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

Back in 2010, the government asked to use Section 702 against US persons. The FISA Court backed them down off that request. Then, six months later, the government admitted it had been collecting US person communications all along.

DAN COATS JUST CONFIRMED HE SIGNED THE SECTION 702 CERTIFICATE WITHOUT EVEN READING THE ACCOMPANYING MEMO

Today, the Senate Intelligence Committee had a hearing on Section 702 of FISA. It basically went something like this:

> It's okay that we have a massive dragnet because the men running it are very honorable and diligent.
>
> The men running the dragnet refuse to answer a series of straight questions, and when they do, they're either wrong or deeply dishonest.

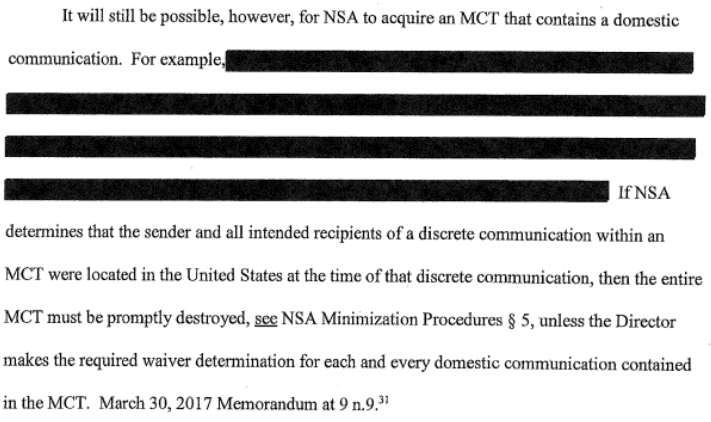
I'll lay that out in more detail later.

But the most important example is an exchange between Ron Wyden and Dan Coats that will

reverberate like Clapper's now famous answer to Wyden that they don't "wittingly" collect on millions of Americans. It went like this:

> Wyden: Can the government use FISA 702 to collect communications it knows are entirely domestic?
>
> Coats: Not to my knowledge. It would be against the law.

Coats' knowledge should necessarily extend at least as far as Rosemary Collyer's opinion reauthorizing the dragnet that Coats oversees, which was, after all, the topic of the hearing. And that opinion makes it quite clear that *even under the new more limited regime*, the NSA can collect entirely domestic communications.



It will still be possible, however, for NSA to acquire an MCT that contains a domestic communication. For example, [redacted] If NSA determines that the sender and all intended recipients of a discrete communication within an MCT were located in the United States at the time of that discrete communication, then the entire MCT must be promptly destroyed, see NSA Minimization Procedures § 5, unless the Director makes the required waiver determination for each and every domestic communication contained in the MCT. March 30, 2017 Memorandum at 9 n.9.[31]

Indeed, the passage makes clear that that example was presented in the memo tied to the certification about Section 702 that Coats signed (but did not release publicly). Effectively, Dan Coats signed a certificate on March 30 stating that this collection was alright.

I'm not sure what this example refers to. Collyer claims it has to do with MCTs, though like Dan Coats, she didn't seem to understand the program she approved. There are multiple ways I know of where entirely domestic communications may be collected under 702, which I'll write about in the near future.

In any case, if Dan Coats was being truthful in response to Wyden's question, then he, at the

same time, admitted that he certified a program without even reading the accompanying memorandum, and certainly without understanding the privacy problems with the program as constituted.

He either lied to Wyden. Or admitted that the current 702 certification was signed by someone who didn't understand what he was attesting to.

Update: I did a version of this (including comment on Mike Rogers' testimony) for Motherboard. It includes this explanation for Coats' comment.

> Section 702(b)(4) plainly states we 'may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States.' The DNI interpreted Senator Wyden's question to ask about this provision and answered accordingly.

PROCESSING VERSUS HANDLING IN SECTION 702

This is a really weedy post on changes to NSA's minimization procedures. Read at your own risk.

ANNUAL FISC REPORT SUGGESTS THE COURT

DID NOT APPROVE ANY SECTION 702 CERTIFICATE IN 2016

The FISC annual report today appears to state that the FISC did not approve any 702 certificates in 2016, which would mean the government presumably worked on extensions from November 6 until the turn of the year.

I CON THE RECORD'S "GENERALLY" USEFUL SECTION 702 Q&A

ODNI released a "generally" good document, in that, it's good except in its egregious use of the word "generally" to hide one of the most important details.

RON WYDEN'S COMPLAINTS ABOUT SECTION 702

Ron Wyden raised a number of concerns about how Section 702 can affect Americans, some of which have gotten relatively little attention.

ONE WAY TO HIDE SECTION 702 SPYING ON US PERSONS

In January, the Intelligence Community publicly admitted for the first time that it doesn't track Section 702 derived information at the granular level within intelligence reports. That may lead to failures to comply with notice requirements to defendants.

THE EASY SECTION 702 SURVEILLANCE NUMBER JAMES CLAPPER CAN SHARE

Last week, a bunch of House Judiciary Committee members set James Clapper a letter stating that before the Committee deals with Section 702 reauthorization next year, they'd like:

- The number of telephone communications in which one caller is located in the United States
- The number of Internet communications acquired through upstream collection that originate or terminate in the United States
- The number of communications of or concerning U.S. persons that the NSA positively identifies as

> such in the routine course of its work

They asked for those numbers by May 6.

In response, Clapper is humming and hawing about "several options" for disclosing how many Americans get spied on under Section 702.

> Clapper said that "any methodology we come up with will not be completely satisfactory to all parties."
>
> "If we could have made such an estimate and if such an estimate were easy to do – explainable without compromise – we would've done it a long time ago," he said.

We just learned there is, however, one number that should be easy-peasy to make public (and one I'm frankly alarmed the HJC members didn't mention, as they should have known about it for some time): the number of back door searches FBI conducts on Section 702 data for reasons other than national security.

As I noted the other day, in response to FISC amicus (and former Eric Holder counsel) Amy Jeffress' argument that FBI's back door searches of Section 702 are unconstitutional, Thomas Hogan required FBI "submit in writing a report concerning each instance … in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign intelligence information." As I noted, that's an easily gamed number – I'm sure FBI treats a lot of criminal matters as national security ones, and FBI has the ability to see if there is 702 data without looking at it, permitting it to see if the same data is available under another authority.

Nevertheless, DOJ must have an exact number of reports they've submitted in response to this reporting requirement, which has been in place

for over four months.

That's not to say HJC shouldn't insist on getting estimates for all the other numbers they're seeking. But they should also demand that this number — the number of times FBI is using a foreign intelligence exception for criminal prosecutions that should be subject to a probable cause standard — be made public.

THE GOVERNMENT ADMITS 9 DEFENDANTS SPIED ON UNDER SECTION 702 HAVE NOT GOTTEN FISA NOTICE

As I noted, in his opinion approving the Section 702 certifications from last year, Judge Thomas Hogan had a long section describing the 4 different kinds of violations the spooks had committed in the prior year.

One of those pertained to FBI agents not establishing an attorney-client review team for people who had been indicted, as mandated by the FBI's minimization procedures.

In his section on attorney-client review team violations, Hogan describes violations in *all four* of the Quarterly Reports submitted since the previous 702 certification process: December 19, 2014, March 20, 2015, June 19, 2015, and September 18, 2015. He also cites three more Preliminary Compliance Reports that appear not to be covered in that September 18, 2015 report: one on September 9, 2015, one on October 5, 2015, and one on October 8, 2015. His further discussion describes the government claiming at a hearing on October 8 to discuss the issue that, thanks to a new system FBI had

deployed to address the problem, “additional instances of non-compliance with the review team requirement were discovered by the time of the October 8 Hearing.”

But as Hogan notes in his November 2015 opinion, FBI discovered a lot of these issues because FBI had had a similar problem the previous year and he required them to review for it closely in his 2014 order. A July 30, 2014 letter submitted as part of the recertification process describes two instances in depth: one noticed in February 2014 and reported in the March Quarterly report, and one noticed in April and reported in the June 2014, each involving multiple accounts. A footnote to that discussion admits “there have been additional, subsequent instances of this type of compliance incident.”

Set aside, for the moment, the persistence with which FBI failed to set up review teams to make sure prosecutorial teams were not reading the attorney-client conversations of indicted defendants (who are the only ones who get such protection!!!). Set aside the excuses they gave, such as that they thought this requirement — part of the legally mandatory minimization procedures — didn’t apply for sealed indictments or with targets located outside the United States.

Conservatively, this significantly redacted discussion identifies 9 examples (2 reported in Compliance Reports in 2014, at least 1 reported each in each of four quarterly Compliance report between applications, plus 3 individual compliance reports submitted after the September Compliance report) when people who have been indicted had their communications collected under Section 702, whether they were the target of the 702 directives or not.

And yet, as Patrick Toomey wrote in December, not a single defendant has gotten a Section 702 notice during the period in question.

> Up until 2013, no criminal defendant received notice of Section 702

> surveillance, even though notice is required by statute. Then, after reports surfaced in the *New York Times* that the Justice Department had misled the Supreme Court and was evading its notice obligations, the government issued five such notices in criminal cases between October 2013 and April 2014. After that, the notices stopped — and for the last 20 months, crickets.

We know both Mohamed Osman Mohamud — who received a 702 notice personally — and Bakhtiyor Jumaev — who would have secondary 702 standing via Jamshid Muhtorov, with whom he got busted — had their attorney-client communications spied on. But that wasn't (damn well better not have been!!) 702 spying, because both parties to all those conversations were in the US.

These are 9 different defendants who've not yet been told they were being spied on under 702.

Why not?

The answer is probably the one Toomey laid out: that even though members of a prosecutorial team were listening in on attorney-client conversations collected under 702, DOJ made sure nothing from those conversations (or anything else collected via 702) got used in another court filing, and thereby avoided the notice requirement.

> Based on what can be gleaned from the public record, it seems likely that defendants are not getting notice because DOJ is interpreting a key term of art in Fourth Amendment law too narrowly — the phrase "derived from." Under FISA itself, the government is obliged to give notice to a defendant when its evidence is "derived from" Section 702 surveillance of the defendant's communications. There is good reason to think that DOJ has interpreted this phrase so narrowly that

it can almost always get around its own rule, at least in new cases.

It is clear from public reporting and DOJ's filings in the ACLU's lawsuit that it has spent years developing a secret body of law interpreting the phrase "derived from." Indeed, from 2008 to 2013, National Security Division lawyers apparently adopted a definition of "derived" that eliminated notice of Section 702 surveillance altogether. Then, after this policy became public, DOJ came up with something else, which produced a handful of notices in existing cases.

Savage reports in *Power Wars* that then-Deputy Attorney General James Cole decided that Section 702 information had to have been "material" or "critical" to trigger notice to a defendant. But the book doesn't provide any details about the legal underpinnings for this rule or, crucially, how Cole's directive was actually implemented within DOJ. The complete absence of Section 702 notices since April 2014 suggests DOJ may well have found new ways of short-circuiting the notice requirement.

One obvious way DOJ might have done so is by deeming evidence to be "derived from" Section 702 surveillance only when it has expressly relied on Section 702 information in a later court filing — for instance, in a subsequent FISA application or search warrant application. (Perhaps DOJ's interpretation is slightly more generous than this, but probably not by much.) DOJ could then avoid giving notice to defendants simply by avoiding all references to Section 702 information in those court filings, citing information gleaned from other investigative sources instead — even if the information from

> those alternative sources would never have been obtained without Section 702.

So these 9 mystery defendants don't tell us anything new. They just give us a number — 9 — of defendants the government now has officially admitted have been spied on under 702 who have not been told that.

As I noted, Judge Hogan did not include this persistent attorney-client problem among the things he invited Amy Jeffress to review as amicus. Whether or not she would have objected to the persistent violation of FBI's minimization procedures, a review of them would also have given her evidence from which she might have questioned FBI's compliance with another part of 702, that defendants get notice.

But DOJ seems pretty determined to flout that requirement going forward.

MORE EVIDENCE SECRET "TWEAKS" TO SECTION 702 COMING

Way at the end of yesterday's Senate Intelligence Committee Global Threats hearing, Tom Cotton asked his second leading question permitting an intelligence agency head to ask for surveillance, this time asking Admiral Mike Rogers whether he still wanted Section 702 (the first invited Jim Comey to ask for access to Electronic Communications Transactions Records with National Security Letters, as Chuck Grassley had asked before; Comey was just as disingenuous in his response as the last time he asked).

Curiously, Cotton offered Rogers the opportunity to ask for Section 702 to be passed unchanged.

Cotton noted that in 2012, James Clapper had asked for a straight reauthorization of Section 702.

> Do you believe that Congress should pass a straight reauthorization of Section 702?

But Rogers (as he often does) didn't answer that question. Instead, he simply asserted that he needed it.

> I do believe we need to continue 702.

At this point, SSCI Chair Richard Burr piped up and noted the committee would soon start the preparation process for passing Section 702, "from the standpoint of the education that we need to do in educating and having Admiral Rogers bring us up to speed on the usefulness and any tweaks that may have to be made."

This seems to parallel what happened in the House Judiciary Committee, where it is clear some discussion about the certification process occurred (see this post and this post).

Note this discussion comes in the wake of a description of some of the changes made in last year's certification in this year's PCLOB status report. That report notes that last year's certification process approved the following changes:

- NSA added a requirement to explain a foreign intelligence justification in targeting decisions, without fully implementing a recommendation to adopt criteria "for determining the expected foreign intelligence value of a particular target." NSA is

also integrating reviewing written justifications in its auditing process.

- FBI minimization procedures were revised to reflect how often non-national security investigators could search 702-collected data, and added new limits on how 702 data could be used.
- NSA and CIA write justifications for conducting back door searches on US person data collected under Section 702, except for CIA's still largely oversight free searches on 702-collected metadata.
- NSA and CIA twice (in January and May) provided FISC with a random sampling of its tasking and US person searches, which the court deemed satisfactory in its certification approval.
- The government submitted a "Summary of Notable Section 702 Requirements" covering the rules governing the program, though this summary was not comprehensive nor integrated into the FISC's reauthorization.

As the status report implicitly notes, the

government has released minimization procedures for all four agencies using Section 702 (in addition to NSA, CIA, and FBI, NCTC has minimization procedures), but it did so by releasing the now-outdated 2014 minimization procedures as the 2015 ones were being authorized. At some point, I expect we'll see DEA minimization procedures, given that the shutdown of its own dragnet would lead it to rely more on NSA ones, but that's just a wildarseguess.