

HOW FBI COULD USE REVERSE TARGETING TO USE SECTION 702 AGAINST KEITH GARTENLAUB

Some weeks ago, in a post named, "Evidence the US Government Used Section 702 against Keith Gartenlaub['s Parents-in-Law]," I laid out the evidence that Section 702 was used against Keith Gartelaub. As I showed,

- A warrant in his case seemed to parallel construct Yahoo and Google content, often a sign the government is trying to introduce a second source for PRISM content
- In spite of reference to Skype metadata, nothing in the court case ever seemed to reflect the content from those calls, in spite of the fact they'd be readily collectible
- After approving the sharing of FISA information with the National Center for Missing and Exploited Children for traditional FISA data, the government approved such sharing for 702 data the day before they arrested Gartenlaub

But there was just one problem with that argument – one made clear in the title of the

post. Ultimately, the government is only supposed to be allowed to target foreigners like Gartenlaub's "well connected" Chinese parents-in-law, not Gartenlaub. Yet by all appearances, the investigation started with Gartenlaub, basically by deciding that allegations of Boeing theft must mean there was a Boeing theft at Gartenlaub's location and then, very quickly, settling on Gartenlaub as the likely culprit.

Around January 28, 2013: Agent Wesley Harris reads article that leads him to start searching for Chinese spies at Boeing

February 7, 8, and 22, 2013: Harris interviews Gartenlaub

June 18, 2013: Agent Harris obtains search warrant for Gartenlaub and his wife, Tess Yi's, Google and Yahoo accounts

So if Agent Harris did obtain 702 data between February, when he first showed interest in Gartenlaub, and June, when he appeared to be parallel constructing Google and Yahoo content, it would have been for the purpose of obtaining information on Gartenlaub, already a focus of the investigation.

That would pretty clearly be reverse targeting (unless, for some reason, the FBI already had a big stash of his in-laws' communications in their 702 collection, in which it'd come up in a back door search).

In other words, while there's a good deal of circumstantial evidence that the government used 702 to spy on his conversations with his in-laws, that shouldn't be allowed under a common sense definition of what reverse targeting does.

Except, as Senator Wyden's 702 reform and the SSCI bill report make clear, that kind of reverse targeting *actually is* permitted by current practice.

In his comments to the SSCI bill report, for

example, Wyden explained,

The bill does not include a meaningful prohibition on reverse targeting, which would require a warrant when a significant purpose of targeting a foreigner is actually to collect the communications of the American communicant. The current standard permits the government to conduct unlimited warrantless searches on Americans, disseminate the results of those searches, and use that information against those Americans, so long as it has any justification at all for targeting the foreigner.

His own bill would insert language prohibiting the targeting someone outside the US if a significant purpose is to get the communications of someone inside the US. If it was, the bill would require the government to get a Title I (traditional) order. [Bolded language is new.]

(d) Targeting procedures

(1) Requirement to adopt—The Attorney General, in consultation with the Director of National Intelligence, shall adopt targeting procedures that are reasonably designed to—

(A) ensure —

(aa) that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(bb) that an application is filed under title I, if otherwise required, when a significant purpose of an acquisition authorized under subsection (a) is to acquire the communications of a particular, known person reasonably believed to be located in the United States;

And a SSCI Wyden amendment modified by Angus King would prohibit the targeting of someone overseas if a purpose of the targeting was to collect on someone in the US.

By a vote of four ayes to eleven noes, the Committee rejected an amendment by Senator Wyden, as modified by Senator King, which would have revised the standard on current reverse targeting prohibitions to replace “the” with “a,” such that the statute would state “If a purpose of such acquisition is to target a particular known person.” The votes in person or by proxy were as follows: Chairman Burr–no; Senator Risch–no; Senator Rubio–no; Senator Collins–no; Senator Blunt–no; Senator Lankford–no; Senator Cotton–no; Senator Cornyn–no; Vice Chairman Warner–no; Senator Feinstein–no; Senator Wyden–aye; Senator Heinrich–aye; Senator King–aye; Senator Manchin–no; and Senator Harris–aye.

Clearly, the current prohibition on reverse targeting *actually would* nevertheless permit the government to obtain Gartenlaub’s in-laws communications to find out what they talk about in order to assess whether he might be plotting to steal IP from Boeing with them. And even though we still only have circumstantial evidence this is what happened, if it did, it would show the problem with reverse targeting: because Gartenlaub had Chinese in-laws, it (may have) made it far easier to obtain potentially damning information using 702 than it would be for any of his colleagues who didn’t have such ties with anyone of interest in China.

Effectively (again, if Gartenlaub was indeed reverse targeted), it would mean the government could obtain communications without any suspicion from which they could look for evidence of probable cause that he (or his wife)

was an agent of a foreign power.

Ultimately, after both a criminal warrant and a FISA warrant claiming they had probable cause Gartenlaub was spying for China, after reading his emails for months, searching his home, and searching multiple devices, the government never found evidence to support that claim. But they did find old child porn (though no forensic evidence showing he had accessed that porn). It appears likely that they would never have found it if he hadn't had the bad luck of marrying a well-connected Chinese-American.