NSA CONDUCTS SO MANY BACK DOOR SEARCHES ON US PERSONS IT WOULD BE IMPRACTICABLE TO APPROVE THOSE QUERIES

Update, 8/3/14: Given what we've subsequently learned about FBI's substantial number of uncounted back door searches, Litt's description of further controls as not practicable probably most directly relates to FBI, not NSA.

While there wasn't as much as I'd like, the Privacy and Civil Liberties Oversight Board hearing today focused somewhat on the issue of back door searches: which are when NSA searches on US person data on "incidentally" collected data under Section 702 of FISA.

DOJ National Security Director Deputy AAG Brad Wiegmann even suggested we should call them queries, perhaps to obscure all the obvious problems with them as searches under the Fourth Amendment.

The most telling exchange, however, came when PCLOB Board Member Patricia Wald suggested that the FISA Court conduct the same kind of oversight over these backdoor searches that it is now doing pursuant to the changes in Section 215 President Obama made in January. (CSPAN won't let me embed this yet but here's a link.) ODNI General Counsel Robert Litt shot that idea down aggressively, stating that is is not practicable.

> Patricia Wald: The President required, or, I think he required in his January directive that went to 215 that at least temporarily, the selectors in 215 for

> questioning the databank of US telephone calls—metadata—had to be approved by the FISA Court. Why wouldn't a similar requirement for 702 be appropriate in the case where US person indicators are used to search the PRISM database? What big difference do you see there?
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> Robert Litt: Well, I think from a theoretical perspective it's the difference between a bulk collection and a targeted collection which is that—
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> Wald: But I would think that, sorry for interrupting, [cross-chatter] I would think that message since 702 has actually got the content.
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> Litt: Well, and the second point that I was going to make is that I think the operational burden in the context of 702 would far greater than in the context of 215.
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> Wald: But that would—
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> Litt: If you recall, the number of actual telephone numbers as to which a RAS—reasonable articulaable suspcion determination was made under Section 215 was very small. The number of times that we query the 702 database for information is *considerably* larger. I suspect that the Foreign Intelligence Surveillance Court would be extremely unhappy if they were required to approve every such query.
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> Wald: I suppose the ultimate question for us is whether or not the inconvenience to the agencies or even the unhappiness of the FISA Court would be the ultimate criteria.
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> Litt: Well I think it's more than a question of convenience, I think it's also a question of practicability.

NSA General Counsel Raj De, who has spent the

better part of the last 9 months saying “it’s only metadata” went on to argue that somehow this “targeted” content program (which of course requires no advance review of selectors) is less intrusive than the metadata collection under Section 215.

Make up your damn mind!

To be fair, I suspect one of the issues is that after the Nidal Hasan attack (and this is just a very well educated guess), NSA rolled out a system whereby new communications between a targeted foreigner and an American automatically pulls up all previous communications involving that US person. That would count as a search, even though it would effectively feel like an automatic cross-referencing of all prior communications involving someone talking to a target, even if that is a US person.

Nevertheless, this means that NSA is conducting so many back door searches on US person data that it would be “impracticable” to actually give those searches some kind of review.

No wonder NSA refuses to give numbers on this practice to Ron Wyden.