ON THE COMING SHOWDOWN OVER PROMISCUOUS SHARING OF EO 12333 DATA

A number of outlets are reporting that Ted Lieu and Blake Farenthold have written a letter to NSA Director Mike Rogers urging him not to implement the new data sharing effort reported by Charlie Savage back in February. While I'm happy they wrote the letter, they use a dubious strategy in it: they suggest their authority to intervene comes from Congress having "granted" NSA authority to conduct warrantless collection of data.

> Congress granted the NSA extraordinary authority to conduct warrantless collection of communications and other data.2
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> 2 See Foreign Intelligence Surveillance Act and the Patriot Act.

As an initial matter, they've sent this letter to a guy who's not in the chain of approval for the change. Defense Secretary Ash Carter and Attorney General Loretta Lynch will have to sign off on the procedures developed by Director of National Intelligence James Clapper; they might consult with Rogers (if he isn't the one driving the change), but he's out of the loop in terms of implementing the decision.

Furthermore, the Congressionally granted authority to conduct warrantless surveillance under FISA has nothing to do with the authority under which NSA collects this data, EO 12333. In his story, Savage makes clear that the change relies on the [what he called "little-noticed," which is how he often describes stuff reported here years earlier] changes Bush implemented in the wake of passage of FISA Amendments Act. As I noted in 2014,

> Perhaps the most striking of those is that, even while the White House claimed "there were very, very few changes to Part 2 of the order" — the part that provides protections for US persons and imposes prohibitions on activities like assassinations — the EO actually replaced what had been a prohibition on the dissemination of SIGINT pertaining to US persons with permission to disseminate it with Attorney General approval.
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> The last paragraph of 2.3 — which describes what data on US persons may be collected — reads in the original,
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> > In addition, agencies within the Intelligence Community may disseminate information, **other than information derived from signals intelligence**, to each appropriate agency within the Intelligence Community for purposes of allowing the recipient agency to determine whether the information is relevant to its responsibilities and can be retained by it.
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> The 2008 version requires AG and DNI approval for such dissemination, but it affirmatively permits it.
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> > In addition, elements of the Intelligence Community may disseminate information to each appropriate element within the Intelligence Community for purposes of allowing the recipient element to determine whether the information is relevant to its responsibilities and can be retained by it, **except that information derived from signals intelligence may only be**

> > **disseminated or made available to Intelligence Community elements in accordance with procedures established by the Director in coordination with the Secretary of Defense and approved by the Attorney General.**
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> Given that the DNI and AG certified the minimization procedures used with FAA, their approval for any dissemination under that program would be built in here; they have already approved it! The same is true of the SPCMA — the EO 12333 US person metadata analysis that had been approved by both Attorney General Mukasey and Defense Secretary Robert Gates earlier that year. Also included in FISA-specific dissemination, the FBI had either just been granted, or would be in the following months, permission — in minimization procedures approved by both the DNI and AG — to conduct back door searches on incidentally collected US person data.
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> In other words, at precisely the time when at least 3 different programs expanded the DNI and AG approved SIGINT collection and analysis of US person data, EO 12333 newly permitted the dissemination of that information.

What Bush did just as he finished moving most of Stellar Wind over to FISA authorities, was to make it permissible to share EO 12333 data with other intelligence agencies under the same kind of DNI/AG/DOD approval process already in place for surveillance. They've already been using this change (though as I note, in some ways the new version of EO 12333 made FAA sharing even more permissive than EO 12333 sharing). And Savage's article describes that they've intended to roll out this further expansion since Obama's first term.

> Obama administration has been quietly developing a framework for how to carry it out since taking office in 2009.
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> [snip]
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> Intelligence officials began working in 2009 on how the technical system and rules would work, Mr. Litt said, eventually consulting the Defense and Justice Departments. This month, the administration briefed the Privacy and Civil Liberties Oversight Board, an independent five-member watchdog panel, seeking input. Before they go into effect, they must be approved by James R. Clapper, the intelligence director; Loretta E. Lynch, the attorney general; and Ashton B. Carter, the defense secretary.
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> "We would like it to be completed sooner rather than later," Mr. Litt said. "Our expectation is months rather than weeks or years."

All of which is to say that if Lieu and Farenthold want to stop this, they're going to have to buckle down and prepare for a fight over separation of powers, because Congress has had limited success (the most notable successes being imposition of FAA 703-705 and Section 309 of last year's intelligence authorization) in imposing limits on EO 12333 collection. Indeed, Section 309 is the weak protection Dianne Feinstein and Mark Udall were able to get for activities they thought should be covered under FAA.

Two more points. First, I suspect such expanded sharing is already going on between NSA and DEA. I've heard RUMINT that DEA has actually been getting far *more* data since shutting down their own dragnets in 2013. The sharing of "international" narcotics trade data has been baked into EO 12333 from the very start. So it would be unsurprising to have DEA replicate its

dragnet using SPCMA. There's no sign, yet, that DEA has been included under FAA certifications (and there's not, as far as we know, an FAA narcotics certificate). But EO 12333 sharing with DEA would be easier to implement on the sly than FAA sharing. And once you've shared with DEA, you might as well share with everyone else.

Finally, this imminent change is why I was so insistent that SPCMA should have been in the Brennan Center's report on privacy implications of EO 12333 collection. What the government was doing, explicitly, in 2007 when they rolled that out was making the US person participants in internationally collected data visible. We've seen inklings of how NSA coaches analysts to target foreigners to get at that US person content. The implications of basing targeting off of SPCMA enabled analysis under PRISM (which we know they do because DOJ turned over the SPCMA document, but not the backup, to FISC during the Yahoo challenge), currently, are that US person data can get selected *because US persons are involved* and then handed over to FBI with no limits on its access. Doing so under EO 12333 will only expand the amount of data available — and because of the structure of the Internet, a great deal of it is available.

Probably, the best way to combat this change is to vastly expand the language of FAA 703-705 to over US person data collected incidentally overseas during next year's FAA reauthorization. But it will take language like that, because simply pointing to FISA will not change the Executive's ability to change EO 12333 — even secretly! — at will.