

THE TRUTH MISSING FROM ALEXANDER JOEL'S "TRUTH" ABOUT EO 12333

Over at Salon, I've got a piece responding to Office of Director of National Intelligence Civil Liberties Officer Alexander Joel's column purporting to describe the "truth" about EO 12333.

Click through to see this part of my argument:

- Joel resorts to the tired old "target" jargon
- Joel points to PPD 28, which rather than supporting his point, actually shows how broadly the NSA uses bulk collection and therefore how meaningless that "target" jargon is
- Joel doesn't address one of John Napier Tye's points – that current technology allows the NSA to collect US person data overseas
- We know they're doing that in the SPCMA – the Internet dragnet authority conducted on Internet data collected overseas

But it's Joel's claim about oversight I find most problematic.

Oversight is extensive and multi-layered. Executive branch oversight is provided internally at the NSA and by both the Department of Defense and the

Office of the DNI by agency inspectors general, general counsels, compliance officers and privacy officers (including my office and the NSA's new Civil Liberties and Privacy Office). The Department of Justice also provides oversight, as do the Privacy and Civil Liberties Oversight Board and the president's Intelligence Oversight Board. In addition, Congress has the power to oversee, authorize and fund these activities.

As I note in my piece, really what we have is single branch oversight. And that's not going to prevent abusive spying.

Joel's claim, "Oversight [of E0 12333 collection] is extensive and multi-layered," rings hollow. He lists 4 oversight positions at 3 Executive branch agencies, then points to 3 more Executive branch agencies he claims have a role. Having the Executive oversee the Executive spying on Americans poses precisely the kind of threat to our democracy Tye raised.

Then Joel claims, "Congress has the power to oversee, authorize and fund these activities." Of course, that's different from Congress actually using that power. Moreover, the record suggests Congress may not currently have the power to do anything but defund such spying, assuming they even know about it. Senate Intelligence Committee Chair Dianne Feinstein **admitted** last August that her committee doesn't receive adequate information on E0 12333 collection. Joel's boss, James Clapper, **refused to answer** a question from Senator Amy Klobuchar on E0 12333 violations in a hearing in October. And when Senator Mark Udall **suggested** a "vast trove" of Americans' communications collected overseas should

be provided the protections laid out in FISA, Assistant Attorney General John Carlin explained the National Security Division – the part of DOJ he oversees, which has a central role in oversight under FISA – would not have a role in that case because the collection occurred under EO 12333.

In his column, Joel makes no mention of the third branch of government: the Courts. That's because, as ACLU's Patrick Toomey laid out last week, the government **doesn't give** defendants any notice if their prosecutions arise from data collected under EO 12333. Criminal prosecutions are where some of the most important oversight on Executive branch spying takes place. By exempting EO 12333 from any such notice, then, the government is bypassing another critical check on potentially abusive spying.

Back in 1978, our government decided that both Congress and the courts should have a role when the Executive branch spied on Americans. That was the entire premise behind the FISA law. But by moving more and more of its spying overseas, the government can and – apparently, at least to a limited extent – *is* bypassing the oversight accorded through three branches of government.

FISA was written in 1978, before it became so easy to spy on Americans' domestic communications overseas. FISA Amendments Act partly addressed the new technological reality – by giving the Executive permission to spy on foreigners domestically. But it provided inadequate protections – Sections 703-5 – in return. Those measures, requiring a Court order for targeting Americans who are themselves overseas (but not for targeting Americans' data that transits overseas), simply don't do enough to prevent the government from using this new technological reality from spying on Americans.