

IN NEWLY RELEASED IG REPORTS, ADMINISTRATION REDACTED DISCUSSION OF THE BILL BINNEY OPTION

One of the most fascinating aspects of the IG Reports Charlie Savage just liberated is how they redacted the NSA IG Report, a draft of which Edward Snowden already got released.

Consider the following redactions.

NSA redacts the discussion that shows they were already spying

Starting at PDF 146, the entire section describing what Michael Hayden did in the days immediately after 9/11 is redacted. Here's what is included in the Snowden version.

(TS//SV/NF) On 14 September 2001, three days after terrorist attacks in the United States, General Hayden approved the targeting of terrorist-associated foreign telephone numbers on communication links between the United States and foreign countries where terrorists were known to be operating. Only specified, pre-approved numbers were allowed to be tasked for collection against U.S.-originating links. He authorized this collection at Special Collection Service and Foreign Satellite sites with access to links between the United States and countries of interest, including Afghanistan. According to the Deputy General Counsel, General Hayden determined by 26 September that any Afghan telephone

number in contact with a U.S. telephone number on or after 26 September was presumed to be of foreign intelligence value and could be disseminated to the FBI.

(TS//SV/NF) NSA OGC said General Hayden's action was a lawful exercise of his power under Executive Order (E.O.) 12333, United States Intelligence Activities, as amended. The targeting of communication links with one end in the United States was a more aggressive use of E.O. 12333 authority than that exercised by former Directors. General Hayden was operating in a unique environment in which it was a widely held belief that additional terrorist attacks on U.S. soil were imminent. General Hayden said this was a "tactical decision."

(U//FOUO) On 2 October 2001, General Hayden briefed the House Permanent Select Committee on Intelligence (HPSCI) on this decision and later informed members of the Senate Select Committee on Intelligence (SSCI) by telephone. He had also informed DCI George Tenet.

(TS) At the same time NSA was assessing collection gaps and increasing efforts against terrorist targets immediately after the 11 September attacks, it was responding to Department of Defense (DoD), Director of Central Intelligence Community Management Staff questions about its ability to counter the new threat.

We can tell the discussion in the released version is different, even though it is entirely redacted. That's because the discussion is longer, appears to include two footnotes, and has some indentations that don't appear in the Snowden version.

But as it is, the discussion is legally dangerous for the Executive, because it either shows that NSA used the 15-day window permitted under FISA (which would make the Yoo memos all the more problematic), or conducted this spying without any authorization. (There are also “doth protest too much” discussions of how the NSA never spied on Americans before this that we know to be false, so I suspect that’s part of the problem.)

NSA redacts the Cheney paragraph

The final report redacts a discussion (PDF 148-149) titled, “Vice President Asked What Other Authorities NSA Needed.” Some related discussion appears in the Snowden version, but clearly not the entire discussion.

Mr. Tenet relayed that the Vice President wanted to know if NSA could be doing more. General Hayden replied that nothing else could be done within existing NSA authorities. In a follow-up telephone conversation, Mr. Tenet asked General Hayden what could be done if he had additional authorities. General Hayden said that these discussions were not documented.

Though it’s possible – perhaps even probable – that what the NSA draft depicts as NSA identifying its own needs is actually Hayden getting people to identify the needs Cheney had already identified for him.

In any case, the final IG report complains that none of this was documented, which suggests there was far more of interest that actually went on in these discussions.

NSA Redacts the Binney Option

Perhaps most interesting, the NSA redacts almost

all of whatever became of this discussion.

Among other things, NSA considered how to tweak transit collection—the collection of communications transiting through but not originating or terminating in the United States. NSA personnel also resurfaced a concept proposed in 1999 to address the Millennium Threat. NSA proposed that it would perform contact chaining on metadata it had collected. Analysts would chain through masked U.S. telephone numbers to discover foreign connections to those numbers, without specifying, even for analysts, the U.S. number involved. In December 1999, the Department of Justice (DoJ), Office of Intelligence Policy Review (OIPR) told NSA that the proposal fell within one of the FISA definitions of electronic surveillance and, therefore, was not permissible when applied to metadata associated with presumed U.S. persons (i.e., U.S. telephone numbers not approved for targeting by the FISC).

Though PDF 150 appears to have a footnote that would modify that discussion (but that doesn't appear in the Snowden version).

According to NSA OGC, DoJ has since agreed with NSA that simply processing communications metadata in this manner does not constitute electronic surveillance under the FISA.

This footnote *may* refer to the SPCMA decision in 2007 to 2008. Except that's not what Binney et al proposed back in 1999. On the contrary: SPCMA permits NSA to chain through *unmasked* US person metadata, whereas Binney had proposed permitting only chaining through masked US person identifiers.

Which suggests the George Ellard may have been misrepresenting what was possible in this sensitive IG Report designed for Congress.

But that would make it easier to come to this conclusion, one not included in the Snowden version:

Under its authorities, NSA had no other options for the timely collection of communications of suspected terrorists when one end of those communications was in the United States and the communications could only be collected from a wire or cable in the United States.

No wonder they redacted the Binney discussion.