

PCLOB: AN EXERCISE IN FALSE OVERSIGHT

As you may have seen from the reporting or my live-tweeting of yesterday's Privacy and Civil Liberties Oversight Board hearing on the government's surveillance program, there were a few interesting bits of news, starting with former FISC judge James Robertson's assertion that what FISC has done since it started approving bulk collection amounts to "approval" not "adjudication" and puts the court in an inappropriate policy making role. Robertson also said FISC needs an adversarial role it doesn't currently have. Robertson also raised the possibility Section 215 could be used to create a gun registry not otherwise authorized by law, a point ignored by the former government officials on his panel.

I also thought James Baker's testimony was interesting. In his prepared statements, Baker seemed to suggest the entire hearing was a wasted exercise, because the program had plenty of oversight. (Remember, Baker was in a key role at DOJ working with FISC through 2007, and got stuck trying to keep intelligence gathered under the illegal program out of traditional FISA applications.) But just before the end of the hearing Baker said before all the bulk collection, FISA worked. He repeated it, FISA worked. Baker may have come to accept these bulk programs, but he sure seemed to think they weren't necessary.

But the most telling part of the hearing, in my opinion, is the presence of Steven Bradbury and Ken Wainstein on the panel.

There were plenty of other former government officials on the panels, representing all branches. But these two were in far more central positions in the roll out of both the legal and illegal programs. One of the key documents released by the Guardian, showing Wainstein and Bradbury recommending that newly confirmed

Attorney General Michael Mukasey resume the contact chaining of Internet metadata, shows them expanding one of the most legally questionable aspects of this surveillance.

The ground rules of the hearing made it worse. The hearing followed the inane rules the Obama Administration adopts in the face of large leaks, pretending these public documents aren't public. The Chair of PCLOB, David Medine, said no one could confirm anything that hadn't already been declassified by the government.

Which not only put that document outside the scope of the discussion. But meant neither Bradbury nor Wainstein disclosed this clear conflict.

At one point in the hearing, the moderator even suggested that every time ACLU's Jameel Jaffer said something, either Bradbury or Wainstein should have an opportunity to rebut what Jaffer said.

Yes, there were a number of interesting revelations at the hearing, along with the typical inanity from Wainstein and, especially, Bradbury. But it was set up with all the conflicts of a Presidential Commission meant to dispel controversy, not a real champion for privacy or civil liberties.

And its treatment of these two former government skills is just representative of that.