BOB LITT SPINS SHARING NSA-COLLECTED COMMS WITH DEA AND FBI AS HARMLESS

ODNI General Counsel Bob Litt has a pretty amusing post attempting to reassure us about the imminent change permitting the NSA to share intelligence it collects under EO 12333 more broadly. As part of it, he suggests that EO 12333 "imposes additional restrictions" (which amount to the procedures he is currently developing in secret) on the sharing of SIGINT.

> Executive Order 12333 generally allows intelligence information to be shared within the Intelligence Community, in order to allow agencies to determine whether that information is relevant to their mission, but imposes additional restrictions on the sharing of signals intelligence, requiring that that be done only in accord with procedures established by the Director of National Intelligence in coordination with the Secretary of Defense, and approved by the Attorney General.

What Litt neglects to say is this was actually a change that the Bush Administration implemented in 2008, without fully consulting Congress. It likely wasn't a change at all but instead a belated effort to change EO 12333 to reflect that the Executive really had secretly been doing since 2002. But it's not something that even Saint Ronny thought necessary when he first implemented EO 12333.

Litt goes on to insist that we don't need to worry our pretty little heads about this because the NSA will *only* [emphasis Litt's] be sharing with elements of the intelligence community and

only for foreign intelligence and CI purposes.

> These procedures will thus not authorize any additional collection of anyone's communications, but will only provide a framework for the sharing of lawfully collected signals intelligence information between elements of the Intelligence Community. Critically, they will authorize sharing *only* with elements of the Intelligence Community, and *only* for authorized foreign intelligence and counterintelligence purposes; they will*not* authorize sharing for law enforcement purposes. They will require individual elements of the Intelligence Community to establish a justification for access to signals intelligence consistent with the foreign intelligence or counterintelligence mission of the element. And finally, they will require Intelligence Community elements, as a condition of receiving signals intelligence, to apply to signals intelligence information the kind of strong protections for privacy and civil liberties, and the kind of oversight, that the National Security Agency currently has.

As a threshold matter, both FBI and DEA are elements of the intelligence community. Counterterrorism is considered part of FBI's foreign intelligence function, and cyber investigations can be considered counterintelligence *and* foreign intelligence (the latter if done by a foreigner). International narcotics investigations have been considered a foreign intelligence purpose since EO 12333 was written.

In other words, this sharing would fall squarely in the area where eliminating the wall between intelligence and law enforcement in 2001-2002 also happened to erode fourth amendment protections for alleged Muslim (but not white supremacist) terrorists, drug dealers, and

hackers.

So make no mistake, this will degrade the constitutional protections of a lot of people, who happen to be disproportionately communities of color.

And without more details, you should be very skeptical of Litt's assurances that the FBI and DEA and other receiving IC elements will have to, "apply to signals intelligence information the kind of strong protections for privacy and civil liberties, and the kind of oversight, that the National Security Agency currently has." While both CIA and FBI had to adopt minimization procedures before receiving raw 702 data (the equivalent of what is being done here), those minimization procedures are actually more permissive than NSA's. Significantly, both agencies are permitted to copy the metadata they receive in bulk, basically so they can dump that data into their own metadata databases. And, barring the publication of the newly more restrictive guidelines on FBI's back door searches, we should assume EO 12333 back door searches, like FBI's 702 back door searches at least until recently, aren't even tracked closely, much less noticed to defendants.

I also suspect that Treasury will be a likely recipient of this data; as of February 10, Treasury *still* did not have written EO 12333 protections that were mandated 35 years ago (and DEA's were still pending at that point).

All of which is to say Litt's reassurances shouldn't reassure you at all.