

# HOW NSA SPIES ON FIRST AMENDMENT PROTECTED SPEECH: THE EO 12333 LOOPHOLE

As important as the fact that NSA was illegally watch-listing 3,000 US Persons is what they did once they got caught doing so.

They kept watch-listing them.

As I noted, NSA's solution to the problem that it had put 3,000 US Persons on its contact-chaining and alert list without doing the First Amendment review required by Section 215 was simply to move them off the list available for use with Section 215 data.

NSA remedied this compliance incident by re-designating all such telephone identifiers as non RAS-approved for use as seed identifiers in early February 2009.

The NSA continued its alert list function after the problems with it were discovered; it just restricted its use to data collected under EO 12333. Which appears to mean these 3,000 US persons would continue to have their communications that came up in EO 12333 collections (which would be collected outside of the country) watch-listed. That wouldn't give the NSA as much data about their conversations, granted, but they chose to do that rather than affirm that they weren't watch-listing these people solely because of First Amendment protected activities.

That suggests the NSA could – and may have, in at least some of these cases – spy on Americans' because of their speech or religion or politics, so long as they did so only using collections

for which the First Amendment protections do not attach.

Now, we don't know whether and how many of those 3,000 people were targeted for their First Amendment activities. But seeing NSA's behavior here does raise questions about the US person described in this story about the NSA's efforts to discredit ideological foes of the US.

One of 6 "radicalizers" NSA sought discrediting information on in 2012 is a US person (though living overseas). The NSA used contact chaining to measure the targets' (limited, in the case of the English speakers) ties to extremists. And then it collected things like their online porn habits.

But the thing is, it appears that the impetus for this porn-sniffing pertained only to the NSA's very expansive disagreement with the 6 "radicalizers" ideology.

It was about their speech, including the speech of the US person.

It appears the NSA believes its mandate includes spying on Americans for their protected speech, just so long as it does so using their E0 12333 authorities.