TODAY'S NSA-RELATED ORWELLIANISM: "DERIVED FROM"

As I noted in this post, the government has submitted its response to Mohamed Osman Mohamud's motion for discovery on how DOJ came to forget to tell him he had been discovered through the use of Section 702 spying.

The bulk of their argument basically boils down to this assertion, which they repeat in many forms throughout their response.

> A remedy for untimely notice exists under FISA: the defendant will be given the opportunity to challenge evidence obtained or derived from FISA collection in a suppression hearing governed by the procedures set forth in FISA.

That is, they argue the only thing Mohamud is entitled to is an opportunity to challenge the Section 702 evidence, which they intend to prevent adversarial review of by chanting "national security." Which is another way of saying they believe Mohamud has no real remedy at all.

But the really pathetic part of the response comes in the passage where they try to explain why they didn't give Mohamud timely review.

The problem was not bad faith, they argue (and they'd like the judge to just ignore the other late notice they gave Mohamud in this case). No, not at all.

Rather, it derived from confusion over the meaning of "derived from."

You see, DOJ has always known that it must notify defendants when they plan to use information "derived from" Title VII (that is, Section 702) collection.

> At the outset, defendant's assertion regarding the existence of a "secret policy" and claim that the government engaged in deliberate misconduct to conceal the use of Title VII-derived evidence are unfounded. The Department has always understood that it is required to notify any "aggrieved person" of its intent to use or disclose, in a proceeding against such person, any information obtained or derived from Title VII collection as to which that person is an aggrieved person, in accordance with 50 U.S.C. §§ 1806(e), 1881e(a).

It's just that DOJ didn't really consider information "derived from" Section 702 to be information "derived from" Section 702, instead considering it to be "obtained from" Title I (traditional FISA) and Title III (stored communication). Or something like that.

> The Department's determination, however, that information obtained or derived from Title I or Title III collection may, in particular cases, also be derived from prior Title VII collection is a relatively recent development (and one that occurred after trial of defendant). The Supplemental Notification filed in this case, which the government provided based on its own review, resulted from that determination and demonstrates good faith, not misconduct.
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> As this Court knows, pursuant to Title I of FISA, the government must notify any "aggrieved person" of its intent to "enter into evidence or otherwise use or disclose," in a proceeding against such person, "any information obtained or derived from [FISA authorized] electronic surveillance of that aggrieved person." 50 U.S.C. § 1806(c); see also 50 U.S.C. § 1825(d) (requiring

> notice to an aggrieved person of the intent to use evidence against such person obtained or derived from a physical search conducted pursuant to FISA). The FAA provides that information acquired from Title VII collection "is deemed to be" information acquired pursuant to Title I for, among other things, the purposes of the applicability of the statutory notice requirement and the suppression and discovery provisions in Section 1806 of Title I. See 50 U.S.C. § 1881e(a).
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> The Department has always understood that notice pursuant to Sections 1806(c), 1825(d) and 1881e(a) must be provided when the government intends to use evidence directly collected pursuant to Title I, III, or VII. Such evidence would be evidence that was "obtained from" such FISA collection.

It's around about here that the government admits it has been using a different definition of "derived from" in the case of criminal Title III warrants "derived from" FISA information than it has been when using FISA warrants "derived from" other FISA collection.

> Likewise, the Department has always recognized that notice pursuant to those provisions must be provided when the government intends to use evidence obtained through ordinary criminal process (such as a Rule 41 search warrant) that was itself based directly on information obtained pursuant to Title I, III, or VII. Such evidence would be evidence that was "derived from" such FISA collection.
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> Prior to recent months, however, the Department had not considered the particular question of whether and under what circumstances information obtained through electronic surveillance under

> Title I or physical search under Title III could also be considered to be derived from prior collection under Title VII. After conducting a review of the issue, the Department has determined that information obtained or derived from Title I or Title III FISA collection may, in particular cases, also be derived from prior Title VII collection, such that notice concerning both Title I/III and Title VII collections should be given in appropriate cases with respect to the same information.3
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> 3 The Department has concluded that in determining whether information is "obtained or derived from" FISA-authorized surveillance, the appropriate standards and analyses are similar to those appropriate in the context of surveillance conducted pursuant to Title III (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522).

Breaking! DOJ plans to start treating legal words used in a national security context the same as they treat the same words in a criminal context.

And so you see, the problem was *not* a matter of bad faith or prosecutorial misconduct. Goodness no! It was just that DOJ used a special definition of "derived from" back in 2010 when it did not provide proper notice to Mohamud.

> In November 2010, at the time the original notice was filed, the government knew that some of the evidence to be used in the case had been obtained or derived from Title I and Title III FISA collection. It did not consider whether that same evidence was also "derived," as a matter of law, from prior FISA collection pursuant to Titles I, III, or VII.

Note they're subtly changing their argument here. They're suggesting they didn't *consider* whether this information was "derived from" Section 702 in 2010, even though they've just explained that even if they had, they would have been using their special definition of "derived from" that would have led them to conclude that information "derived from" Section 702 is not really information "derived from" Section 702.

There's a reason they're doing that, I think. DOJ needs to pretend that when it was arguing that the Amnesty v. Clapper plaintiffs shouldn't get standing to challenge Section 702, because only defendants being prosecuted based on evidence "derived from" 702 should — and more importantly would — get to challenge Section 702, it wasn't using this sneaky definition of "derived from."

> 4 Defendant's claim that the Department's statements to the U.S. Supreme Court in Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013), were inconsistent with existing Department policy is baseless. The Department informed the U.S. Supreme Court in that case, that "[i]f the government intends to use or disclose any information obtained or derived from its acquisition of a person's communications under [Title VII] in judicial or administrative proceedings against that person, it must provide advance notice of its intent to the tribunal and the person, whether or not the person was targeted for surveillance under [Title VII]." US Gov't Br. at 8. This is an accurate statement of both the law and the government's previous and current understanding that FISA imposes an obligation on the government to provide notice of its intent to use or disclose information that was derived from Title VII collection as well as information that was obtained from Title VII collection. The issue before the Court

> in Clapper did not involve the precise circumstances in which information is properly considered to be derived from Title VII collection, and as such that case has no bearing here.

Using a specious definition of “derived from” with an alleged terrorist is one thing. Using the very same specious definition of “derived from” with SCOTUS is a very different thing. And DOJ would like you to think they’re not doing just that.

It almost makes you wish this very challenge gets appealed up to SCOTUS, to see what the Justices think about DOJ’s special definition of “derived from.”