FISA AMENDMENTS ACT: "TARGETING" AND "QUERYING" AND "SEARCHING" ARE DIFFERENT THINGS

Steven Aftergood suggests there's disagreement among Senate Intelligence Committee members about whether or not the FISA Amendments Act allows the government to get US person content without a warrant.

> The dispute was presented but not resolved in a new Senate Intelligence Committee report on the Foreign Intelligence Surveillance Act Amendments Act (FAA) Sunsets Extension Act, which would renew the provisions of the FISA Amendments Act through June 2017.
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> "We have concluded… that section 702 [of the Act] currently contains a loophole that could be used to circumvent traditional warrant protections and search for the communications of a potentially large number of American citizens," wrote Senators Ron Wyden and Mark Udall.
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> But Senator Dianne Feinstein, the Committee chair, denied the existence of a loophole. Based on the assurances of the Department of Justice and the Intelligence Community, she said that the Section 702 provisions "do not provide a means to circumvent the general requirement to obtain a court order before targeting a U.S. person under FISA."

I don't think there is a conflict. Rather, I think DiFi simply responded to Wyden and Udall's assertions with the same spin the government has

used for some time. That's because DiFi is talking about "targeting" and Wyden and Udall are talking about "searching" US person communications.

DiFi quotes much of the language from Section 702 earlier in her statement on FAA, repeating, repeating the word "target" three times.

> In enacting this amendment to FISA, Congress ensured there would be important protections and oversight measures to safeguard the privacy and civil liberties of U.S. persons, including specific prohibitions against using Section 702 authority to: "intentionally target any person known at the time of acquisition to be located in the United States;" "intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;" "intentionally target a United States person reasonably believed to be located outside the United States;" or "intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." As an additional measure the law also requires that an acquisition under Section 702 "shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States." [my emphasis]

Her specific retort to the problem Wyden and Udall differentiates clearly between "querying information collected under Section 702 to find communications of a particular United States person" and "conduct[ing] queries to analyze data already in its possession" and "targeting."

> Finally, on a related matter, the Committee considered whether querying

> information collected under Section 702 to find communications of a particular United States person should be prohibited or more robustly constrained. As already noted, the Intelligence Community is strictly prohibited from using Section 702 to target a U.S. person, which must at all times be carried out pursuant to an individualized court order based upon probable cause. With respect to analyzing the information lawfully collected under Section 702, however, the Intelligence Community provided several examples in which it might have a legitimate foreign intelligence need to conduct queries in order to analyze data already in its possession. The Department of Justice and Intelligence Community reaffirmed that any queries made of Section 702 data will be conducted in strict compliance with applicable guidelines and procedures and do not provide a means to circumvent the general requirement to obtain a court order before targeting a U.S. person under FISA. [my emphasis]

Which not only makes it crystal clear that the government can access communications after it has been collected, but that they have done so.

Though the difference between what DiFi describes—"querying data"—and what Wyden and Udall describe—"search[ing] for the communications" of particular American citizens—is telling.

> We have concluded, however, that section 702 currently contains a loophole that could be used to circumvent traditional warrant protections and search for the communications of a potentially large number of American citizens.
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> [snip]

> Since all of the communications collected by the government under section 702 are collected without individual warrants, we believe that there should be clear rules prohibiting the government from searching through these communications in an effort to find the phone calls or emails of a particular American, unless the government has obtained a warrant or emergency authorization permitting surveillance of that American.a
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> Section 702, as it is currently written, does not contain adequate protections against warrantless "back door" searches of this nature. We offered an amendment during the committee's markup of this bill that would have clarified the law to prohibit searching through communications collected under section 702 in an effort to find a particular American's communications.

What DiFi describes sounds like data mining; what Wyden and Udall describe sounds like using the huge amount of data collected in the name of foreign intelligence to collect enough data such that US person communications are there if you ever want or need it. And their proposed amendments—both voted down in committee—also use the words, "review" and "contents," making it clear the government is accessing US person communications and reading it.

Then again, there has been little doubt that's what the government is doing since the bill passed. When Michael Mukasey and Mike McConnell issued veto threats against Russ Feingold amendments that would prevent this kind of search, it become clear that's what the intelligence community intended to do with the bill. And when the government submitted a thoroughly duplicitous court filing in Amnesty v. Clapper—wielding the word "target" the same way DiFi did, but also ignoring the clause on intentionally collecting US person data—it

became clear the government doesn’t want to talk about collecting US person communications.

This is not a dispute. DiFi hides behind that word “targeting,” which she knows well doesn’t do anything substantive to prevent the government from reading American communications without a warrant. But both she and Wyden and Udall make it clear the government is using the data it collected in the guise of foreign intelligence to get to US person communications.