THE IMPASSE ON EXECUTIVE SPYING

In an important post the other day, Steve Vladeck described what he believed to be the most important lesson Edward Snowden has taught us.

> They miss the single most important lesson we've learned – or should have learned – from Snowden, i.e., that the grand bargain has broken down. Intelligence oversight just ain't what it used to be, and the FISA Court, as an institution, seemed to have been far better suited to handle individualized warrant applications under the pre-2001 FISA regime than it has been to reviewing mass and programmatic surveillance under section 215 of the USA PATRIOT Act and section 702, as added by the FISA Amendments Act of 2008.
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> Thus, even if one can point to specific individual programs the disclosure of which probably has not advanced the ongoing public policy conversation, all of the disclosures therefore illuminate a more fundamental issue of public concern – and one that should be (and, arguably, has been) driving the reform agenda: Whatever surveillance authorities the government is going to have going forward, we need to rethink the structure of oversight, both internally within the Executive Branch, and externally via Congress and the courts. That's not because the existing oversight and accountability mechanisms have been unlawful; it's because so many of these disclosures have revealed them to be inadequate and/or ineffective. And inasmuch as such reforms may strengthen not just mechanisms of democratic accountability for our intelligence

> community, but also their own confidence in the propriety and forward-looking validity of their authorities, they will make all of us — including the NSA — stronger in the long term.

While I agree with Vladeck that's an important lesson from Snowden, I don't think it has been admitted by those who most need the lesson: most members of Congress (most of all, the Intelligence Committees) and the FISA Court, as well as the other Article III judges who are quickly becoming dragnet experts.

But I'm hopeful PCLOB — which is already under attack even from Susan Collins for having the audacity to conduct independent oversight — will press the issue.

As I have noted in the past, PCLOB has a better understanding of how the Executive uses EO 12333 than any other entity I've seen (I think the Review Group may have a similar understanding, but they won't verbalize it).

That's why I find their treatment of FISA as a compromise to put questions about separation of powers on hold so interesting.

> In essence, FISA represented an agreement between the executive and legislative branches to leave that debate aside 600 and establish a special court to oversee foreign intelligence collection . While the statute has required periodic updates, national security officials have agreed that it created an appropriate balance among the interests at stake, and that judicial review provides an important mechanism regulating the use of very powerful and effective techniques vital to the protection of the country. 601
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> 600 "[T]he bill does not recognize, ratify, or deny the existence of any Presidential power to authorize warrantless surveillance in the United

> States n the absence of the legislation. It would, rather, moot the debate over the existence or non – existence of this power[.]" HPSCI Report at 24. This agreement between Congress and the executive branch to involve the judiciary in the regulation of intelligence collection activities did not and could not resolve constitutional questions regarding the relationship between legislative and presidential powers in the area of national security . See In re: Sealed Case , 310 F.3d 717, 742 (FISA Ct. Rev. 2002) ("We take for granted that the President does have that authority [inherent authority to conduct warrantless searches to obtain foreign intelligence information] and, assuming that is so, FISA could not encroach on the President ' s constitutional power.").

When NSA chose to avoid First Amendment review on the 3,000 US persons it had been watch-listing by simply moving them onto a new list, when it refused to tell John Bates how much US person content it collects domestically off telecom switches, when it had GCHQ break into Google's cables to get content it ought to be able to obtain through FISA 702, when it rolled out an Internet dragnet contact-chaining program overseas in part because it gave access to US person data it couldn't legally have here, NSA made it clear it will only fulfill its side of the compromise so long as no one dares to limit what it can do.

That is, Snowden has made it clear that the "compromise" never was one. It was just a facade to make Congress and the Courts believe they had salvaged some scrap of separation of powers.

NSA has made it clear it doesn't much care what its overseers in Congress or the Court think. It'll do what it wants, whether it's in the FISC or at a telecom switch just off the US shore. And thus far, Obama seems to agree with

them.

Which means we’re going to have to start talking about whether this country believes the Executive Branch should have relatively unfettered ability to spy on Americans. We’re going to have to take a step back and talk about separation of powers again.