GOLDILOCKS PORRIDGE OF NSA REFORM

Since Obama's speech on the dragnet, I've been skeptical the promise to obtain court review before conducting phone dragnet searches means anything. There's nothing — not a thing — in the actual speech or the White House fact sheet accompanying it distinguishes the allegedly new court review from the review that already exists.

> The President has directed the Attorney General to work with the Foreign Intelligence Surveillance Court so that during this transition period, the database can be queried only after a judicial finding, or in a true emergency.

After all, the FISC quarterly approves which terror (and Iranian) groups NSA can target in the dragnet. That's a judicial finding! Without more specificity, there's no reason to believe this is any further review than already occurs.

In off-the-record briefing before speech (I didn't listen in but saw a transcript), anonymous Senior Administration Officials did insist this meant an individualized review of each identifier to be queried (though there were no details about whether the court had to approve each query using that identifier; also, the SAOs indicated no limits would be put on using Section 215 to engage in bulk collection or querying of other items). Though one reason Executive Branch officials like to do off the record briefings is so their credibility can't be challenged if their secret assurances prove to be hollow. And how would anyone prove these claims to be hollow, in any case, given that all of these reviews are secret?

That background is one reason I'm intrigued by Siobhan Gorman's tick-tock of how the White House included this review as a very last minute

sop to the Review Group, in response to pushback in a January 15 meeting.

> Top White House officials, including National Security Adviser Susan Rice, met the afternoon of Jan. 15 with the members of the NSA review panel, which had issued an influential report a month earlier calling for an overhaul of key surveillance programs. The meeting turned tense, though not combative.
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> The panel had proposed a restructuring that would store telephone data outside the U.S. government and require NSA to obtain approval from the secret Foreign Intelligence Surveillance Court to conduct a search of the database. Currently, NSA searches are governed by an internal process.
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> White House officials told panel members at the meeting that they were inclined to move the phone data out of the NSA's hands. But they didn't mention judicial review of the searches.
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> The panel's response was "that's half" of their recommendation, according to a person close to the review panel. Some panel members interpreted the White House officials' failure to mention judicial review as a sign that the recommendation wouldn't be adopted, said several people familiar with the talks.
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> Appealing to the White House officials, panel members said that without judicial approval, "there's no way you can restore trust" from the public, said a person familiar with the talks.
>
> [snip]
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> White House officials appeared "rattled" by the pushback, the person said. "It caused them to regroup."
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> The next day—the day before Mr. Obama's

> speech—White House officials inserted a new section into the speech that required judicial approval of a search from the secret court, which oversees many of NSA's surveillance programs.
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> But even that evening, White House officials were struggling with whether the president could singlehandedly impose such requirements on another branch of government. They sought late-night advice from the Justice Department on how to structure the rule, trying to make it more collaborative than compulsory, a U.S. official said.

Which is how, Gorman goes on, they came up with language that on its face doesn't impose any new review.

But there are several things that don't make sense with this story.

First, the NSA Review Group didn't recommend this kind of individualized review for Section 215, though they did say the intent of the law was to permit the government to query providers on individual orders after getting FISC authorization, suggesting such review is implicit.

> As originally envisioned when section 215 was enacted, the government can query the information directly from the relevant service providers after obtaining an order from the FISC.

They did recommend judicial review for National Security Letters (and Gorman's story makes it clear this discussion was wrapped up in a discussion of the Review Group's recommendations for NSLs). But the Review Group's recommendations focused on ending bulk collection and moving whatever remained out of government hands. Obama outright rejected the

first recommendation and punted the second to a Congress that won't adopt it.

PCLOB, on the other hand, did recommend something much closer to individualized review for the transition period (though they recommended it come after queries were made).

> (c) submit the NSA's "reasonable articulable suspicion" determinations to the FISC for review after they have been approved by NSA and used to query the database;

Though their last meeting with the White House was on January 8, well before this last-minute addition.

In any case, this last minute changed is pitched — by someone described as a "person familiar with the intelligence-agency discussions" — as central to a Goldilocks "just right" solution that left both privacy advocates and the intelligence community placated.

> The White House strategy appears to have muted major criticism, both from privacy advocates and intelligence officials.
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> While privacy advocates said they had wanted Mr. Obama to require more privacy safeguards, their primary message has been that the true effect of the overhauls can't be known until they are implemented.
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> Among the spy agencies, there's relief that Mr. Obama's speech didn't criticize the surveillance operations.
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> "Nobody lost, nobody won," said one person familiar with the intelligence-agency discussions. "That's the nature of our government."

Except the privacy advocate view portrayed here (with no source) doesn't resemble the view I'm hearing from privacy advocates, who are focusing

on Congress and on more pressure. That is, at least the Goldilocks conclusion, that this represents a happy middle, seems to be IC propaganda, perhaps designed to hide how little has actually changed (and unless we can trust Administration officials who would not speak on the record, this last minute solution is useless). It takes a story that claims the Review Group recommendation was to provide judicial review — not to end bulk collection —and declares the Review Group got what they wanted.

They didn't.

All of this in an article published in the news hole of a Friday night.