BOB LITT AND RACHEL BRAND REDEFINE "INCIDENTAL"

Sometimes, especially with PCLOB, there's an exchange that I wildly imagine (emphasis on imagine—I'm not saying this is actually the case) is intended solely for my benefit.

Such is the case with an exchange at last week's PCLOB hearing.

PCLOB Board Member Rachel Brand was trying — as she seemed to be doing exclusively with her questioning — to cue the government witnesses to pitch descriptions of programs in such a way as to make them less troubling. So she walked them through how NSA keeps upstream about collection for a shorter period than it keeps PRISM data. This gave NSA General Counsel Raj De an opportunity to make it sound like NSA, out of the generosity of its own heart, decided to throw out data sooner, and also gave him the opportunity to claim that collection FISC Judge John Bates found to be intentional collection of US person data was actually incidentally collected data.

> MS. BRAND: Okay. So you said in an earlier round of questioning that upstream, collection from upstream is retained for a shorter period of time than collection from PRISM and you said that the reason for that distinction is that there's a potentially greater privacy concern with respect to upstream collection. Can you elaborate on why, whether the additional privacy concerns that pertain to upstream.
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> MR. DE: Sure. And a lot of this is laid out in this court opinion that's now public. This is from the fall of 2011. I think because of the nature of abouts collections, which we have discussed, there is potentially a greater

> likelihood of implicating incidental U.S. person communication or inadvertently collecting wholly domestic communications that therefore must need to be purged.
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> And for a variety of circumstances the court evaluated the minimization procedures we had in place and as a consequence of that evaluation the government put forth a shorter retention period to be sure that the court could reach comfort with the compliance of those procedures with the Fourth Amendment. And so two years was one element of the revised procedures that are now public.

It's a nice benign way of describing how NSA got busted for violating the Fourth Amendment, and the FISC's only response was to force the NSA to violate it for 2 years of retention rather than for 5 years.

From there, Brand invited the witnesses an opportunity to redefine the word "incidental" so it also includes this practice, which Bates judged to be intentional. ODNI General Counsel Bob Litt rose to the challenge of Orwellianism.

> MS. BRAND: Okay. I want to use the word incidental collection there again, and your definition earlier seemed to be that by incidental you mean, by incidental U.S. person collection you mean that the person on the other end of the phone from the non-U.S. person abroad is a U.S. person. That's your definition, right? Is there another definition that you're aware of? Because you seem to be – okay. I think there's been some frustration with the use the term incidental in that context because it's not accidental, it's intentional. It's actually unavoidable. And so I just wanted to make sure that we're all on the same page, that by incidental you

> mean not accidental, not unintentional, but this is actually what we're doing.
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> MR. LITT: It is incidental to the collection on the target. It is not accidental, it is not inadvertent. Incidental is the appropriate term for it.

And by thus redefining incidental, Bob Litt gets to pretend that intentional wiretapping Americans in the US is not a violation of the laws — including Section 702 — prohibiting the intentional wiretapping of Americans in the US.