

FBI'S BACK DOOR SEARCHES: EXPLICIT PERMISSION ... AND BEFORE THAT

I have written numerous times about the timing of authorization for FBI to do back door searches. There's a passage of the November 6, 2015 FISC opinion finding those searches to be constitutional that some have taken to clearly date the authority. But I believe the (unredacted sections of the) passage are being misread.

As Judge Thomas Hogan describes, "Queries by FBI personnel of Section 702-acquired data...

may be reasonably designed to "find and extract" either "foreign intelligence information" or "evidence of a crime." See id. at 11, 28-29. Both types of queries have been explicitly permitted by the FBI Minimization Procedures since 2009.²⁴ Unlike NSA and CIA, the FBI applies this standard to all queries of Section 702-acquired information, regardless of whether the querying term includes information concerning a United States person. See id.; see also Oct. 20 Transcript at 19-20.²⁵ The FBI also applies this standard regardless of whether the dataset being queried

²⁴ In [REDACTED], the Court approved FBI Minimization Procedures that incorporated by reference, as modified in a number of respects not relevant here, the "Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act" which were approved by the Attorney General on October 22, 2008 and submitted to this Court in [REDACTED] ("October 2008 SMPs"). See [REDACTED], Memorandum Opinion issued on April 7, 2009, at 14-17 ("April 7, 2009 Opinion"). Section III.D of the October 2008 SMPs permitted FBI personnel to use queries that were reasonably designed "to find and extract foreign intelligence information or evidence of a crime and to minimize the extraction of third-party information." See Oct. 2008 SMPs at 16.

As the unredacted parts of the section make clear, queries for both foreign intelligence information or evidence of a crime "have been *explicitly* permitted by the FBI Minimization Procedures since 2009." [my emphasis] The footnote goes on to describe how Minimization Procedures approved by Attorney General Mukasey on October 22, 2008 and submitted on some redacted date were approved by an opinion issued on April 7, 2009.

Already, that's a curious set of details. If the minimization procedures were approved in October 2008, normally they'd be submitted close to right away, though it's not clear that that happened. But why bother, given that FISC had just approved FAA certifications on September 4 (this timing resembles what had happened earlier that year, when the government significantly changed the program within days of getting certificates approved)? In any case, James Clapper's censors want to hide what those dates were. One likely reason they might have done so would be to hide the dates from defendants, including a few of the ones challenging 702. Another would be to obscure how the approval process went after passage of FISA Amendments Act, specifically given that the FISA Court of Review finalized its Yahoo opinion in August of that year, in which it relied on DOJ's promise that "there is no database" of incidentally collected US person information.

There is no database that is acquired with information that is incidentally collected; and under the targeting procedures, there is a provision for destroying evidence, and that's at EA 19 and 53.

But two other things suggest that's not the end of the story. First, the use of "explicitly" suggests there may have been a period before FISC approved the minimization procedures when such a practice was approved but perhaps not explicitly. Perhaps that simply refers to that lag period, between the time Mukasey approved those minimization procedures and the time FISC approved them.

But then there's that redacted paragraph (the next footnote, 25, starts after it). Hogan adds something to his discussion beyond his description of the explicit approval of those minimization procedures.

As I have pointed out, Mukasey (writing with then Director of National Intelligence Mike McConnell, who would also have to approve any PRISM minimization procedures) made it clear in

response to a Russ Feingold amendment of FISA Amendments Act in February of 2008 that they intended to spy in Americans under PRISM.

So it sure seems likely the Administration at the very least had FBI back door searches planned, if not already in the works, well before FISC approved the minimization procedures in 2009. That's probably what Hogan explained in that paragraph, but James Clapper apparently believes it would be legally inconvenient to mention that.