

WHAT HAPPENED TO OBAMA'S ORDERED RESTRICTIONS ON BACK DOOR SEARCHES?

In the wake of yesterday's PCL0B Report, Presidential Review Board Member Geoffrey Stone reminded that Obama's hand-picked group recommended requiring warrants before accessing US person data collected via Section 702.

In effect, the Review Group recommended that backdoor searches for communications involving American citizens should be prohibited unless the government has probable cause and a warrant. This is essentially what the recently enacted House amendment endorsed.

The Review Group concluded that the situation under section 702 is distinguishable from the situation when the government lawfully intercepts a communication when it has probable cause and a warrant. This is so because, in the section 702 situation, the government is not required to have either probable cause or a warrant to intercept the communication. Because section 702 was *not intended* to enable the government to intercept the communications of American citizens, because our recommended reform would leave the government free to use section 702 to obtain the types of information it was designed and intended to acquire—the communications of non-U.S. citizens, and because the recommended reform would substantially reduce the temptation the government might otherwise have to use section 702 impermissibly in an effort intentionally to intercept the communications of

American citizens, we concluded that this reform was both wise and essential.

But there's a forgotten detail from ancient history of greater interest. *Even the President* ordered up changes for back door searches in criminal contexts.

Specifically, I am asking the Attorney General and DNI to institute reforms that place additional restrictions on government's ability to retain, search, and use in criminal cases, communications between Americans and foreign citizens incidentally collected under Section 702.

Yet in spite of the fact the President asked the Attorney General and DNI to place additional restrictions on the government's ability to keep, search, and use Section 702 collected information in criminal cases, here's what we learned yesterday.

[A]lthough a communication must be "destroyed upon recognition" when an NSA analyst recognizes that it involves a U.S. person and determines that it clearly is not relevant to foreign intelligence or evidence of a crime,⁵³¹ in reality this rarely happens. Nor does such purging occur at the FBI or CIA: although their minimization procedures contain age-off requirements, those procedures do not require the purging of communications upon recognition that they involve U.S. persons but contain no foreign intelligence information.

[snip]

FBI requires that metadata queries, like content queries, be reasonably designed to return foreign intelligence or evidence of a crime. As noted above, however, the FBI does not separately track which of its queries involve U.S.

person identifiers, and so the number of such metadata queries is not known.

As illustrated above, rules and oversight mechanisms are in place to prevent U.S. person queries from being abused for reasons other than searching for foreign intelligence or, in the FBI's case, for evidence of a crime. In pursuit of the agencies' legitimate missions, however, government analysts may use queries to digitally compile the entire body of communications that have been incidentally collected under Section 702 that involve a particular U.S. person's email address, telephone number, or other identifier, with the exception that Internet communications acquired through upstream collection may not be queried using U.S. person identifiers.⁵⁴⁰ In addition, the manner in which the FBI is employing U.S. person queries, while subject to genuine efforts at executive branch oversight, is difficult to evaluate, as is the CIA's use of metadata queries.

And the best estimate we've been given for how many of these FBI queries take places is a "substantial" amount.

It has been 6 months since the President ordered changes. And the FBI still can't even count its US person queries, much less quantify them. PCL0B calls it "difficult to evaluate."

Um, did James Clapper and Eric Holder just blow off the President's order in January? Because it sure looks like FBI's back door searches remain a relatively unregulated mess.