DID THE GOVERNMENT CHANGE WHEN — AND HOW — IT MINIMIZED US PERSON COLLECTIONS SINCE 2008?

I've been digging through the weeds of the government's response to Basaaly Saeed Moalin's challenge of the FISA materials used in his trial. As a reminder, this is one of just two examples of a case where the government has admitted to using the Section 215 database to capture a terrorist (they now say they've used the database in 13 cases total, presumably since 2006).

In a section starting on page 50, the government argues the collection leading to Moalin's indictment (and since then, his conviction) was "lawfully conducted."

> [T]he FISA-obtained or -derived information that wil be offered into evidence in this case was acquired, retained, and disseminated by the FBI in accordance with FISA's minimization requirements, and the implementing standard minimization procedures ("SMPs") promulgated by the Attorney General and approved by the FISC.

As this document mapping out the structure of the argument, the first and only section of their proof addresses minimization. That may seem kind of weird, but remember that the Intelligence Community sometimes calls this collection "collection carried out pursuant to the Section 702 minimization procedures." (Though keep in mind that the collection in question took place under the Protect America Act starting in 2007.)

What I'm particularly interested in, however, is

that following an initial redacted section and footnote addressing minimization, the government's motion addresses two sets of standard minimization procedures (see the first sentence of document page 51). At first, I thought the invocation of "both" pertained to one procedure for electronic and another procedure for physical surveillance (the government used both in its case against Moalin). But the full reference refers to the "current" and the "old" SMPs.

> Under FISA and both sets of SMPs, minimization "may occur at any of several stages, including recording, logging, indexing, or dissemination." lARA, 2009 WL 5169536, at *6 (citing Kevork, 634 F. Supp. at 1017); Senate Report at 40; current SMPs,, Section I.A., pp. 1-2. At the acquisition stage, FISA does not "prohibit the use of automatic tape recording equipment." Rahman, 861 F. Supp. at 252; Kevork, 634 F. Supp. at 1017. Indeed, the FISC has noted that FISA surveillance devices are normally left on continuously and that consequently minimization occurs (under the old SMPs) during the logging and indexing of the pertinent communications.88 See In re Sealed Case, 310 F.3d at 740.

Remember, the wiretaps used in this case date to December 2007 to April 2008. The motion was written in February 2012. This seems to suggest the "old SMPs" were in place in 2007-08, but they have been replaced since then. And the distinction between the two — and an explanation for why they would both be relevant to the question of legality — must appear in a redacted section, perhaps the one that immediately precedes this passage.

Note, these appear to both be different from the minimization procedures leaked by Edward Snowden, which have a date stamp from July 29, 2009. Those address collections under Section

702 of FISA, whereas the reference to SMPs in In Re Sealed Case cited above describes "Standard Minimization Procedures for U.S. Person Agent of a Foreign Power," as referred to in this passage of that ruling.

> The most critical step in retention is the analysis in which an informed judgment is made as to whether or not the communications or other data seized is foreign intelligence information. To guide FBI personnel in this determination the Standard Minimization Procedures for U.S. Person Agent of a Foreign Power in Section 3(a)(4) Acquisition/Interception/Monitoring and Logging provide that "communications of or concerning United States persons that could not be foreign intelligence information or are not evidence of a crime . . . may not be logged or summarized." (emphasis added). Minimization is required only if the information "could not be" foreign intelligence. Thus, it is obvious that the standard for retention of FISA-acquired information is weighted heavily in favor of the government.

This seems to suggest the minimization procedures from 2002 (the ones invoked in this ruling) remained roughly the same until the "old SMPs" referred to in this passage.

But it also appears the passage doesn't treat the "current" SMPs as the Snowden version either. That's because there is no section I.A. in those — and certainly not one discussing logging and indexing.

I raise all this because the new ones seem to allow minimization (or not) at two more different stages: at the collection phase (which, given the description of the kinds of collection they conduct, might be computerized) or at the dissemination stage. Given the language in the minimization procedures we've

seen (and the discussion that follows this passage, which talks about the looser minimization in terrorism cases), that seems to allow decisions long after the initial "collection." (Remember, in this case, the government decided in 2009 not to prosecute but then in 2011, following the prosecution of the hawala involved, did decide to do so.)

In the Section 702 context, there appears to be little logging and indexing (which is why the government can claim it can't say how many Americans get sucked up as "incidental" collection). I wonder if part of this change reflects a de-emphasis of logging and indexing for specific warrants as well?