

IN ADVANCE OF PCLOB, WAPO BUSTS ODNI'S LIMITED HANG OUT ON CERTIFICATIONS

Earlier today, I got to tell the journalists who have long ignored that the FBI does back door searches – or even suggested I was guessing that they do, when it appeared in multiple public documents – that I had been telling them so for a long time.

But today I also have to admit I got suckered by a year-long Director of National Intelligence effort at a limited hangout. That effort was, I'm convinced, designed to hide that the Section 702 program is far broader than government witnesses wanted to publicly admit it was. Nevertheless, I was wrong about a supposition I had believed until about 2 months ago.

Since the first days after the Snowden leaks, the government has suggested it had 3 certificates under Section 702, covering counterterrorism, counterproliferation, and cybersecurity. But – as the WaPo reports (as with the ODNI back door search numbers, in convenient timing that conveniently preempts the PCLOB report) – that's not the case. The NSA has a certificate that covers every foreign government except the other 4 members of the 5 Eyes (UK, Canada, New Zealand, and Australia), as well as various foreign organizations like OPEC, the European Central Bank, and various Bolivarist groups.

For an entire year, the government has been suggesting that is not the case. I even believed them, the one thing I know of where I got utterly suckered. I was wrong.

Frankly, this certification should not be a surprise. It is solidly within the letter of the law, which permits collection on any agent of a foreign power. From the very first PRISM

revelations, which showed collection on Venezuela, it was clear NSA collected broadly, including on Bolivarist governments and energy organizations.

But consistently over the last year, the NSA has suggested it only had certifications for CT, CP, and cyber.

On June 8 of last year, for example, ODNI listed 3 Section 702 successes.

- Communications collected under Section 702 have provided the Intelligence Community insight into terrorist networks and plans. For example, the Intelligence Community acquired information on a terrorist organization's strategic planning efforts.
- Communications collected under Section 702 have yielded intelligence regarding proliferation networks and have directly and significantly contributed to successful operations to impede the proliferation of weapons of mass destruction and related technologies.
- Communications collected under Section 702 have provided significant and unique intelligence regarding potential cyber threats to the United States including specific potential

computer network attacks.
This insight has led to
successful efforts to
mitigate these threats

The October 3, 2011 John Bates opinion, released in October, made it clear there were just 3 certificates at that point.

██████████, which was filed on April 20, 2011; (2) the "Government's Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications" for DNI/AG 702(g) Certifications ██████████, which was filed on April 22, 2011; and (3) the "Government's Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications" for DNI/AG 702(g) Certifications ██████████, which was also filed on April 22, 2011.¹

(Though note the Semiannual Compliance Review released last year looked to be consistent with at least one more certificate.)

The President's Review Group emphasized the categorical nature of certificates, and in its second discussion thereof named those same three categories.

[S]ection 702 authorized the FISC to approve annual certifications submitted by the Attorney General and the Director of National Intelligence (DNI) that identify certain categories of foreign intelligence targets whose communications may be collected, subject to FISC-approved targeting and minimization procedures. The categories of targets specified by these certifications typically consist of, for example, international terrorists and individuals involved in the proliferation of weapons of mass destruction.

[snip]

Section 702 requires that NSA's certifications attest that a "significant purpose" of any acquisition is to obtain foreign intelligence information (i.e. directed at international terrorism, nuclear proliferation, or hostile cyber activities), that it does not intentionally target a United States person, that it does not intentionally target any person known at the time of acquisition to be in the United States, that it does not target any person outside the United States for the purpose of targeting a person inside the United States, and that it meets the requirements of the Fourth Amendment.

And in March testimony before PCL0B, NSA General Counsel Raj De suggested those same three topics.

But beyond that there has to be a valid foreign intelligence reason within the ambit of one of those certifications that the FISC approves annually. Those are certifications on things like counterterrorism, encountering WMDs, for example, weapons of mass destruction.

Most recently, former DOJ official Carrie Cordero – who has been involved in this whole certification process – claimed in the CATO debate we've been engaged in "they are not so broad that they cover any and everything that might be foreign intelligence information."

And yet, there's a foreign intelligence certificate that covers any and everything that might be foreign intelligence information, a certificate that destroys the whole point of having certificates (though if there's a cyber one, I suspect it has its own problems, in that it permits domestic collection).

Lots of people are claiming WaPo's latest is no big deal, because of course the NSA spies on foreign government's. They're right, to a point. Except that the government has been strongly implying, since day one, that Section 702 was narrowly deployed, not available to use against all but our 4 closest spying allies.

PCL0B is surely about to make it clear that's not the case. And voila! All of a sudden it becomes clear the government has been misleading when it claimed this was narrowly deployed.