

WAS ADEL DAOUD TARGETED OFF OF A BACK DOOR SEARCH OF TRADITIONAL FISA COLLECTION?

Daoud Adel is a 20-year old US citizen from suburban Chicago who was charged last year in an FBI sting in which he allegedly tried to set off a car bomb outside a night club. Last year, during the debate on FISA Amendments Act reauthorization, Dianne Feinstein named his case directly, suggesting he had been busted using the legislation before the Senate. His legal team first demanded the FAA material she suggested existed back in May. And in September, they requested discovery for materials relating to FAA.

The government, however, strongly suggests none of the communications used to charge him were collected under FAA. It even suggests he misunderstands the meaning of DiFi's comment.

Any discovery based on the FAA is unwarranted here because the FAA is simply not at issue in this case. As the Government explained in a previous filing, it "does not intend to use any such evidence obtained or derived from FAA-authorized surveillance in the course of this prosecution." (DE 49, at 2).

[snip]

The defendant's claim that the Government should disclose "the nature of the FAA surveillance in this case even, for instance[,] Defendant's communications themselves were not intercepted" is perplexing. (DE 52, at 15 n.11). If Daoud's communications were not intercepted, or his facilities not

targeted, he would not be aggrieved and have no basis to challenge the collection. The Government sees no legal relevance to his broad discovery request.

Moreover, the defendant has also made multiple claims, in this motion and others, based on his interpretation of a single public remark. While the Government appreciates the defendant's position in litigating FISA-related matters, it offers that **the defendant may misunderstand this public remark**, which is not a revelation that has any legal implication.

[snip]

As the Government has explained, this case singularly involves "traditional" FISA surveillance. [my emphasis]

Soapbox Orator's comments in response to one of my posts on back door searches led me to examine the government's response closely and I now suspect Daoud may have been identified using a back door search on traditional FISA collection.

Much of this debate centers on comments DiFi made on December 27, 2012, which seemed to suggest the 8 cases she named involved FAA. But those comments **were in response** to comments Ron Wyden had just made. In that speech Wyden described (among other problems with FAA) back door searches.

The fact is, once the government has this pile of communications, which contains an unknown but potentially very large number of Americans' phone calls and e-mails, there are surprisingly few rules about what can be done with it.

For example, **there is nothing in the law that prevents government officials from going to that pile of communications and deliberately searching for the phone**

calls or e-mails of a specific American, even if they do not have any actual evidence that the American is involved in some kind of wrongdoing, some kind of nefarious activity.

Again, if it sounds familiar, it ought to because that is how I began this discussion, talking about these sorts of general warrants that so upset the colonists. General warrants allowing government officials to deliberately intrude on the privacy of individual Americans at their discretion was, as I have outlined this morning, the abuse that led America's Founding Fathers to rise up against the British. They are exactly what the fourth amendment was written to prevent.

If government officials wanted to search an American's house or read their e-mails or listen to their phone calls, they are supposed to show evidence to a judge and get an individual warrant. But **this loophole in the law allowed government officials to make an end run around traditional warrant requirements and conduct backdoor searches for American's communications.** [my emphasis]

Thus, when DiFi complained about "a view by some that this country no longer needs to fear attack," which is what her lawyer says she was addressing, she was addressing, in significant part, Wyden and his warnings about back door searches. In fact, at the end of the passage where she invoked Daoud, she made it clear she was addressing Wyden. Then, she invoked the Senate Intelligence Committee vote on the bill.

I have tried to satisfy Senator Wyden but apparently have been unable to do so.

I am hopeful the Senate Intelligence Committee's 13-to-2 vote to reauthorize

this important legislation will be considered by all Members.

That's important because the Report accompanying that vote described the Committee's rejection of limits on back door searches.

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.

In other words, one of the things the FAA Reauthorization bill did – and I suspect DiFi's speech was meant to do – was to establish record of legislative intent (albeit only that of SSCI and SJC, which also considered limits on back door searches) supporting back door searches, at least of Section 702-collected data.

We need to continue back door searches, DiFi may well have been saying, because otherwise the FBI won't be able to identify as many impressionable young men to catch in stings. (Note, Daoud's case bears many similarities to Mohamed Osman Mohamud's case, and I'd wager a beer the government identified Mohamud in part by reverse targeting Samir Khan's communications. Remember, too, that Mohamud is a Wyden constituent.)

Now, we know that FBI can do back door searches off of traditional FISA material as well as FAA material because that's the basis John Bates used to approve back door searches for NSA and CIA in 2011.

[description of other minimization procedures, almost certainly those of FBI] contain an analogous provision allowing queries of unminimized FISA-acquired information using identifiers – including United States person identifiers – when such queries are designed to yield foreign intelligence information. See [redacted]. In granting [redacted] applications for electronic surveillance or physical search since 2008, **including applications targeting United States persons and persons in the United States**, the Court has found that the [redacted] meet the definitions of minimization procedures at 50 U.S.C. §§ 1801(h) and 1821(4). It follows that substantially-similar querying provision found at Section 3(b)(5) of the amended NSA minimization procedures should not be problematic in a collection that is focused on non-United States persons located outside the United States and that, in the aggregate, is less likely to result in the acquisition of nonpublic information regarding non-consenting United States persons. [my emphasis]

There have been reports of Daoud engaging in jihadist forums and reading Anwar al-Awlaki material. And in fact, we have reason to believe the FBI increasingly used Awlaki material as a tripwire after the 2009 Nidal Hasan attack; at least that's what the Webster report recommended they do.

The identification and designation of Strategic Collections [redacted] will allow the FBI to focus additional resources—and, when appropriate, those

of [redacted] [other government agencies]—on collections most likely to serve as “trip wires.” This will, in turn, increase the scrutiny of information that is **most likely to implicate persons in the process of violent radicalization**—or, indeed, who have radicalized with violent intent. This will also provide Strategic Collections [redacted] with a significant element of program management, managed review, and quality control that was lacking in the pre-Fort Hood [review of information acquired in the Aulaqi investigation] [redacted].
[my emphasis]

So we should expect that Daoud might have come up in back door searches of the known Awlaki traditional FISA warrant (though there’s some question whether the investigative dates in Daoud’s case predate Awlaki’s death).

How chilling, too: Webster talked about using the “trip wire” to identify people “in the process of violent radicalization.” We know what the FBI does to kids like that. Precisely what they did with Daoud: throw a series of confidential informants and undercover officers at him, fostering his radicalization, until he agrees to commit an act they largely orchestrated.

There are a number of other features of the government’s response that leads me to suspect this is about a back door search: the close focus on “significant purpose” language from the PATRIOT Act (which gave the FBI broad authority to use FISA-collected information for criminal investigation), the focus on Daoud’s age (which leads me to believe the intercepts in question may date to before Daoud turned 18 on September 21, 2011 and therefore before Awlaki’s death on September 30, 2011), and the focus on minimization procedures (which, under the terms laid out by Raj De and Robert Litt, would be the only protection accorded Daoud’s communications

if collected incidentally as part of the Awlaki collection).

Heck. According to the terms laid out by De and Litt, it seems back door searches completely bypasses First Amendment protect, because it would be Awlaki's communications that could not be collected solely on First Amendment grounds, not Daoud's (unless FBI's minimization procedures protected this; but the NSA's minimization procedures certainly don't).

All this is, of course, just a hunch. But in any case, De just provided Daoud's lawyers a pretty clear indication that the government conducts back door searches without even reasonable articulable suspicion of wrong-doing.

Which seems like a tremendous reason to challenge back door searches, if that's how they nabbed him.