WYDEN TO COATS: ADMIT YOU KNOW NSA IS COLLECTING DOMESTIC COMMUNICATIONS UNDER 702

Last week, I noted that Ron Wyden had asked Director of National Intelligence Dan Coats a question akin to the one he once asked James Clapper.

> Can the government use FISA Act Section 702 to collect communications it knows are entirely domestic?

Coats responded much as Clapper did four years ago.

> Not to my knowledge. It would be against the law.

But, as I pointed out, Coats signed a certification based off an application that clearly admitted that the government would still collect entirely domestic communications using upstream collection. Rosemary Collyer, citing the application that Coats had certified, stated,

> It will still be possible for NSA to acquire [a bundled communication] that contains a domestic communication.

When I asked the Office of Director of National Intelligence about this, they said,

> Section 702(b)(4) plainly states we "may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the

> United States." The DNI interpreted Senator Wyden's question to ask about this provision and answered accordingly.

Yesterday, Ron Wyden wrote Dan Coats about this exchange. Noting everything I've just laid out, Wyden said,

> That was not my question. Please provide a public response to my question, as asked at the June 7, 2017 hearing.

Wyden doesn't do the work of parsing his question for Coats. But he appears to be making a distinction. The language ODNI's spox pointed to discusses "intentionally acquir[ing a] communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States." Wyden's question, however, did not use the term "intentionally" and did not include the language about "knowing at the time of collection" that the communication is domestic.

The distinction he is making appears to be the one I pointed out in this post. In a 2010 opinion, John Bates distinguished data that NSA had no reason to know was domestic communication (in this case, categories of packet information prohibited by the FISC in 2004, effectively content as metadata, but the precedent holds for all FISA collection), which he treated as legal, from that the NSA had reason to know was domestic.

> When it is not known, and there is no reason to know, that a piece of information was acquired through electronic surveillance that was not authorized by the Court's prior orders, the information is not subject to the criminal prohibition in Section 1809(a)(2). Of course, government officials may not avoid the strictures of Section 1809(a)(2) by cultivating a state of deliberate ignorance when

> reasonable inquiry would likely establish that information was indeed obtained through unauthorized electronic surveillance.

If NSA knew the data it was collecting was domestic, it was illegal. If NSA didn't know the data it was collecting was domestic, it was not illegal.

But don't you dare deliberately cultivate ignorance about whether the data you're collecting is domestic, John Bates warned sternly!

Here, of course, the government has told the court in its application, "Hey, we're going to be collecting domestic communications," but then, in testimony to Congress, said, "nah, we're not collecting domestic communications."

Having said in its application that it is still possible to collect domestic communications, it sure seems the government has ceded any claim to be ignorant that it is collecting domestic communications.

Which would make this collection of domestic communications illegal.