

# WHY DOES NSA GET A PASS ON THE BOSTON MARATHON ATTACK?

In addition to a motion claiming the FBI asked Tamerlan Tsarnaev to become an informant during their investigation of him in 2011, Dzhokhar Tsarnaev's lawyers submitted a motion requesting notice of whether the government intends to submit as evidence or has in its possession surveillance information that would be helpful to Dzhokhar's defense.

This motion is not going anywhere.

The government would generally be obliged to turn this over only if they planned to use it (or evidence derived from it, in the still very attenuated way they define such things) in trial. And as the defense notes in the motion, any surveillance that might exist would most likely be of Dzhokhar's family, especially his brother, not him. Moreover, the defense points to *Amnesty v. Clapper* to invoke the government's admission that it collects data not just in FISA-authorized programs, but also in EO 12333 ones.

And, although we do not reach the question, the Government contends that it can conduct FISA-exempt human and technical surveillance programs that are governed by Executive Order 12333. See Exec. Order No. 12333,

Yet there is no established obligation to notice such evidence, as there is for FISA.

All that said, to justify their demand, the defense notes the government's non-response to three past attempts to get such information. And they note two passages from the recently released House Homeland Security Committee report on the bombing to justify their renewed claim.

This threat assessment included a check of "U.S. government databases and other information to look for such things as derogatory telephone communications, possible use of online sites associated with the promotion of radical activity, associations with other persons of interest, travel history and plans, and education history." Id. at 12. The report also states that, according to FBI officials in Moscow, "electronic communication" between Tamerlan and a jihadist named William Plotnikov "may have been collected."

If any "derogatory" telephone communications had been discovered, presumably the assessment into Tamerlan wouldn't have been closed after less than 4 months, as the report makes clear it was (the Russian notice was March 4, 2011; the FBI set an alert on Tamerlan on March 22, 2011; the FBI closed the assessment on June 24, 2011). Ditto if Tamerlan had significant online activity "associated with the promotion of radical activity" (he would have, after his return from Russia). So for the moment assume nothing significant came of these searches, which are attributed to the FBI. Nevertheless, these comments at least nod to databases that may be, or may be derived from, NSA databases.

The possible intercept between Tamerlan and Plotnikov may have dated to a year after the FBI's assessment, although this NBC report, which seems to have been based on an unredacted report, suggests it predated the warnings. In any case, it's almost certainly a Russian intercept, not an NSA one: the paragraph reporting it (see the partly redacted paragraph on page 15) is one of just a few in this report classified FGI, indicating it derives from foreign government intelligence. If the FBI (and later, CIA) did learn that Tamerlan had come up in incriminating intercepts with Plotnikov in 2011, that's something the NSA presumably could have replicated (and would be solidly within

NSA's interpretation of permissible taps under reverse targeting restrictions as laid out in the most recent PCL0B hearing, even assuming such tasking were done under FAA).

Dzhokhar's defense doesn't deal with what I consider a far more intriguing mention, undoubtedly because it remains heavily redacted (see page 32-34). This one deals with the second Russian alert later that fall – it is another FGI paragraph and footnote – this time to the CIA. It reveals that in providing a warning reported to be largely the same as one sent 6 or 7 months earlier, the CIA version of the Russian warning used the wrong year of birth and transliterated his name differently. There was some other difference in this alert as well (this would be described in the sentence at 33-34, which the following sentence on the name and date inaccuracy add to). And while much of this heavily redacted discussion involves the mechanics of data sharing, what is clear is CIA added Tamerlan (with the wrong birth date and transliteration) to two more databases than FBI had, TIDES (a kind of centralized database) and TSDB (a centralized terrorist screening database) based on some reason to be suspicious. Just as significantly, according to NBC (which also spoke to a "US intelligence official," though it doesn't attribute this specific claim at all), CIA also passed on this information to several other agencies. "On Oct. 19, 2011, the CIA shared information on Tsarnaev with the National Counterterrorism Center (NCTC), DHS, the State Department and the FBI."

Take a step back here and consider this claim. First, NBC's source (or the unredacted report) would have you believe a legal alien in the US got added to the TSDB for alleged ties with extremists in Russia without NSA also getting notice of it. It would also have you believe that any further checks done into Tamerlan at this time never stumbled over the grisly Waltham murder committed just weeks earlier, or Tamerlan's odd behavior afterwards. Tamerlan was getting added to databases, but no one made a

Request for Information about the underlying claims involving people who could be legally targeted in Russia to the NSA, at least as far as the public story goes.

And note what doesn't appear in the House report, but which does appear in Dzhokhar's indictment?

Inspire magazine is an English language online publication of al-Qaeda in the Arabian Peninsula. Volume One of Inspire magazine, which is dated summer 2010, contains detailed instructions for constructing IEDs using pressure cookers, explosive powder from fireworks, shrapnel, adhesive, and other materials. IEDs constructed in this manner are designed to shred flesh, shatter bone, and cause extreme pain and suffering, as well as death.

[snip]

At a time unknown to the Grand Jury, but before on or about April 15, 2013, DZHOKHAR A. TSARNAEV downloaded to his computer a copy of Volume One of Inspire magazine, which includes instructions on how to build IEDs using pressure cookers or sections of pipe, explosive powder from fireworks, and shrapnel, among other things.

There are codes within Inspire that could and presumably are targeted under NSA's upstream collection, meaning if such downloads in any way crossed key international switches, they might have been identified and tracked, along with metadata identifying Dzhokhar's computer.

And yet, in spite of all these potential bread crumbs the NSA might have had, no one has thought to ask NSA whether they did. The HHSC didn't ask NSA for information, And the joint IG report on the attacks did not include NSA's IG.

Don't get me wrong. I'm actually sympathetic to

the idea that even the most diligent effort cannot prevent every attack. I'm not endorsing doing any more domestic collection than NSA already does – though what it does, it does precisely to identify people like Tamerlan, people who have conversations with known extremists overseas. According to both NSA and FBI's rules, neither would have needed even Reasonable Articulate Suspicion into Tamerlan – though they clearly had that – to do a back door search on, say, Plotnikov's communications. I'm also not saying this would make a lick of difference in Dzhokhar's trial (though the allegation is that his computer, not Tamerlan's, is the one with Inspire on it).

But if we're going to do drawn out assessments every time we miss a terrorist attack, shouldn't we also be assessing the actions or inactions of the people who run massive dragnets ostensibly because they'll identify people like Tamerlan? If we're going to have this dragnet – and if NSA is going to justify it by pointing to terrorism – shouldn't we be assessing its role in actually preventing terrorism?