THE NSA HAS NEVER NOT BEEN VIOLATING FISA SINCE IT MOVED STELLAR WIND TO FISA IN 2004

Back in 2013, I noted that FISA Judge John Bates had written two opinions finding NSA had violated 50 U.S.C. §1809(a)(2), which prohibits the "disclos[ure] or use[of] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by" FISA. Each time he did it, Bates sort of waggled around the specter of law-breaking as a way of forcing NSA to destroy data they otherwise wanted to retain and use. I suspect that is why NSA moved so quickly to shut down its PRTT program in 2011 in the wake of his upstream opinion.

In his November 6, 2015 opinion reauthorizing Section 702, presiding judge Thomas Hogan described two more definite violations of 50 U.S.C. §1809(a)(2), and one potential one, bringing the list of times the FISC caught NSA illegally surveilling Americans to four, and potentially five, times.

1. Fall 2009 confession/July 2010 opinion: Collection of categories of data under the bulk PRTT program not permitted by the FISC (Bates' opinion describes a category violation reported to FISC in the very first PRTT docket, along with NSA's assurances it would

never happen again)

2. June 2010 confession/December 10 2010, May 13, 2011 opinions: Retention of overcollected data from a traditional FISA warrant in mission management systems ultimately not deemed necessary for collection avoidance
3. May 2011 confession/October 3, 2011 opinion: Collection of entirely domestic communications on upstream surveillance MCTs
4. July 13, 2015 confession/November 6, 2015 opinion: Retention of 702 communications that had been otherwise purged in mission management systems, even though FISC had ruled against such retention in 2011
5. [Potential] July 13, 2015 confession/November 6, 2015 opinion: Retention of data that should have been purged or aged off in compliance databases

Hogan describes these incidents starting on 56.

Between June and August of 2010, the government filed some notices of violation in conjunction with a single electronic surveillance order (on page 58, he describes that as dealing "exclusively with Title I collection in a

particular case.") It's unclear whether the scope of the surveillance extended beyond what had been authorized, or whether the government had conducted surveillance based on illegally collected data (Hogan refers to it both as overcollection but also as poison fruit). As part of its efforts to resolve the problem, the government argued it could keep some of this poisonous fruit in some kind of oversight database to prevent further collection. But it also argued that its minimization procedures "only applied to interceptions authorized by the Court and did not apply to the fruits of unlawful surveillance," effectively arguing that if it broke the law the FISC could then not tell it what to do because it had broken the law. The government also argued 50 U.S.C. §1809(a)(2) "only prohibits use or disclosure of unlawfully obtained information for investigative or analytic purposes," meaning it could keep illegal data for management purposes.

FISC didn't buy this argument generally, but in a December 10, 2010 opinion did permit NSA to retain "the results of unauthorized surveillance [that] are needed to remedy past unauthorized surveillance or prevent similar unauthorized surveillance in the future." In that opinion, FISC cited John Bates' July 2010 PRTT opinion discussing the application of 50 U.S.C. §1809(a)(2).

After further review, on May 13, 2011, the court ruled that the specific data in question did not fall within that exception.

> [C]ourts should not attempt "to restrict the unqualified language of a [criminal] statute to the particular evil that Congress was trying to remedy — even assuming that it is possible to identify that evil from something other than the text of the statute itself." Brogan v United States, 522 U.S. 398, 403 (1998) … The exception recognized in the December 10, 2010 Opinion stands on narrower but firmer ground: that in

> limited circumstances, prohibiting use of disclosure of the results of unauthorized electronic surveillance would be "so 'absurd or glaringly unjust' … as to [call into] question whether Congress actual intended what the plain language of Section 1809(a)(2) "so clearly imports."

That decision only related to one traditional FISA order — but it did lay out the principle that NSA couldn't keep illegally collected data for vague management reasons.

Which is why Hogan was so surprised to learn NSA was doing the same thing — and had been! — with Section 702 data that had otherwise been purged, which the NSA confessed to Hogan in July of last year. That is, having stopped the practice with a single traditional FISA order, they kept doing it with programmatic 702 data.

> In light of the May 2011 [redacted], the Court was very surprised to learn from the July 13, 2015 Notice that the NSA had not been deleting from [redacted] Section 702 records placed on the NSA's Master Purge List ("MPL").
>
> [snip]
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> As the Court explained to the government at the October 8 Hearing, it expects the government to comply with its heightened duty of candor in ex parte proceedings at all times. Candor is fundamental to this Court's effective operation in considering ex parte submissions from the government, particularly in matters involving large and complex operations such as the implementation of Section 702.

After the hearing, the government submitted several filings effectively saying it was purging the data, then admitting that the technical process it had implemented to effect

the purge was only purging some of the selectors that had been illegally collected.

In any case, after 4 years of retaining 702 data that had to be purged, they were finally moving towards deleting it last year.

The second violation pertains to two tools (both names of which are redacted) that help determine whether a selector can be or has been properly tasked (on page 76, Hogan suggests "most Section 702 information [in these databases] that is otherwise subject to purge pertains to roamer communications."

The first appears to be a pre-tasking tool to see whether it properly tasked. This tool has not aged off PRISM data within the required 5 years, nor upstream data within the required 2 years, though it has aged off pre-October 31, 2011 upstream data. NSA has not done so "because of the utility of these records for compliance and collection avoidance purposes." It also helps to respond to OSD and ODNI oversight questions.

The second is a post-tasking tool to identify whether a Section 702 target may be in the US. It doesn't age off PRISM data within the required 5 years, though it does treat upstream data properly. In addition, it doesn't purge items that have been added to the Master Purge List. Rather than purging, it just masks certain fields from most users.

In general, Hogan seemed to believe most of this data did fall within the narrow exception laid out in the December 2010 opinion permitting the retention of unauthorized data for the purposes of collection avoidance, though he asked for further briefing that would have taken place in January.

He did point to the inclusion in these two tools of other selectors that had been put on the purge list, however, which would raise additional questions:

> Examples would be incidentally acquired

> communications of or concerning United States persons that are clearly not relevant to the authorized purpose of the acquisition or that do not contain evidence of a crime which may be disseminated under the minimization procedures … attorney-client communications that do not contain foreign intelligence information or evidence of a crime … and any instances in which the NSA discovers that a United Staes person or person not reasonably believed to be outside the United States at the time of targeting has been intentionally targeted under Section 702.

That is, Hogan raised the possibility that these tools included precisely the kind of information that should be deliberately avoided.

Ah well. He still reauthorized Section 702.

Consider what this means: between the five years between when, in fall 2004, NSA told Colleen Kollar-Kotelly it was violating her category restrictions on the bulk Internet dragnet until the time, in 2009, it admitted it continued to do so with every single record collected, between the non-disclosure of what NSA was really doing with upstream surveillance between 2008 and 2011, and between the time FISC told NSA it couldn't keep illegally collected data for management reasons in May 2011 to the time in July 2015 it confessed it had continued to do that with 702 data, NSA has *always* been in violation of 50 U.S.C. §1809(a)(2) since it moved Stellar Wind to FISA.

And that's just the stuff they have admitted to.