

SHORTER DEVIN NUNES: THERE ARE PRIVACY- VIOLATING COVERT COUNTER-TERRORISM PROGRAMS WE'RE HIDING

I want to return to a detail I pointed out in the Intelligence Authorization yesterday: This language, which would affirmatively clarify that the Privacy and Civil Liberties Oversight does not get access to information on covert operations.

ACCESS.—Nothing in this section shall be construed to authorize the Board, or any agent thereof, to gain access to information regarding an activity covered by section 503(a) of the National Security Act of 1947 (50 U.S.C. 3093(a)).

Some or several intelligence agencies are demanding this, presumably, at a time when PCLOB is working on a review of two EO 12333 authorized counterterrorism programs conducted by CIA or NSA that affect US persons.

During the next stage of its inquiry, the Board will select two counterterrorism-related activities governed by E.O. 12333, and will then conduct focused, in-depth examinations of those activities. The Board plans to concentrate on activities of the CIA and NSA, and to select activities that involve one or more of the following: (1) bulk collection involving a significant chance of acquiring U.S. person information; (2) use of incidentally collected U.S. person information; (3) targeting of U.S.

persons; and (4) collection that occurs within the United States or from U.S. companies. Both reviews will involve assessing how the need for the activity in question is balanced with the need to protect privacy and civil liberties. The reviews will result in written reports and, if appropriate, recommendations for the enhancement of civil liberties and privacy.

It may be that the IC demanded this out of some generalized fear, of the sort Rachel Brand raised when she objected to PCLOB's plan to conduct this EO 12333 (though none of what she says addresses the covert nature of any program, but only their classification). Indeed, given that PCLOB planned to finish the review in question by end of year 2015, it is unlikely that the two programs PCLOB pursued were covert operations. Furthermore, there is nothing in Ron Wyden's statement opposing this language (which I've replicated in full below) that seems to indicate the specificity of concern as he had, for example, with location data or secret law or the OLC opinion affecting cybersecurity. Indeed, he specifically says, "this Board's oversight activities to date have not focused on covert action."

So there's nothing in the public record to make me believe PCLOB has *already* butted up against a covert operation.

That said, I have in recent weeks become increasingly certain there *are* programs being run under the guise of counterterrorism, off the official books (and/or were, even after Stellar Wind was "shut down"), and probably in ways that affect the privacy of Americans, potentially a great many Americans.

I say that because there are places where the numbers in the public record don't add up, where official sources are providing obviously bullshit explanations. I say that, too, because it is clear some places where you'd be able to

manage such programs (via personnel labeled as “techs,” for example, and therefore not subject to the oversight of the publicly admitted programs) have been affirmatively preserved over the course of years. I say that because certain authorizations were pushed through with far too much urgency given their publicly described roll out over years. I also say that because it’s increasingly clear CIA, at least, views its surveillance mandate to extend to protecting itself, which in this era of inflamed counterintelligence concerns, might (and has in the past for DOD) extend to spying on its perceived enemies (indeed, one of the programs that I think might be such a covert action would be entirely about protecting the CIA).

I have a pretty good sense what at least a few of these programs are doing and where. I don’t know if they are formally covert operations or not – that’s a confusing question given how covert structure has increasingly been used to preserve deniability from US courts rather than foreign countries. But I do know that the IC’s demand that PCLOB be affirmatively disallowed access to such information suggests it knows such programs would not pass the muster of civil liberties review.

In any case, thanks to House Intelligence Chair Devin Nunes for making that so clear.

Wyden’s statement

This afternoon the House of Representatives passed a new version of the Intelligence Authorization bill for fiscal year 2016. I am concerned that section 305 of this bill would undermine independent oversight of US intelligence agencies, and if this language remains in the bill I will oppose any request to pass it by unanimous consent.

Section 305 would limit the authority of the watchdog body known as the Privacy and Civil

Liberties Oversight Board. In my judgment, curtailing the authority of an independent oversight body like this Board would be a clearly unwise decision. Most Americans who I talk to want intelligence agencies to work to protect them from foreign threats, and they also want those agencies to be subject to strong, independent oversight. And this provision would undermine some of that oversight.

Section 305 states that the Privacy and Civil Liberties Board shall not have the authority to investigate any covert action program. This is problematic for two reasons. First, while this Board's oversight activities to date have not focused on covert action, it is reasonably easy to envision a covert action program that could have a significant impact on Americans' privacy and civil liberties – for example, if it included a significant surveillance component.

An even bigger concern is that the CIA in particular could attempt to take advantage of this language, and could refuse to cooperate with investigations of its surveillance activities by arguing that those activities were somehow connected to a covert action program. I recognize that this may not be the intent of this provision, but in my fifteen years on the Intelligence Committee I have repeatedly seen senior CIA officials go to striking lengths to resist external oversight of their activities. In my judgment Congress should be making it harder, not easier, for intelligence officials to stymie independent oversight.

For these reasons, it is my intention to object to any unanimous consent request to pass this bill in its current form. I look forward to working with my colleagues to modify or remove this provision