

THE BLACK HOLES IN USA FREEDUMBER'S INSPECTOR GENERAL REPORTS

I'm still working on understanding all the crud that is included in the USA Freedom Act. And for the first time, I have looked really closely at the language on Inspector General Reports, which effectively modifies Section 106 of the 2005 PATRIOT Act Reauthorization. Not only does the language add a DOJ IG Report roughly parallel to the ones mandated for the years through 2006 for 2012 through 2014, but it adds an Intelligence Community IG Report for those 3 years.

I've long noted that that seems to leave 2010 and 2011 unexamined. That might be covered in the IG report Pat Leahy requested of the Intelligence Committee IG, Charles McCullough, though the dates are different and McCullough said he didn't really have the time. So 2010 and 2011 may or may not currently be reviewed; they're not required to be by the bill, however.

But upon closer review I'm just as interested in some holes the two reports will likely have, in combination.

What I realized when I reviewed the actual language, below, is that USA Freedom is exploiting the fact that Section 215 was originally written exclusively for the FBI, even if the NSA and CIA and probably a bunch of other agencies are using it too (they're doing this with minimization procedures elsewhere in the bill, too). Thus, they can leave language that applies specifically to FBI, and pretend that it applies to other agencies.

In practice, that leaves the DOJ IG to investigate general things about Section 215 use, including:

- any noteworthy facts or circumstances relating to orders under such section, including any improper or illegal use of the authority provided under such section; and
- the categories of records obtained and the importance of the information acquired to the intelligence activities of the Federal Bureau of Investigation or any other Department or agency of the Federal Government;

So long as FBI retains a role in the application process, it will have access to and can review the categories of records obtained, which is critical because this is one of the ways Congress will learn what those categories are.

But only the DOJ IG assesses whether Section 215 is adhering to law (as opposed to protecting Americanas' constitutional rights). At one level, I'd *much* rather have DOJ IG perform this review, because we've never seen anything out of the IC IG resembling real oversight. Plus, under Glenn Fine, DOJ's IG did point to real legal problems with the dragnet (which DOJ largely refused to fix, but which may have led to addition FISC opinions on those subjects). But I have questions whether DOJ's IG would get enough visibility into what NSA and CIA and other agencies are doing with this data to perform a real review of the legality of it.

Then there are some somewhat parallel things both DOJ's and IC's IG would review, including:

- the importance (IC IG) or effectiveness (DOJ IG) of Section 215
- the manner in which that information was collected, retained, analyzed, and disseminated by the intelligence

community;

- the minimization procedures used by elements of the intelligence community under such title and whether the minimization procedures adequately protect the constitutional rights of United States persons; and
- any minimization procedures proposed by an element of the intelligence community under such title that were modified or denied by the FISC

These are all well and good, and there's the possibility that an IC IG review of how NSA analyzes and disseminates Section 215 data would find any of the most concerning potential practices.

I find the last two things DOJ's IG would review at FBI but not even at DEA (if DEA uses Section 215), and which the IC IG would not review at all, the most telling.

- whether, and how often, the Federal Bureau of Investigation used information acquired pursuant to an order under section 501 of such Act to produce an analytical intelligence product for distribution within the Federal Bureau of Investigation, to the intelligence community or to other Federal, State, local, or tribal government Departments, agencies, or instrumentalities; and
- whether, and how often, the Federal Bureau of

Investigation provided such information to law enforcement authorities for use in criminal proceedings

That is, the DOJ IG reports on how often the FBI uses Section 215 for finished intelligence products and how often it serves supports criminal proceedings. But it doesn't track how often NSA uses Section 215 for finished intelligence products, nor does it track how often NSA uses Section 215 to investigate an American further.

The latter fact – that NSA isn't counting how many Americans its targets because of Section 215 derived information – is not all that surprising. NSA has worked hard to obscure how many Americans have been sucked up in its analytical maw. Still, if we were serious about providing some transparency to the corporate store – where anyone 2 or 3 degrees from a RAS approved selector can get dumped and subjected to all of NSA's analytical tradecraft forever – we'd require the IC IG to count this number, too.

And the fact that no one asks NSA and CIA how many finished intelligence reports they're generating out of Section 215 is problematic both because it doesn't identify how often NSA and CIA are sharing intelligence with FBI or National Counterterrorism Center or other agencies like DEA (which was one of the big problems with both the phone and Internet dragnet in 2009-10). But it also makes it harder for Congress to get a real understanding of how effective these tools are.

You can't judge the efficacy of something you don't measure.

To understand how important this is, consider the discussions about the phone dragnet we've had since last year. Everything has been measured in terms of reporting to FBI, which not only doesn't disclose how many people are stuck

in NSA's maw, but to outsiders made the program look totally useless. We still don't know precisely how the government is using the phone dragnet, because the data they've shared to describe its efficacy is probably not the most significant way it is used.

It seems the intelligence community would like to keep it that way.

SEC. 106A. AUDIT ON ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE PURPOSES.

(a) Audit.—The Inspector General of the Department of Justice shall perform a comprehensive audit of the effectiveness and use, including any improper or illegal use, of the investigative authority provided to the Federal Bureau of Investigation under title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.).

(b) Requirements.—The audit required under subsection (a) shall include—

(1) an examination of each instance in which the Attorney General, any other officer, employee, or agent of the Department of Justice, the Director of the Federal Bureau of Investigation, or a designee of the Director, submitted an application to the Foreign Intelligence Surveillance Court (as such term is defined in section 301(3) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1821(3))) for an order under section 501 of such Act during the calendar years of 2002 through 2006 *and* *calendar years 2012 through 2014*, including—

(A) whether the Federal Bureau of Investigation requested that the Department of Justice submit an application and the request was not submitted to the court (including an examination of the basis for not submitting the application);

(B) whether the court granted, modified, or denied the application (including an examination

of the basis for any modification or denial);

[two paragraphs assessing bureaucratic impediments to getting Section 215 orders approved in DOJ taken out]

(2) any noteworthy facts or circumstances relating to orders under such section, including any improper or illegal use of the authority provided under such section; and

(3) an examination of the effectiveness of such section as an investigative tool, including—

(A) the categories of records obtained and the importance of the information acquired to the intelligence activities of the Federal Bureau of Investigation or any other Department or agency of the Federal Government;

(B) the manner in which such information is collected, retained, analyzed, and disseminated by the Federal Bureau of Investigation, including any direct access to such information (such as access to “raw data”) provided to any other Department, agency, or instrumentality of Federal, State, local, or tribal governments or any private sector entity;

(C) with respect to calendar years 2012 through 2014, an examination of the minimization procedures used in relation to orders under section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) and whether the minimization procedures adequately protect the constitutional rights of United States persons;

(D) whether, and how often, the Federal Bureau of Investigation utilized information acquired pursuant to an order under section 501 of such Act to produce an analytical intelligence product for distribution within the Federal Bureau of Investigation, to the intelligence community [*language on National Security Act definition of intelligence community struck*], or to other Federal, State, local, or tribal government Departments, agencies, or instrumentalities; and

(E) whether, and how often, the Federal Bureau of Investigation provided such information to law enforcement authorities for use in criminal proceedings.

(c) Submission Dates.— (1) Prior years.—Not later than one year after the date of the enactment of this Act, or upon completion of the audit under this section for calendar years 2002, 2003, and 2004, whichever is earlier, the Inspector General of the Department of Justice shall submit to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate a report containing the results of the audit conducted under this section for calendar years 2002, 2003, and 2004.

(2) Calendar years 2005 and 2006.—Not later than December 31, 2007, or upon completion of the audit under this section for calendar years 2005 and 2006, whichever is earlier, the Inspector General of the Department of Justice shall submit to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate a report containing the results of the audit conducted under this section for calendar years 2005 and 2006.

(3) *CALENDAR YEARS 2012 THROUGH 2014.*—Not later than December 31, 2015, the Inspector General of the Department of Justice shall submit to the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives a report containing the results of the audit conducted under subsection (a) for calendar years 2012 through 2014.

(d) *INTELLIGENCE ASSESSMENT.*—

(1) *IN GENERAL.*—For the period beginning on January 1, 2012, and ending on December 31,

2014, the Inspector General of the Intelligence Community shall assess—

(A) the importance of the information acquired under title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) to the activities of the intelligence community

(B) the manner in which that information was collected, retained, analyzed, and disseminated by the intelligence community;

(C) the minimization procedures used by elements of the intelligence community under such title and whether the minimization procedures adequately protect the constitutional rights of United States persons; and

(D) any minimization procedures proposed by an element of the intelligence community under such title that were modified or denied by the court established under section 103(a) of such Act (50 U.S.C. 1803(a)).

(2) SUBMISSION DATE FOR ASSESSMENT.—

Not later than 180 days after the date on which the Inspector General of the Department of Justice submits the report required under subsection (c)(3), the Inspector General of the Intelligence Community shall submit to the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives a report containing the results of the assessment for calendar years 2012 through 2014.

(e) Prior Notice to Attorney General and Director of National Intelligence; Comments.—

(1) <<NOTE: Deadline. Reports.>> Notice.—Not less than 30 days before the submission of any report under subsection (c) or (d), Inspector General of the Department of Justice, the Inspector General of the Intelligence Community, and any Inspector General of an

element of the intelligence community that prepares a report to assist the Inspector General of the Department of Justice or the Inspector General of the Intelligence Community in complying with the requirements of this section shall provide such report to the Attorney General and the Director of National Intelligence.

(2) Comments.—The Attorney General or the Director of National Intelligence may provide comments to be included in any report submitted under subsection (c) or (d) as the Attorney General or the Director of National Intelligence may consider necessary.

(f) Unclassified Form.—Each report submitted under subsection (c) and any comments included under subsection (e)(2) shall be in unclassified form, but may include a classified annex.

(g) DEFINITIONS.—In this section:

(1) INTELLIGENCE COMMUNITY.—The term ‘intelligence community’ has the meaning given that term in section 3 of the National Security Act of 1947 (50 U.S.C. 3003).

(2) UNITED STATES PERSON.—The term ‘United States person’ has the meaning given that term in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).