

HAS FEDERAL USE OF DRONES VIOLATED EO 12333?

The Privacy and Civil Liberties Oversight Board just sent a letter to Eric Holder and James Clapper requesting that they have all the Intelligence Committee agencies update what are minimization procedures (though the letter doesn't call them that), "to take into account new developments including technological developments."

As you know, Executive Order 12333 establishes the overall framework for the conduct of intelligence activities by U.S. intelligence agencies. Under section 2.3 of the Executive Order, intelligence agencies can only collect, retain, and disseminate information about U.S. persons if the information fits within one of the enumerated categories under the Order and if it is permitted under that agency's implementing guidelines approved by the Attorney General after consultation with the Director of National Intelligence.

The Privacy and Civil Liberties Oversight Board has learned that key procedures that form the guidelines to protect "information concerning United States person" have not comprehensively been updated, in some cases in almost three decades, despite dramatic changes in information use and technology.

The whole letter reads like the public record of a far more extensive and explicit classified discussion. Which makes me wonder what PCLOB found, in particular.

There are many technological issues that might be at issue – especially location data, but also generally Internet uses. Then there's the

advance in database technology, making the sharing of information much more invasive because of the way it can be used. But I wonder if this letter isn't a demand that members of the intelligence community correct their use of drones.

The letter seems to point to something in EO 12333 Section 2.3 as its concern. Among the other potential enumerated categories of interest is this one:

Agencies within the Intelligence Community are authorized to collect, retain or disseminate information concerning United States persons only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General, consistent with the authorities provided by Part 1 of this Order. Those procedures shall permit collection, retention and dissemination of the following types of information:

[snip]

(h) Information acquired by overhead reconnaissance not directed at specific United States persons; [my emphasis]

We recently learned that the FBI has used drones in the following situations:

UAVs have been used for surveillance to support missions related to kidnappings, search and rescue operations, drug interdictions, and fugitive investigations. Since late 2006, the FBI has conducted surveillance using UAVs in eight criminal cases and two national security cases. For example, earlier this year in Alabama, the FBI used UAV surveillance to support the successful rescue of the 5-year-old child who was being held hostage in an underground bunker by Jimmy Lee Dykes.

[snip]

The FBI does not use UAVs to conduct “bulk” surveillance or to conduct general surveillance not related to an investigation or an assessment.

It goes on to cite the Domestic Investigations and Operations Guide as its internal authority for the use of drones.

And while FBI’s use of drones to catch a kidnapper may not fall under the FBI’s intelligence mandate (and therefore may not violate E.O. 12333, which is about intelligence collection), it seems the two national security uses would.

If the subject of those national security investigations was a US person, it would seem to be a violation of E.O. 12333.

Note, too, that drones are listed among PCLOB’s focus items (see page 13).

That’s just a guess. I would also imagine that minimization procedures need updated given the more prevalent use of databases (NCTC’s access of government databases is another of PCLOB’s focuses). I would imagine that some intelligence community members (including both the NCTC and DHS) are in violation of the mandate that the FBI collect foreign intelligence within the US. And PCLOB also cites GPC use as another of its foci, which is one of the technologies that has developed in the last 30 years.

But given the timing of it all, I wonder if this is a push to get the FBI to stop using drones for intelligence collection.