

UNIT 8200 REFUSENIKS MAKE VISIBLE FOR ISRAEL WHAT REMAINS INVISIBLE IN THE US

Last week, 43 reserve members of Israel's equivalent to the NSA, Unit 8200, released a letter announcing they would refuse to take actions against Palestinians because the spying done on them amounts to persecution of innocent people. The IDF has responded the same way government agencies here would – scolding the whistleblowers for not raising concerns in official channels. But the letter has elicited rare public discussion about the ethics and morality of spying.

One of the allegations made by the refuseniks highlighted in the English press is that Israel used SIGINT to recruit collaborators, which in turn divides the Palestinian community.

The Palestinian population under military rule is completely exposed to espionage and surveillance by Israeli intelligence. While there are severe limitations on the surveillance of Israeli citizens, the Palestinians are not afforded this protection. There's no distinction between Palestinians who are, and are not, involved in violence. Information that is collected and stored harms innocent people. *It is used for political persecution and to create divisions within Palestinian society by recruiting collaborators and driving parts of Palestinian society against itself.* In many cases, intelligence prevents defendants from receiving a fair trial in military courts, as the evidence against them is not revealed. Intelligence allows for the continued control over millions of people through thorough and intrusive supervision and

invasion of most areas of life. This does not allow for people to lead normal lives, and fuels more violence further distancing us from the end of the conflict. [my emphasis]

These refuseniks, apparently, have access both to the intelligence they collect and how it is used. That means they're in a position to talk about the effects of Unit 8200's spying. And press coverage has made it sound like something that would uniquely happen to occupied Palestinians.

It's not.

We know of one way that the NSA's dragnet is definitely being used to recruit informants (aka collaborators), and another whether it is permissible to use.

The first way is via the phone dragnet. As I have noted, the government has twice told the FISA Court – once in 2006 and once in 2009 – that FBI uses dragnet derived information to identify people who might cooperate (aka inform or collaborate) in investigations. Once people come up on a 2-degree search, they are dumped into the corporate store indefinitely, data mined with sufficient information to find embarrassing and illegal things. Apparently, FBI uses such data to coerce cooperation, though we have no details on the process.

All the revealing things metadata shows? The government uses that information to obtain informants.

One way the government probably does this is by using the connections identified by metadata analysis (remember, this is not just phone and Internet data, but also includes financial and travel data, at a minimum) to put people on the No Fly list, regardless of whether they are a real threat to this country. Then, No Fly listees have alleged, FBI promises help getting them off that life-altering status if they inform on their community.

More troubling still is FBI's uncounted use of warrantless back door searches of US person content when conducting assessments. As I noted, in addition to doing assessments in response to "tips," the FBI will use them to profile communities or identify potential informants.

As the **FBI's Domestic Investigations and Operations Guide** describes, assessments are used for "prompt and extremely limited checking out of initial leads." No factual predicate (that is, no real evidence of wrong-doing) is required before the FBI starts an assessment. While FBI cannot use First Amendment activities as the sole reason for assessments, they can be considered. In addition to looking into leads about individual people, FBI uses assessments as part of the process for Domain Assessments (what **FBI calls their profiling of Muslim communities**) and the selection of informants to try to recruit. In some cases, an Agent doesn't need prior approval to open an assessment; in others, they may get oral approval (though for several kinds, an Agent must get a formal memo approved before opening an assessment). And while Agents are supposed to record all assessments, for some assessments, they're very cursory reports – basically complaint forms. That is, for certain types of assessments, FBI is not generating its most formal paperwork to track the process.

So while I can't point to a DOJ claim to FISC that these back door searches are useful because they help find informants, it appears to be possible. Plus, as early as 2002, Ted Olson said they would use evidence of rape collected using traditional FISA to talk someone into cooperating (aka inform or collaborate); that was the reason he gave for blowing the wall between intelligence and criminal investigations

to smithereens.

Indeed, knowing the way the government uses phone dragnet information as an index to collected content, the government may well use phone dragnet metadata to pick which Americans to subject to warrantless back door searches.

It sounds really awful when we hear about Israel using SIGINT – including information we provide without minimizing it – to spy on Palestinians.

But we have a good deal of reason to believe the US intelligence community – in collaboration – does similar things, spying on Muslim communities and using SIGINT to recruit collaborators that end up sowing paranoia and distrust in the communities.

Not only don't we have a group of refuseniks who, among themselves, can explain how all of this works. But how the FBI uses all this data is precisely what the government intends to keep secret under the so-called "transparency" provisions of USA Freedom Act. While I will provide more detail in a follow-up post, remember that the FBI refuses to count its back door searches, which means it would be almost impossible for anyone to get a real sense of how these warrantless back door searches on US persons are used. It also has asserted it does not need to disclose evidence derived from Section 215 to criminal defendants, which is another way the evidence against defendants gets hidden.

It's awful that Israel is doing it. But it's even worse that we're almost certainly doing the same, but that we can only find hints of how it is being done.