

CONGRESS CAN'T LEGISLATE OVERSIGHT FOR FEAR OF LEGAL CHALLENGES THAT'D ACCOMPLISH OVERSIGHT CONGRESS CAN'T LEGISLATE

Julian Sanchez has his own rebuttal to former DOJ official Carrie Cordero's claims that FISA has plenty of oversight (see mine here). You should definitely read it, which is wonky and interesting. But I wanted to add my non-wonky answer to a question Sanchez poses.

I'll grant Cordero this point: as absurd as it sounds to say "we can't tell you how many Americans we're spying on, because it would violate their privacy," this might well be a concern if those of us who follow these issues from the outside are correct in our surmises about what NSA is doing under FAA authority. The only real restriction the law places on the *initial* interception of communications is that the NSA use "targeting procedures" designed to capture traffic to or from overseas groups and individuals. There's an enormous amount of circumstantial evidence to suggest that initial acquisition is therefore *extremely* broad, with a large percentage of international communications traffic being fed into NSA databases for later querying. If that's the case, then naturally the tiny subset of communications later reviewed by a human analyst—because they match far narrower criteria for suspicion—is going to be highly unrepresentative. To get even a

rough statistical sample of what's in the larger database, then, one would have to "inspect"—possibly using software—a whole lot of the innocent communications that wouldn't otherwise ever be analyzed. And possibly the rules currently in place don't make any allowance for querying the database—even to analyze metadata for the purpose of generating aggregate statistics—unless it's directly related to an intelligence purpose.

A few points about this. First: assuming, for the moment, that this is the case, why can't NSA and DOJ say so clearly and publicly?

Sanchez dismisses a bunch of lame excuses that the government might provide. But he doesn't consider another obvious answer.

The government can't tell us it can't tell us how many Americans get spied on after every foreign telecommunication gets sucked up because if it did, then it'd be a lot easier for the plaintiffs in *Amnesty v. Clapper* to get standing. And the government can't have that—particularly not before SCOTUS hears the case on October 29—because if so it would allow the plaintiffs to actually challenge the underlying surveillance, and possibly even to challenge what I've called the database exception.

So the government can't answer Ron Wyden's questions before the FISA Amendments Act gets extended because the government is not about to let this extension wait until after the election, which is, after all, just a week after SCOTUS hears *Clapper*. And since the House is planning to leave DC for the election on October 5, it means the public simply can't be told the underlying facts of this spying program, because it'd give *Amnesty* and the ACLU more than three weeks to figure out how to win their standing case at SCOTUS.

Which brings me to another piece of oversight we can't have. As I have noted, Dianne Feinstein, after suggesting her legislation requiring the government to turn over the Targeted Killing OLC memos would accomplish what John Cornyn wanted to accomplish, not only crafted the language such that the government could withhold the memo from Cornyn because he's not read into the assassination compartment.

DiFi's thorough rolling of Cornyn on this point was even worse, however. Cornyn wanted to put an amendment on the must-pass FISA Amendments Act. If his amendment hadn't been tabled, there'd be a very good chance it'd get passed, and therefore that it'd be passed by October 5, meaning (given Cornyn's one month deadline) the government would have to comply by November 5. Heck, it might even be passed by September 20, which is the next hearing for one of two FOIA hearings on drone and/or targeted killing the ACLU has.

But the Intelligence Authorization is not a must-pass legislation, and certainly not something that has to pass by the election. So assuming it gets dumped into the lame duck period and given the six month deadline on DiFi's legislation, it would give the Administration until sometime next year to comply. Add in its covert operation loophole (the same way the government has been refusing the ACLU's FOIA), and its application solely to the Intelligence Committees, DiFi's amendment safely protects the government from having to admit publicly what it has already repeatedly admitted (albeit in a format the judges say doesn't count), that it has used drones to kill an American citizen.

DOJ can't tell the committees overseeing it about the authorization they gave the President to kill American citizens, you see, because if it did then the Administration could no longer claim the authorization to kill American citizens is too secret for oversight. Or something like that.

You see, I'm beginning to be convinced that the only kind of legislation Congress can accomplish ensures that it doesn't accidentally legislate something that accidentally allows NGOs using the courts to conduct the oversight that Congress won't exercise.