CAN THE GOVERNMENT USE FISA TO GET EVIDENCE OF PAST CRIMINAL ACTIVITIES?

A terror support case due to start in NYC in December seems to present some interesting questions about the use of EO 12333 and FISA evidence. Ahmed Mohammed El Gammal was arrested last year on charges he helped someone else — who apparently got killed in Syria — travel to and train for ISIL. After almost a year and several continuations, the government provided notice they intended to use material gathered under a FISA physical surveillance order (but not an electronic surveillance order). The case clearly involves a ton of Internet communications; the defense proposed voir dire questions ask if potential jurors are familiar with Twitter, Tango, Whatsapp, Cryptocat, Viber, Skype, Surespot or Snapchat, and asks how much potential jurors use Facebook.

After the government submitted the FISA notice, El Gammal's lawyers submitted three filings: one seeking access to CIPA information, one seeking to suppress the FISA material, and one asking where all the other surveillance came from.

The FISA complaint, aside from the standard challenge, appears to stem from both the delay in notification and some concerns the government did not adhere to minimization procedures (in the defense reply, they noted that the government had already released minimization procedures but refused to do so here). In addition, the FISA challenge suggests the government used FISA to "was to gather evidence of his past criminal activity," which it argues is unlawful. His lawyers also seem to question whether there was no other way to obtain the information (which is particularly interesting given the delayed notice).

In addition, the government's response describes some of the reasons El Gammal's lawyers suspect the government used some kind of exotic (probably 12333) surveillance against him (some of which are partly or entirely redacted in the defense filings).

> The defendant's motion speculates that the Government relied upon undisclosed techniques when it (1) "appears to have sought information about El Gammal from at least two entities—Verizon and Yahoo—before his identity seems to have become known through the criminal investigation," (Def. Memo. 3) (2) "seems to have learned about El Gammal before receiving, in the criminal investigation, the first disclosure that would necessarily have identified him," (Def. Memo. 5) and (3) appeared to have "reviewed the contents of [CC-1's] [social media] account before [the social media provider] made its Rule 41 return" (Def. Memo. 5). This speculation is baseless. The Government has used a number of investigative techniques in this case. Not all of those techniques require notice or disclosure at this (or any) stage of the investigation.2 And the Government has complied with its notice and disclosure obligations to date.
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> 2 Additional background regarding this investigation is provided in Section IV.A. of the Government's September 23, 2016 Classified Memorandum in Opposition to the Defendant's Pretrial Motion to Suppress, and for the Disclosure of the FISA Order, Application, and Related Materials.

It appears that the government had obtained Facebook material (the primary social media involved here) either under Section 702 or EO 12333, then parallel constructed it via warrant. And it appears to suggest the involvement of some kind of programmatic Verizon and Yahoo collection that may not have been disclosed (El Gammal was in custody before the end of the old phone dragnet).

Particularly given the timing (in the wake of FBI obtaining a way to get into Syed Rezwan Farook's phone), I had thought the physical search might have been to decrypt El Gammal's iPhone, but it appears the government had no problems accessing the content of multiple Apple devices.

There's no reason to think El Gammal will have any more luck obtaining this information than previous defendants seeking FISA and 12333 information have been.

But his lawyers (SDNY's excellent public defenders office) do seem to think they're looking at something more programmatic than they've seen before. And they do seem to believe those techniques are being parallel constructed.