IN 2010, THE GOVERNMENT TRIED TO USE SECTION 702 AGAINST US PERSONS

I'm working my way through the FISA related documents released last week. And I wanted to point out something that happened around October 2010: the NSA tried to turn 702 into a domestic surveillance program.

First, some background. Before 2011, it appears the government got 702 certificates approved every six months. Also, because the initial certificates were approved a month apart (in part because the initial PAA certificates were also approved a month apart for some really interesting reasons), the government submitted two sets of documents. That's what explains the nearly identical pairs of documents released last week (Documents 11 and 5 approve 2009 certs, and Documents 4 and 2 approve 2010 certs).

Sometime in late summer to fall 2010, the government submitted a pretty dramatically altered request (see Document 16). [Update: This targeting certificate from 2010 was submitted on July 16, though that feels like odd timing and none of the targets are described as including US persons.]

As part of that, the government defined one of the targets to include US persons (albeit ones apparently located overseas).

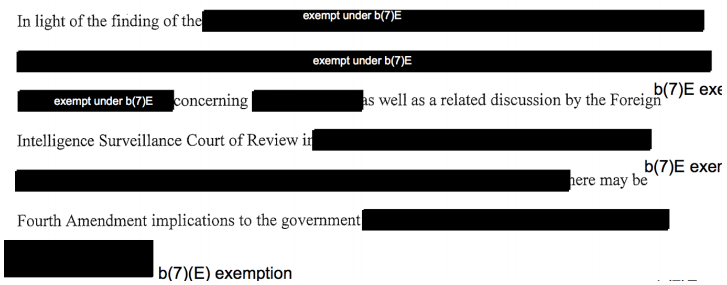
> Moreover, the government has defined the term [redacted] to include US persons, which raises the question whether permitting the intentional acquisition of communications of US persons reasonably believed to be located outside the United States is consistent with the requirements of 50 U. S.C. § 1881 a(b)(3).

In addition, the government requested to keep *and disseminate* any US person or domestic data it found "to the extent reasonably necessary to counter any imminent threat to human life or the national security that is related to the target."

> Another significant change to the minimization procedures relates to the provisions that allow NSA to retain, process, and disseminate any communication acquired while a target of 702 collection was inside the United States or after a target has been determined to be a United States person, "to the extent reasonably necessary to counter any imminent threat to human life or the national security that is related to the target, including obtaining authorization against the target pursuant to another section of the Act." NSA Minimization Procedures at 7-10.

Whereas later minimization procedures have language about protecting imminent threats (defined broadly to include property), this request included vague "threat to national security" language.

Finally, John Bates implied that the submission implicated some prior court decision(s), including one by the FISCR.



Remarkably, these prior decisions (as well as the name of the target that includes US persons) were redacted with the b(7)E law enforcement technique exemption, not the b(1) or b(3) that covers most of the other redactions in these

memos. I can't recall any other b(7)E redaction in all the FISA orders I've read.

Also note, that in 2010, there were only two known FISCR opinions, the one tearing down the wall in 2002, and the one authorizing PRISM in 2008; this may be an as yet unidentified FISCR opinion.

By all appearances, in fall of 2010, the government tried to get approval to use 702 against US persons.

In response to this request, Bates basically said, "submit a legal justification."

> To date, the government has not provided the Court with an adequate legal basis upon which to undertake this review and make the required findings. Therefore, and in accordance with Rule 10(a)(ii) of the Foreign Intelligence Surveillance Court Rules of Procedure, the Court hereby ORDERS the government to file a written memorandum of law that addresses the legal issues identified in this Briefing Order and any others that have not previously been presented to the Court.

Document 4 and Document 2 reveal that the government submitted that memorandum. But after the court saw it and discussed it, the government basically said, "um, nevermind"

> The government timely filed its Memorandum of Law on [redacted] 2010.
>
> The Court then discussed the issues presented with representatives of the government on [redacted] 2010, at which time the Court identified certain concerns regarding the government's submissions. On [redacted], 2010, the Attorney General and the DNI executed two amendments regarding the [redacted] Submission, which were filed with the Court as part of the [redacted]

> Submission. These amendments have the effect of reverting to the use of targeting and minimization procedures previously approved by the Court in the context of prior certifications.

Just to make sure the government got the message, Bates emphasized that his 2010 approvals were limited to non-US persons outside of the US.

> Like the acquisitions approved by the Court in all of the Prior 702 Dockets, acquisitions under are limited to "the targeting of non-United States persons reasonably believed to be located outside the United States."

This all had to have happened after July 2010 (because the approvals cite Bates July 2010 opinion restarting the PRTT dragnet). But the approvals almost certainly happened in November, because the government submitted its reauthorization applications on April 20 and 22 the following year and they were still doing reauthorizations every six months with applications submitted a month in advance.

So in 2010, the government asked to use 702 to spy on Americans, Bates called them on it, and they backed down.

Sort of. On May 2, the government confessed for the first time that it had been collecting US person data all along.