FISC JUDGES SHOULD THREATEN NSA WITH CRIMINAL PROSECUTION MORE OFTEN

This James Bamford description of NSA efforts to avoid criminal prosecution in a 1975 investigation convinced me to point to evidence that then FISA Chief Judge John Bates — who is normally fairly deferential to the Executive Branch — cowed the government with threats of criminal prosecution.

The story starts in the October 3, 2011 opinion. After having laid out how the government was collecting US person data from the switches, Bates noted that the government wanted to keep on doing so.

> The government's submissions make clear not only that the NSA has been acquiring Internet transactions since before the Court's approval of the first Section 702 certification in 2008,15 but also that NSA seeks to continue the collection of Internet transactions.

Noting that this collection had been going on longer than the 3 years the government had been using Section 702 of the FISA Amendments Act to justify its collection likely references a time when the NSA — led by Keith Alexander as far back as 2005 — was collecting that US person information with no legal sanction whatsoever as part of Dick Cheney's illegal program.

Then, in footnote 15, Bates notes that sharing such illegally collected information is a crime.

> The government's revelations regarding the scope of NSA's upstream collection implicate 50 U.S.C. § 1809(a), which makes it a crime (1) to "engage[] in electronic surveillance under color of

> law except as authorized" by statute or (2) to "disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by statute. See [redacted] (concluding that Section 1809(a)(2) precluded the Court from approving the government's proposed use of, among other things, certain data acquired by NSA without statutory authority through its "upstream collection"). The Court will address Section 1809(a) and related issues in a separate order. [my emphasis]

Now, I'm particularly interested in the redacted text, because it appears some FISC judge has had to issue this threat in a past (still-redacted) opinion. That threat may have applied to this same upstream collection, but from the time before the government pointed to FAA to justify it (again, Alexander's tenure would overlap into that illegal period).

In the days after Bates' ruling, the government considered appealing it. On October 13 (10 days after his initial rule) Bates gave the government a schedule for responding to his 1809(a) concerns. In its first response, the government said 1809(a) didn't apply. But then, on November 22, they finally responded to his concerns in earnest.

> The Court therefore directed the government to make a written submission addressing the applicability of Section 1809(a), which the government did on November 22, 2011. See [redacted], Oct. 13, 2011 Briefing Order, and Government's Response to the Court's Briefing Order of Oct. 13, 2011 (arguing that Section 1809(a)(2) does not apply).

It's unclear what the government argued in that November 22 submission, or what the redacted title is (the November 30, 2011 opinion references a November 29 submission). But shortly thereafter, the government started taking action.

> Beginning late in 2011, the government began taking steps that had the effect of mitigating any Section 1809(a)(2) problem, including the risk that information subject to the statutory criminal prohibition might be used or disclosed in an application filed before this Court.

At first, the government claimed it couldn't segregate the illegal data, but would make sure it was subjected to some of the limitations imposed with the new minimization procedures.

> Although it was not technically feasible for NSA to segregate the past upstream collection in the same way it is now segregating the incoming upstream acquisitions, the government explained that it would apply the remaining components of the amended procedures approved by the Court to the previously collected data, including (1) the prohibition on using discrete, non-target communications determined to be to or from a U.S. person or a person in the United States, and (2) the two-year age-off requirement. See id. at 21.

By April 2012, however, they decided (they claimed, in oral form — any bets we learn this oral assurance was false?) to come up with a better solution — purging what they could identify entirely.

> Thereafter, in April2012, the government orally informed the Court that NSA had made a "corporate decision" to purge all data in its repositories that can be

> identified as having been acquired through upstream collection before the October 31, 2011 effective date of the amended NSA minimization procedures approved by the Court in the November 30 Opinion.

Then they went through and figured out what reports derived from the tainted collections, and assessed whether they could be individually defended or not.

In the end, Bates never ruled on whether the government was — as they claimed — exempt from rules limiting the collection and dissemination of illegally collected data.

> Under the circumstances, the Court finds it unnecessary to further address the arguments advanced by the government in its November 22, 2011 response to the Court's October 13, 2011 briefing order regarding Section 1809(a), particularly those regarding the scope of prior Section 702 authorizations.

(The government likes to introduce precedents about "good faith" Fourth Amendment violations in situations like this, which is, I suspect, some of how they claimed to be immune from the law.)

The FISC as a whole likely would work far better as an oversight vehicle if Bates had taken action regarding these prior lies and the tainted collection.

Still, what Bates forced the government to do is far more than the FBI did in an equivalent situation, when DOJ Inspector General Glenn Fine found a bunch of illegally collected US person phone data obtained using exigent letters; most of that material never got expunged.

All of which offers a lesson in effective oversight. The government appears to claim it is not bound the rules that bind precisely this

kind of collection. In an opinion expressing consternation with the government's serial lies, Bates made it clear he believes at least some laws limit the government.

The end result is not perfect: the same guy who oversaw that illegal collection before it had any legal cover, Keith Alexander, still runs our nation's spying machine. But without at least some leverage, you can't exercise oversight.