Government Continues to Avoid Court Rulings on Domestic Surveillance

By: emptywheel Monday April 19, 2010 10:46 am

Three significant pieces of news, taken together, show that the Courts continue to chip away at Bush-and-now-Obama's domestic surveillance programs.

FISA Court Encourages Government to Stop Collecting Some Metadata

First, and potentially most importantly, the FISA Court, after learning more about what the collection of telecom metadata entailed, raised some concerns with the government, leading them to voluntarily stop collecting it.

> The Foreign Intelligence Surveillance Court, which grants orders to U.S. spy agencies to monitor U.S. citizens and residents in terrorism and espionage cases, recently "got a little bit more of an understanding" about the NSA's collection of the data, said one official, who spoke on the condition of anonymity because such matters are classified.
>
> The data under discussion are records associated with various kinds of communication, but not their content. Examples of this "metadata" include the origin, destination and path of an e-mail; the phone numbers called from a particular telephone; and the Internet address of someone making an Internet phone call. It was not clear what kind of data had provoked the court's concern.
>
> [snip]

> The NSA voluntarily stopped gathering the data in December or January rather than wait to be told to do so, the officials said. The agency had been collecting it with court permission for several years, officials said.

Curiously, Adam Schiff is quoted in the story specifically addressing VOIP.

Al-Haramain Agrees to Vaughn Walker's Judgment

Next, on Friday, al-Haramain responded to Vaughn Walker's tidy judgment on FISA–which I have argued was crafted to be rather tempting to the government–by basically accepting his judgment and backing off any further constitutional claims associated with the suit. In their proposed judgment, al-Haramain basically:

- Asks for the $61,200 in damages defined by the statute ($20,400 for each of three plaintiffs, which comes from $100/day for each day of violation)
- Asks for $550,800 total in punitive damages ($183,600 for each of three plaintiffs)
- Asks for legal fees (bmaz estimates these might run to around $3,375,000)
- Dismisses all other constitutional claims and claims against Robert Mueller as an individual
- Requests a declaration that "the defendants' warrantless electronic surveillance of plaintiffs was unlawful as a violation of FISA"
- Requests an order that the government purge all information illegally collected (except that which would be exculpatory)

In short, al-Haramain is basically saying, "gosh what a nifty solution you've crafted, Judge Walker. Let's see what Eric Holder thinks of it."

Now, the government might have some complaint about the particular description of its illegal wiretapping. And I'm betting they're going to have operational troubles with purging the illegally collected information, particularly if it means purging a lot of poisoned fruit along with it. But I still do think the government will try to find a way to accept Walker's nifty solution.

Government Backs Down in Request to Access Stored Emails without Warrant

Finally, in another case in Denver, the government backed down a request that Yahoo turn over the stored emails of one of its customers without a warrant. Yahoo, EFF, and a bunch of other privacy advocates had made a stink, and rather than face an adverse judgment, the government backed down.

> In the face of stiff resistance from Yahoo! and a coalition of privacy groups, Internet companies and industry coalitions led by EFF, the U.S. government today backed down from its request that a federal magistrate judge in Denver compel Yahoo! to turn over the contents of a Yahoo! email user's email account without the government first obtaining a search warrant based on probable cause.
>
> The EFF-led coalition filed an amicus brief this Tuesday in support of Yahoo!'s opposition to the government's motion, agreeing with Yahoo! that the government's warrantless seizure of an email account would violate both federal privacy law and the Fourth Amendment to the Constitution. In response, the Government today filed a brief claiming that it no longer had an investigative need for the demanded emails and withdrawing the government's motion.

As EFF points out, the government has repeatedly backed down when challenged on this type of collection and related collection.

> This is not the first time the government has evaded court rulings in this area. Most notably, although many federal magistrate judges and district courts have ruled that the government may not conduct real-time cellphone tracking without a warrant, the government has never appealed any of those decisions to a Circuit Court of Appeals, thereby preventing the appeals courts from ruling on the issue. Similarly, a federal magistrate judge in New York, Magistrate Judge Michael H. Dolinger, has twice invited EFF to brief the court on applications by the government to obtain private electronic communications without a warrant, and in each case, the government withdrew its application rather than risk a ruling against it (in one case the government went so far as to file a brief anticipating EFF's opposition before finally dropping the case).

Which I think illustrates the common theme here. While we don't yet know what the Obama Administration will do in the case of al-Haramain, in the two other cases, they have backed off of surveillance activities to avoid any adverse ruling from Courts. That's partly a testament to their discomfort with their own legal position with regards to these activities. But it's also an indication that they'd rather continue their programs in some lesser form than risk having a Court declare the whole program unconstitutional.

If I'm right about all this, it means the government is balancing facing an Appeals Court on FISA and State Secrets, versus paying less then $4 million to close the chapter on Bush's most egregious form of domestic surveillance while still protecting executive programs that engage in similar collection.

35 Comments Spotlight
Tags: Eric Holder, Vaughn Walker, Al-Haramain, EFF, Yahoo
Related Posts

- Elena Kagan on Illegal Wiretapping June 30, 2010

35 Responses to "Government Continues to Avoid Court Rulings on Domestic Surveillance"

Palli April 19th, 2010 at 10:58 am
1

Is this an appropriate question: Is there one case or one individual victim that could serve as the one over-arching case to make the clearest, deepest statement against the government crimes of Torture?

Reply
earlofhuntingdon April 19th, 2010 at 11:44 am
2

> while still protecting executive programs that engage in similar collection.

That's the nut. We don't know what those are, nor do we know how much those programs really "back off" from the egregious practices engaged in by Bush, or whether technological advances allow the collection of prohibited data by less "intrusive" means.

The latter is important because advances in collecting, collating and analyzing what used to be random bits of data about a target can reveal astonishing levels of detail that used to be lost or go unnoticed. All of that abuses the privacy of American citizens about whom probable cause does not exist that they committed or aided in the commission of a crime. It can readily be abused for other than national security reasons. How tempting was it for Rove, or is it for Rahm, not to sneak a peek at such data for political and electoral

purposes?

Reply
Hmmm April 19th, 2010 at 1:31 pm
3

Small moves, but the direction is right. And that is an encouraging thought.

> And I'm betting they're going to have operational troubles with purging the illegally collected information, particularly if it means purging a lot of poisoned fruit along with it.

That sparked a technology thought. What if all this massive data collection-and-retention stuff is based on some secret data storage technology breakthrough that we mere mortal citizens don't know about yet? After all, the volumes of data involved are massive in a practically unprecedented scale, so a new technology could be a good fit. We know that in holographic image storage the entire image is essentially stored in every part of the recording medium; inverting that concept, what if things are getting stored in some intrinsically interdependent manner, such that it's not possible to remove any piece of data without destroying other data? In that scenario, it would be damaging or impossible to actually remove specific pieces of data from the stored information set. The crystal in Zardoz, etc.

Very very far fetched, of course, but in the absence of actual information logic and deduction are the only tools we have to try to get any sort of understanding at all…

Reply
qweryous April 19th, 2010 at 1:49 pm
4
In response to Hmmm @ 3

> "inverting that concept, what if things are getting stored in some intrinsically interdependent manner, such that it's not possible to remove any piece of data without destroying other data? In that scenario, it would be damaging or impossible to actually remove specific pieces of data from the stored information set."

No doubt already argued in some way irrespective of the technical implementation.

As in: "If the staples are pulled out and the appropriate pages removed (as instructed by the court), the remaining files will be ruined…"

Or: "The mainframe that we use crashes with every 404 we get, and then we have to wait for the Geek Squad…so if we start deleting stuff it will be all the court's fault…"

Reply
Hmmm April 19th, 2010 at 1:53 pm
5
In response to qweryous @ 4

IIUC you're suggesting that the storage system could, perhaps, have had an intentional (though perhaps covert) design goal of making the deletion of any data at all impossible and/or a self-destruct-causing event. That is different from what I was thinking, but from an evil-motives perspective it does make a lot of sense. Also devious… have you considered a career in information security?

Reply
Cujo359 April 19th, 2010 at 2:20 pm
6
In response to Hmmm @ 3

Actually, if you avoid most web traffic, and confine yourself to just the "metadata" from VOIP calls (connection information, etc.), the volumes become a lot more manageable. I have no idea what they're actually doing, mind you, but that much is true.

The main problem that I can see, given how I understand FISA to work, is that administratively it would be necessary for someone to verify that this information had been purged. Practically speaking, that could be difficult, at least without some serious forethought.

Reply
Mary April 19th, 2010 at 3:54 pm
7

OT – two soldiers in the unit involved in the "Collateral Murder" wikileaks video have come out with a letter of apology.

http://www.countercurrents.org/steiber190410.htm

One is the medic who is seen rushing one of the children to a US vehicle for assistance. [I guess he was also the one turned down in his requests to try to get them to a US facility for treatment instead of dumping them off] The lead in says that after the incident he applied for mental health assistance but was denied by his commander.

"The soldier in the video said that your husband shouldn't have brought your children to battle, but we are acknowledging our responsibility for bringing the battle to your neighborhood, and to your family."

Here is the site where they ask for people to co-sign the letter with them:
http://org2.democracyinaction.org/o/5966/p/dia/action/public/?action_KEY=2724

Reply
JasonLeopold April 19th, 2010 at 5:37 pm
8

OT as well, Goldman Sachs hired Greg Craig to defend the company against fraud charges

Reply
BoxTurtle April 19th, 2010 at 5:47 pm
9

As I said before, if I was the White House, I'd be dancing in the Oval Office. I can close this case for chickenfeed and not have any kind of definative ruling AND I get to keep my secrets? Only thing that confuses me is why it's taking so long for the government to accept.

Hmm@3: It doesn't need to be anything magic. We keyword the message and add it to the compressed keyword index, which is basically just the keyword and a code indicating the document number and the location in the document. The message is then compressed and stored online or offline, depending on how likely the computer thinks it is that it'll be wanted again. So you're keeping less than 5% of the data online,

prior to compression.

Qweryous @4: The court is not going to be to tolerant of their screwed up design, if it really works that way. They'd have to come up with some method of satisifying the court. It can be brute forced to never cough up AL-H or scan it, but it would be ugly code.

Cujo359@6: Given that the court has good cause NOT to trust the government in this case, I'm not certain how the Judge would handle it. You couldn't be confident that they'd reveiled all the ddatbases the info was in, for example. However, AL-H is likely going to be inclined to let that slide IMO since in any future prosecution the government would have a heck of a time proving their evidence is untainted. If the court really wanted to push it, I suppose a special master could be appointed to assure deletion.

Boxturtle (Somebody should tell Obama that the carpet he's sweeping things under is starting to look lumpy)

 Reply
BoxTurtle April 19th, 2010 at 5:49 pm
10
In response to JasonLeopold @ 8

Oh, my. They ARE scared, aren't they?

Boxturtle (Knowing Craig's rates, it might be cheaper to settle with the givernment. :-))

 Reply
Hmmm April 19th, 2010 at 5:53 pm
11
In response to Cujo359 @ 6

I don't know either, but for purposes of judging the Constitutional issues from a citizen perspective it seems it would be safer to be thinking about the high side. (Last year we figured recording all the phone conversations in the US on hard drives was very doable technically, and was mainly a constantly-growing-physical-plant-size problem.) Indexing and searching a data set that big quickly gets into fairly gnarly computer science, of course.

 Reply
bmaz April 19th, 2010 at 6:27 pm
12
In response to BoxTurtle @ 9

Well, that is not quite right. There would be a definitive ruling entered, in fact it already has been, and that order would merge into the judgment and, I think chances are pretty good, be published in the Federal Supplement Reports. The extent to which it would be controlling precedent might be somewhat limited, but the decision would certainly be out there and citable. It would also have a little credence to it in light of the fact the government willingly accepted it without appellate challenge. That is how I would argue it anyway.

 Reply
orionATL April 19th, 2010 at 7:01 pm
13

this is a very valuable post because it synthesizes disparate rulings and points onlookers like me, and i'd bet many
others,

to a pattern of behavior on the part of our doj – see what you can get away with. intimidate persons and businesses and see if they will yield readily.

i find one particular aspect of this ew post especially disturbing, the yahoo matter.

the doj has clearly gotten in the habit,

during the permissive times of ashcroft, gonzales, and mukasey

of short-circuting the law with abandon to meet their law enforcement needs, e.g., issuing national security letters.

recently the doj investigators presented yahoo with a demand for access to an email account and they did so without bothering to request court permission, aka, judicial oversight of their activity.

clearly, eric holder is failing to rein in doj investigation units from those free-wheeling days of terrorist boogey-men in 2001-2009.

a permissive approach to small failures by state police to seek judicial review and approval of their police activities is just the sort of fertile ground from which police states grow.
begins.

Reply
BoxTurtle April 19th, 2010 at 7:49 pm
14
In response to bmaz @ 12

Yes, the lack of hard precident was what I was really refering to. Thanks for correction of the judgement.

I'd still much rather have this than an appeals court ruling against me.

Boxturtle (A smart poker (or 11 dimensional chess) player knows when to cut his losses)

Reply
Hmmm April 19th, 2010 at 8:04 pm
15
In response to BoxTurtle @ 9

> It doesn't need to be anything magic. We keyword the message and add it to the compressed keyword index, which is basically just the keyword and a code indicating the document number and the location in the document. The message is then compressed and stored online or offline, depending on how likely the computer thinks it is that it'll be wanted again. So you're keeping less than 5% of the data online, prior to compression.

Possibly, but remember we've heard hints of ID'ing people from their voiceprint on the phone — remember the secret awesome mystery targeting technology in Iraq where they could call death from the skies with very very specific location, which we interpreted as putting voiceprint ID together with cell phone GPS

coordinates? That kinda stuff needs the actual audio for the analysis, not just transcribed keywords. And even the definition of what a keyword is will change over time — maybe this year it's "Barbie" but next year it might be "and". And anyway like I said before, storing a full audio recording of all phone calls in the US isn't a problem any more from a storage technology PoV.

Bigger stuff could be continuous audio video recordings of a good percentage of US home interiors via laptop microphones and webcams, continuous recordings from the micropohones in a good percentage of US cell phones, continuous recordings of mic/sensors on all the telephone poles (like the gunshot detection technology), continuous recording of the GPS location of a good percentage of US cell phones… that kinda stuff. Think continuous signal analysis, either realtime or at any time after the fact — not so much databases of message content reduced to text. If you have the original recording online then you can re-analyze it as many times as you want or need to, for example when you become aware of a new bad guy you can go back and search everything for all previous calls made by that person.

Total Information Awareness, baby.

Reply
orionATL April 19th, 2010 at 8:19 pm
16

hmmm @15

hmmm, i know i should trust our govt,

i really should.

but why don't i feel good about doing so?

Reply
Hmmm April 19th, 2010 at 8:46 pm
17

Because despite original good intentions on both of your parts, you're now on the receiving end of an abusive relationship?

Reply
Gitcheegumee April 19th, 2010 at 8:48 pm
18
In response to orionATL @ 13

"Our government is the potent, the omnipresent teacher. For good or ill it teaches the whole people by its example."

"Crime is contagious. If the government becomes the law breaker, it breeds contempt for laws; it invites every man to become a law unto himself."

Justice Louis Brandeis

Reply
orionATL April 19th, 2010 at 9:07 pm
19

gitcheegumee @18

whoa.

that quote snapped my head back.

can we get obama to (re)appoint brandeis?

“the gov’t teaches” and so it does.

that is why we have swat teams and “plain clothes” drug cops

both borrowed from, respectively, the federal military and the federal cia.

Reply
orionATL April 19th, 2010 at 9:28 pm
20

hmmm @17

wavpeac had a thougtful comment here within the last 2 weeks(+-).

a kind of personall/family inventory.

if you didn’t see it earlier, you might want to seek it out.

Reply
emptywheel April 19th, 2010 at 9:54 pm
21
In response to JasonLeopold @ 8

Good. I’m glad I never gave up my distrust of him…

Reply
stryder April 19th, 2010 at 11:14 pm
22

ot
fwiw

http://www.fas.org/blog/secrecy/2010/04/torture_olc.html

“Torture and the OLC,” and Other New Hearing Volumes

By authorizing extreme interrogation methods and defining them as legally permissible, the Bush Administration’s Office of Legal Counsel enabled “our country’s descent into torture,” said Sen. Sheldon Whitehouse (D-RI) last year at a contentious hearing of a Senate Judiciary Subcommittee that he chaired. The hearing presented contrasting views on a range of related issues, including whether or not the Bush Administration’s “enhanced interrogation” program constituted torture under international law. The 695 page record of the hearing was published late last month, with voluminous attachments and submissions for the record. See “What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration,”

May 13, 2009.

Reply
JohnJ April 20th, 2010 at 12:30 am
23

A few notes:

- Anyone notice that 1TB drives are now $100 *retail*? That indicates they are building them for ~$25 ea. My experience in this industry says that someone is buying enough to drive the price WAAAY down. The technology is there because they are the same physical size as a 10MB used to be. The Gov's got PLENTY of storage.

- On technology: I worked on a system for NSA >25 years ago that was to clamp onto the trans-Atlantic cable listening for *speaker independent* key words. Ten years after that one place I worked had a start up project on speaker independent voice recognition mysteriously shut down a month after it was announced and staffed. That almost certainly was due to a government secrecy order. (I can't remember the legal name of that kind of order, but I've worked on at least two projects shut down that way). They have got a lot of technology we don't have a notion about.

- It may be assumed here, (this is not a crowd here that misses much) but I didn't see it stated….they already have the yahoo info they need; they are just trying to sanitize it. No one is sitting at their keyboard waiting for permission to read the information.

Yeah, and cops don't use the GPS in their girlfriends cells to track them ;).

Reply
Mary April 20th, 2010 at 7:26 am
24
In response to bmaz @ 12

This part, the proposed order declaring that: "the defendants' warrantless electronic surveillance of plaintiffs was unlawful as a violation of FISA" is going to cause some line drawing imo, but the plaintiffs may end up willing to compromise on that to get this thing settled and get the info purged.

I'd guess gov will also moan over the ability to purge and want something more like an agreement not to use and they'll want the dismissals of constitutional claims to be with prejudice, although with SOL issues, by now they probably don't care much – but protecting the telecoms as agents acting under color of law would give some impetus on that front.

I'm hanging out alone, but I don't necessarily see gov bellying up to the bar on what has been put out there so far.

Reply
Mary April 20th, 2010 at 7:27 am
25
In response to stryder @ 22

Whitehouse, Feingold, Leahy, Nadler, etc. – the voices have become very soft with the Obama admin's join-up to the Bush policies, and beyond -with targeting Americans for assassinations.

Reply
bobInpacifica April 20th, 2010 at 7:42 am
26

Where does the power accrue? That's the question here.

When the FISA bailout program happened in 2008 we all remember that Senator Obama flipflopped. But why were the Republicans all steadfast in supporting something that gave so much power to the Executive Branch? They had to be pretty sure that McCain was going to lose. In any case, the odds were against the Repubs, so why give so much power to Obama?

Obama himself had to know about the misuses of government surveillance. If nothing else the conservative entity known as the FBI had recently busted Eliot Spitzer, whose op-ed in WaPo blew the lid off of the huge mortgage scam, and they busted Spitzer with laws written to bust drug money laundering and tap terrorists' phone calls. But after the Secret Service turned off the metal detector at a campaign rally (in DALLAS!) and his airplane had "mechanical difficulties" and had to have an emergency landing he seemed to embrace the FISA bill.

But why did the Republicans embrace a bill that would give so much power to Obama? Because it isn't Obama who gets the power. The intelligence agencies are the ones who get the power, not the Presidents.

Another example: Dawn Johnsen was nominated and then the Obama Administration acted all wimpy and let it die/killed the nomination. What changed from the time of the nomination to the time of its withdrawal? I suggest someone higher up the chain of command from Obama put the kabosh on it.

I hope readers here can get their heads around this. While I like engaging in political talk as much as the next guy, politics in the U.S., at least at the national level, are more like professional wrestling. The results are mostly predetermined, and the wrestlers who want to continue their careers soon learn when it's turn to win, when to fall and when to let themselves get bashed into the turnbuckle.

Reply
b2020 April 20th, 2010 at 7:43 am
27
In response to Mary @ 25

But we knew that. I like Feingold's speeches, but he has not exactly been… effectual now, has he. Leahy's voice was born soft.

There is worse: Barbara Lee submitted a resolution to every single Congress since 2002 suggesting "Disavowing the Doctrine of Preemption". It never made it out of committee, even under the 2006 Democratic Congress. In the 110th, she was down to one co-sponsor. In the 111th, she choose to not resubmit it.

But then, the worst is Obama – rousing oration combined with crimes and cover-up in broad daylight.

Reply
fatster April 20th, 2010 at 8:02 am
28

O/T Go, Rahm, go!

“It’s no secret” he wants to be Chicago Mayor–per Politico.

Reply
fatster April 20th, 2010 at 8:04 am
29

And Greg Craig is now working for Goldman Sachs. LINK.

Reply
bmaz April 20th, 2010 at 8:26 am
30
In response to Mary @ 24

Yer not alone; I am still, if being called on to bet, putting my chips down on the government continuing to fight.

Reply
orionATL April 20th, 2010 at 8:29 am
31

mary @27

feingold has a shtick.

he makes a speech stating the right and true way to think or proceed or criticizing some govt misconduct or another.

then he sits down -

until

it’s time once again to step up to the dais and make another speech that will delight right-thinking americans -

then he sits down again -

until…

a regular righteous jack-in-the-box.

he’s been playing this game for far longer than the length of the o’s time in power.

Reply
fatster April 20th, 2010 at 8:46 am
32
In response to b2020 @ 27

It almost seems that “actions of previous administrations” is now included in that part of the Oath of Office about preserving, protecting and defending, doesn’t it?

Reply

bobschacht April 20th, 2010 at 8:49 am
33
In response to stryder @ 22

So, nothing but crickets from the MSM on this?
That's part of what is wrong with this country now. Information that ought to enrage draws yawns.

Bob in AZ

Reply
Hmmm April 20th, 2010 at 12:16 pm
34
In response to fatster @ 32

Stare decisis' horrible mutant twin.

Reply
fatster April 20th, 2010 at 6:33 pm
35
In response to Hmmm @ 34

Yeppers. Thnx.

Reply

Sorry but the comments are closed on this post

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The Abu Zubaydah Document »