JIM SENSENBRENNER SEEMS TO ENDORSE TWO TIMES TWO HOPS

I'm working on a larger post about a theory I have about the Internet dragnet. But while working on that, I noticed that in 2009 the government admitted that it had used the Internet dragnet, like the phone dragnet, to contact chain on US emails that were connected with suspect emails, but which had not themselves found to be suspicious (or tied to a foreign power).

> This practice involved an analyst running query using as a seed "a U.S.-based e-mail account" thta had been in direct contact with a properly validated seed account, but had not itself been properly validated under the RAS approval process. [redacted] Response at 2-3. When he granted renewed authorization for bulk PR/TT surveillance on [redacted], Judge Walton ordered the government not to resume this practice without proper Court approval. See Docket No. PR/TT [redacted] Primary Order issued [redacted] at 10.
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> In its response, the government also described an automated means of querying, which it regarded as consistent with the applicable PR/TT orders. This form of querying involved the determination that an e-mail address satisfied the RAS standard, but for the lack of a connection to one of the Foreign Powers (e.g., there were sufficient indicia that the user of the e-mail address was involved in terrorist activities, but the user's affiliation with a particular group was unknown).
>
> [snip]

> In the event that such an e-mail address was in contact with a RAS-approved seed-account on an NSA "Alert List," that e-mail address would itself be used as a seed for automatic querying, on the theory that the requisite nexus to one of the Foreign Powers had been established.

Up until 2009, the government was blithely extending the chaining process by declaring US person targets new seeds and chaining from there.

I raise this because the NSA has been struggling, unsuccessfully, since 2009 to resume it's alert function(s). It may be that's one reason why NSA embraced outsourcing data retention to the telecoms.

And because, in effort to defeat a Zoe Lofgren amendment at least Wednesday's markup of the Jim Sensenbrenner seemed to endorse this derivative hop process.

Lofgren's amendment would have added language limiting upstream collection to that which involved the target of the acquisition.

> Lofgren. Mr. Chairman, I believe that this amendment fixes a loophole that was created by the FISA court in its November 2011 decision that is now in the public arena. The amendment clarifies that the government can only use selectors to collect information to or from the target of an authorized investigation. Under the current law, as blessed by the FISA court, NSA is using 702 authority to collect communications that are to, from, or even about a foreign intelligence target so long as these communications are believed not to be wholly between U.S. persons. Now, the USA Freedom Act did not address this loophole, and actually the original PATRIOT Act did not either, this is a

> court-constructed document, but it allows false positives, and intentional use of vague about criteria could be used to lead to massive collection of U.S. persons' communication. This amendment would prevent that adverse outcome by limiting the selectors to target and collect communications only when one of the parties to that communication is the target of an authorized investigation.

Sensenbrenner's response was, at first, on point, claiming that the prohibition targeting that has reverse targeting as a purpose of the acquisition at all.

But then he went into this language about Section 215, a totally different part of FISA.

> Sensenbrenner: Say there is a section 215 order that is aimed at a target, it goes two hops and on the second hop, there is a U.S. person who is not at the time of the second hop a target of an authorized investigation. What this amendment does is limits adding that person to a target of an authorized investigation and going the two hops from that. Now, a lot of these conspiracies are more than two hops. But I don't think that if there is a reasonable suspicion that if it goes for more than two hops that we ought to preclude, finding out who those people are talking to in the furtherance of their plot.

In it, he seemed to say that NSA must be able to declare US person selection terms new RAS approved seeds without having enough evidence to declare them a target of an investigation. But in the process, he seemed to envision derivative seeds, the addition of new US person seeds off of existing contact chains.

Which sounds a lot like the old alert process that FISC ruled improper in 2009 (although this would presumably require a new FISC review).

My theory about the dragnet may explain a bit more about why Sensenbrenner seemed to offer such an inapt argument against Lofgren's memo (and why Lofgren's warnings that upstream collection can easily become the new dragnet).

But for the moment, note that Sensenbrenner at least seems to envision the 2 hops permitted by his bill could, in turn, become two more hops without any more reasonable basis for suspicion.