

SNOWDEN'S EMAILED QUESTION ADDRESSES ONE ABUSE REVEALED BY HIS LEAKS

In an effort to rebut Edward Snowden's claims that he raised concerns via proper channels, NSA just released an email Snowden sent to NSA's Office of General Counsel. The email reveals their own training is not clear about something central to Snowden's leaks: whether laws passed by Congress take precedence over EO 12333.

In the email, Snowden describes a training program on USSID 18, NSA's internal guidelines on protecting US person data. Snowden's email reads, in part,

Hello, I have a question regarding the mandatory USSID 18 training.

The training states the following:

(U) The Hierarchy of Governing Authorities and Documents is displayed from the highest authority to the lowest authority as follows:

U.S. Constitution

Federal Statutes/Presidential Executive Orders (EO)

[snip]

I'm not entirely certain, but this does not seem correct, as it seems to imply Executive Orders have the same precedence as law. My understanding is that EOs may be superseded by federal statute, but EOs may not override statute.

An NSA lawyer wrote back (in part),

Executive Orders (E.O.s) have the “force and effect of law.” That said, you are correct that E.O.s cannot override a statute.

The NSA has not revealed whether Snowden called the lawyer with further questions, as he invited Snowden to do. Nor have they said this email to Office of General Counsel is the only email Snowden sent (only that it’s the only one he sent to OGC).

Nevertheless, the email is really suggestive, particularly as it took place when Snowden had already started downloading a slew of information.

That’s because Snowden’s documents (and documents released in response to his leaks) reveal NSA has repeatedly used EO 12333 to push the limits of laws passed by Congress, if not to evade the law altogether.

Here are just two of numerous examples:

NSA Avoids Stricter Minimization Procedures Under the Phone Dragnet: The NSA has fairly strict minimization procedures under the Section 215-authorized phone dragnet, but only NSA’s internal rules (USSID 18) for the EO 12333-authorized phone dragnet. Nevertheless, for the first 3 years of the FISA-authorized program, NSA didn’t follow their Section 215 rules, instead applying the less stringent rules of USSID 18 (effectively letting a DOD Directive supersede the PATRIOT Act). In one of their most egregious violations discovered in 2009, they watch listed 3,000 US persons without giving those people the required First Amendment review, as required by minimization procedures written to fulfill the law. But instead of purging those records upon discovery (or even stopping the watchlisting), they just moved them into the EO 12333-only category. They just kept spying on the US persons using only data collected under EO 12333.

And these 2009 violations are not isolated. At least as recently as 2011, the NSA was still engaging in this authority arbitrage; a training program from that year makes it clear NSA trained analysts to re-run queries under EO 12333, if possible, to get around the dissemination requirements of Section 215. (Update: I'm not saying this particular arbitrage is illegal; it's not. But it does show how NSA games these authorities.)

NSA Collects US Person Content by Getting It Overseas: Because of the structure of the Internet, a great deal of US person data exists overseas. We've seen discussion of this US person data overseas including at least email content, address books, videocam images, and location. But because NSA collects this via dragnet, not targeted collection, it claims it is not targeting any American, even though it permits the searching of EO 12333 data for US person content, apparently without even Reasonable Articulate Suspicion. And because it is not targeting Americans under their dragnet and back door loopholes, it does not apply FISA Amendment Act restrictions on collecting US person data overseas under Sections 703, 704, and 705. Effectively, it has the ability to avoid those restrictions entirely by using EO 12333 as a dodge.

I'm not the only one concerned about this: at a hearing in February, both Dianne Feinstein and (at more length) Mark Udall raised concerns with National Security Division Assistant Attorney General John Carlin, suggesting some of this EO 12333 data should be treated according to FISA. Carlin – who is supposed to be a key player in overseeing NSA – showed no interest in doing so.

In both these questions, NSA did not allow laws to take precedence over EO 12333. On the contrary, NSA just created ways that it could apply EO 12333 and ignore the law that should have or might have applied.

Not only does Snowden's question make it clear that the NSA doesn't make the precedence of law

over E0 12333 clear in training, but the lawyer's response was rather ambiguous on this point as well.

One thing we've learned from Snowden's leaks is that the Executive is (at a minimum) evading the intent of Congress on some of its treatment of US person data. And by releasing this email as part of a pissing contest with Snowden, NSA *has made it clear that's by design*, even in their most core training program.

NSA is not telling its analysts that laws passed by Congress – even those offering protection to US person data – must take precedence over the looser protections under E0 12333. Which may be why they're comfortable collecting so much US person data under E0 12333.

Update: According to Snowden, I'm absolutely right.

Today's release is incomplete, and does not include my correspondence with the Signals Intelligence Directorate's Office of Compliance, which believed that a classified executive order could take precedence over an act of Congress, contradicting what was just published. It also did not include concerns about how indefensible collection activities – such as breaking into the back-haul communications of major US internet companies – are sometimes concealed under E.O. 12333 to avoid Congressional reporting requirements and regulations.