

NSA'S "PRESUMPTION OF REGULARITY"

As you've probably heard, the most striking part of the October 3, 2011 FISA opinion finding NSA's collection violated the Fourth Amendment is Footnote 14.

The Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.

In March, 2009, the Court concluded that its authorization of NSA's bulk acquisition of telephone call detail records from [redacted] in the so-called "big business records" matter "ha[d] been premised on a flawed description of how the NSA uses [the acquired] metadata," and that "[t]his misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime." Docket [redacted] Contrary to the government's repeated assurances, NSA had been routinely running queries of the metadata using querying terms that did not meet the required standard for querying. The Court concluded that this requirement had been "so frequently and systematically violated that it can fairly be said that this critical element of the overall ... regime has never functioned effectively." Id.

Two more entirely redacted substantial

misrepresentations follow.

Footnote 32 reveals how, after NSA did a review of the communications the FISC ultimately found to violate the Fourth Amendment, the FISC caught it in downplaying the number of affected communications. After it sent the NSA back to new analysis, the problem grew from 2,000 to 10,000 a year to 48,000 to 56,000 a year. I guess the FISC found, like I have, that you can't trust the biggest math organization in the world to do basic math.

Yet in spite of the fact that this opinion lists three substantial misrepresentations the NSA had made in recent history and caught the NSA in bad math, here's how it decided it could trust the government's assurances that it didn't use this abusive communication to target non-targeted people.

Therefore, the Court has no reason to believe that NSA, by acquiring the Internet transactions containing multiple communications, is targeting anyone other than the user of the selected tasked selector. See United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

I'm not surprised FISC invoked this (especially not surprised that John Bates, who can be very deferential, did). It is the law.

But (as the case of Adnan Latif showed) we keep extending the presumption of regularity to the government in spite of abundant evidence we shouldn't.