

RON WYDEN'S WHAT'S-OLD-IS-NEW QUESTION: REVERSE TARGETING

When you track Ron Wyden's persistent attempts to squeeze answers out of National Security officials, you grow familiar with the rhythm of questions. Drone memos – Article II or AUMF, he asked for years before getting a still-secret answer. Has the government ever bulk collected location, Keith Alexander refused to answer yet again yesterday. As I noted, he publicly asked for the common commercial agreement OLC memo back in January before he asked again yesterday, in addition to a number of non-public requests he (and Russ Feingold) made.

That's true of most of his questions from yesterday.

He asked, again, about the NSA's ability to search through incidentally collected data for US person communications.

Section 702 of FISA was intended to give the government new authority to target foreigners, but the executive branch has argued that the NSA should have the authority to deliberately go through communications collected under section 702 and conduct warrantless searches for the communications of individual Americans. Has the NSA ever conducted any of these warrantless searches for individual Americans' communications?

He tried to limit this in last year's reauthorization, asked about it last fall, and caught Keith Alexander lying about it back in June.

The answer to the question, of course, is "Yes."

He asked, again, how long the government has used PATRIOT to conduct bulk collection of US person data.

How long has the NSA used Patriot Act authorities to engage in the bulk collection of Americans' records? And was this collection underway when Congress was voting to reauthorize the Patriot Act in late 2005 and early 2006?

He – and 25 other Senators – asked this question back in June. But Clapper refused to answer it.

The answer to the question (as has been confirmed by the 2009 draft NSA IG Report) is “Yes.” Which of course either means Congress added the “relevant to” language to shut down such bulk collection, or the government lied about how it was using the Pen Register/Trap and Trace and Business Records provisions when Congress reauthorized the PATRIOT Act in 2006.

But it's the last question that – in this form at least – is new:

One of the recurring debates about section 702 of FISA is whether the law should include stronger protections against reverse targeting, which is the prohibited practice of trying to spy on Americans by collecting the communications of foreigners that those Americans are believed to be talking to. Since the FISA Amendments Act was passed in 2008, have there been any instances of reverse targeting by NSA analysts?

Don't get me wrong. There has been plenty of discussion of reverse targeting going back to before the FISA Amendments Act (and, for that matter, the Protect America Act) were passed.

But the answer to this question, as with the two others, is almost surely “Yes.” Otherwise, Wyden wouldn't have asked it (and planned to ask it during a public hearing).

Which means that, either before or after the FISA Court permitted the NSA to search through incidentally collected for US person

communications (see question 1), it caught analysts picking foreign targets in such a way that they could collect the communications of Americans.

They did precisely what the law prohibits explicitly.

That is new.

No wonder DiFi ensured Wyden wouldn't get a second round of questions, saving Keith Alexander and James Clapper from answering this in public.