process is that, instead of waiting for individual analysts to perform manual queries of particular selection terms that have been RAS approved, the NSA's database periodically performs queries on all RAS – approved seed terms, up to three hops away from the approved seeds. The database places the results of these queries together in a repository called the "corporate store."

The ultimate result of the automated query process is a repository, the corporate store, containing the records of all telephone calls that are within three "hops" of every currently approved selection term. 69 Authorized analysts looking to conduct intelligence analysis may then use the records in the corporate store, instead of searching the full repository of records.

According to the FISA court's orders, records that have been moved into the

corporate store may be searched by authorized personnel “for valid foreign intelligence purposes, without the requirement that those searches use only RAS – approved selection terms.” 71 Analysts therefore can query the records in the corporate store with terms that are not reasonably suspected of association with terrorism. They also are permitted to analyze records in the corporate store through means other than individual contact-chaining queries that begin with a single selection term: because the records in the corporate store all stem from RAS-approved queries , the agency is allowed to apply other analytic methods and techniques to the query results. 72 For instance, such calling records may be integrated with data acquired under other authorities for further analysis. The FISA court’s orders expressly state that the NSA may apply “the full range” of signals intelligence analytic tradecraft to the calling records that are responsive to a query, which includes every record in the corporate store.

(While I didn’t know the date, I have been pointing the extent to which corporate store data can be analyzed for some time, but thankfully the PCLOB report has finally led others to take notice.)

On December 27, 2012, Jeff Merkley gave a speech in support of his amendment to the FISA Amendments Act that would push to make FISC decisions public. It referenced both the backdoor loophole (which John Bates extended to NSA and CIA in 2011, was implemented in 2012, and affirmed by the Senate Intelligence Committee in June 2012) **and** the language underlying the phone dragnet. Merkley suggested the government might use these secret interpretations to conduct wide open spying on Americans.

If it is possible that our intelligence agencies are using the law to collect and use the communications of Americans without a warrant, that is a problem. Of course, we cannot reach conclusions about that in this forum because this is an unclassified discussion.

My colleagues Senator Wyden and Senator Udall, who serve on Intelligence, have discussed the loophole in the current law that allows the potential of backdoor searches. **This could allow the government to effectively use warrantless searches for law-abiding Americans.** Senator Wyden has an amendment that relates to closing that loophole. Congress never intended the intelligence community to have a huge database to sift through without first getting a regular probable cause warrant, but because we do not have the details of exactly how this proceeds and we cannot debate in a public forum those details, then we are stuck with wrestling with the fact that we need to have the sorts of protections and efforts to close loopholes that Senator Wyden has put forward.

[snip]

Let me show an example of a passage. Here is a passage about what information can be collected: " reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2)," and so on.

Let me stress these words: "relevant to an authorized investigation."

There are ongoing investigations, multitude investigations about the conduct of individuals and groups around

this planet, and one could make the argument that any information in the world helps frame an understanding of what these foreign groups are doing. So certainly there has been some FISA Court decision about what “relevant to an authorized investigation” means or what “tangible things” means. **Is this a gateway that is thrown wide open to any level of spying on Americans or is it not?** Is it tightly constrained in understanding what this balance of the fourth amendment is? We do not know the answer to that. We should be able to know. If we believe that an administration and the secret court have gone in a direction incompatible with our understanding of what we were seeking to defend, then that would enable us to have that debate here about whether we tighten the language of the law in accordance with such an interpretation. **Again, is this an open gateway to any information anywhere in the world, anytime, on anyone or is it a very narrow gate? We do not know.** [my emphasis]

Also in December 2012, the White House wrote a set of talking points warning, in part, that if Congress aligned the expiration dates of FAA with the PATRIOT Act it might lead some people to think they were connected.

Aligning FAA with expiration of provisions of the Patriot Act risks confusing distinct issues.

Now why is it, do you think, that the White House was so worried, when it was refusing to release information about either the backdoor loophole or the phone dragnet that serves as an index to tell NSA which content to access, that we might think PATRIOT had some tie to FAA?

The relationship between the dragnet and content

has, as NSA's SID Director Theresa Shea represented in declarations last year, been in place for some time. But it sure seems like it got new life in 2012, just as the Administration got Congress to reauthorize one half of the whole contraption.