

WHEN NSA TALKS ABOUT UNINTENDED CONSEQUENCES, YOU NEED TO ASK A FOLLOW-UP QUESTION

In yesterday's hearing on Section 702 reauthorization, Dianne Feinstein asked all DOJ, FBI, and NSA whether they opposed a statutory prohibition on "about" searches.

DOJ's Stuart Evans falsely claimed that the FISC has found "about" collection to be legal; that's not true given the assumption – which has proven out in practice – that NSA would do back door searches on the resulting domestic communications that result. Indeed, both judges who considered whether collecting and searching MCTs including domestic communications was constitutional, John Bates and Rosemary Collyer, called it a Fourth Amendment problem.

But I'm more interested in NSA Deputy General Counsel for Operations Paul Morris' answer.

Morris: NSA opposes a statutory change at this point because that would box us in and possibly have unintended consequences.

Feinstein: Are you saying you would oppose this?

Morris: Oppose, right, we don't think it would be a good idea at this time.

Feinstein: Huh. Thank you. That answers my question.

When the NSA complains preemptively about being "boxed in" to prevent a practice the FISC has found constitutionally problematic, it ought to elicit a follow-up question. Why doesn't the NSA want to be prohibited from an activity that is

constitutionally suspect?

More importantly, especially given that “abouts” collection is currently not defined in a way that has any technical meaning, Feinstein should have followed up to ask about what “unintended consequences” Morris worried about. Morris’ comment leads me to believe my suspicion – that the NSA continues to do things that have the same effect as “abouts” collection, even if they don’t reach into the “content” of emails that are only a subset of the kinds of things that get collected using upstream collection – is correct. It seems likely that Morris wants to protect collection that would violate any meaningful technical description of “abouts.”

Which suggests the heralded “end” to “abouts” collection is no such thing, it’s just the termination of one kind of collection that sniffs into content layers of packets.

Links to all posts on yesterday’s 702 hearing:

NSA talks about unintended consequences ... no one asks what they might be

NSA argues waiting 4 years before dealing with systematic violations is not a lack of candor

FBI’s can only obtain raw feeds on selectors “relevant to” a full investigation

Everyone claims an FBI violation authorized by MOU aren’t willful

Even amicus fans neglect to mention Rosemary Collyer violated USAF in not considering one