CONFIRMED: DOJ USES SECTION 702 TO GET TITLE I FISA WARRANTS

In addition to the apparent miscommunication between Mark Udall and Acting (and presumably soon to be confirmed) DOJ National Security Division Head John Carlin, there was an even more telling exchange in today's hearing.

In it, Martin Heinrich asked whether DOJ had yet written down its radical new policy of giving notice to defendants caught using Section 702.

> Heinrich: As you know in October 2013, after months and months of discussion and debate in which you and the NSD were involved, DOJ adopted a new policy by which Federal prosecutors would inform defendants when they intended to offer evidence informed, obtained, or derived from intelligence collected under Section 702 of FISA. And when you and I met in December you informed me that that policy had not yet been reduced to a formal written policy, and so, Mr. Carlin, I wanted to ask, is that process done yet and has that policy been finalized and if so has it been disseminated in written form?
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> Carlin: Thank you Senator, and thank you for having taken the time to meet prior to this uh, hearing, in terms of the question, it is my understanding that it was the practice of the, uh, or policy of the Department, to inform a defendant in a criminal case, to give notice, if there was 702 information that was going to be used against them prior to, uh, prior to this change in practice. The change in practice had to do with a particular set of circumstances when there was an instance where information obtained from one prong of the FISA

> statute, 702, was used and led to information that led to another prong of FISA, Title I FISA, being used, and that when the notice was given to the defendant that that notice was referring to one type of FISA but not both types of FISA. And that is the practice that we uh reviewed and changed, so that now defendants are receiving notice in those instances of both types of uh, FISA, the review of cases affected like that, uh, affected by that continues, but we have filed such notice now, I believe in three uh criminal matters, including the case of Mohamed Mohamud, the individual convicted by a jury of attempting to uh use an explosive device in a Christmas tree lighting ceremony. In reference to that case we've now filed, um, there's a filing in that case we should provide to your staff where we lay out what our practice is and I will ensure that that filing is distributed to US Attorneys offices across the country so they know exactly what our position is in that issue.
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> Heinrich: That's helpful. And so you'll share that with the committee as well?
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> Carlin: Yes sir.
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> Heinrich: Great.

Now, Carlin might be forgiven for all the uming and ahing here. After all, the filing he appears to be referring to is sort of an extended effort to pretend that "derived from" doesn't mean "derived from," all in an effort to pretend DOJ hasn't been deliberately hiding this (in Mohamud's case) for over 3 years.

But kudos to Carlin for not using that verb — derived — in his answer, choosing instead to use "was used and led to information that led to."

All that said, Carlin did admit what has been clear for some time: that DOJ has been hiding

Section 702 collected information by getting Title I warrants they provide to defendants. Which is another way of saying all the reassurances people have given about the protections given to people collected incidentally in Section 702 fall flat, because what has actually been happening is the government uses that incidental collection to justify Title I warrants.

Um.

I’m glad that’s all cleared up.