

ON THE REFUSAL TO EXERCISE OVERSIGHT OVER VAST SURVEILLANCE PROGRAMS, EPISODE 117

The Joint IG Report on the illegal wiretap program left out all discussion of what happened to the Internet and (to a lesser extent) phone metadata collection that got moved into Pen Register/Trap&Trace and Section 215 collection, respectively, as described by the NSA Draft IG Report (see page 39 ff).

The transition of certain PSP-authorized activities to FISC orders is described in detail in Section 5 of the classified report and Chapter Five of the DOJ OIG Report. Further details regarding this transition are classified and therefore cannot be addressed in this unclassified report.

But the report did make it clear that Glenn Fine, then DOJ's Inspector General, had recommended DOJ and other Intelligence Committee agencies track whether these programs were useful in their new form.

As noted above, certain activities that were originally authorized as part of the PSP have subsequently been authorized under orders issued by the FISC. The DOJ OIG believes that DOJ and other IC agencies should continue to assess the value of information derived from such activities to the government's counterterrorism efforts.

[snip]

Finally, the collection activities

pursued under the PSP, and under FISA following the PSP's transition to that authority, involved unprecedented collection activities. We believe the retention and use by IC organizations of information collected under the PSP and FISA should be carefully monitored.

The Joint IG Report came out in July 2009. The debate over extending the PATRIOT Act started in earnest in September 2009.

Yet not only wasn't that review baked into the extension, but when Patrick Leahy tried to include additional oversight that would include, among other things,

- Mandate further audits of some of these provisions, such as the use of pen registers
- Give the Court oversight over the minimization procedures for the use of Section 215 and pen register and trap and trace devices
- Require that Section 215 and pen registers only be granted if authorities can show that the requested information has ties to terrorism

Dianne Feinstein got Leahy to take much of that out in a substitute bill, and then Jeff Sessions, seemingly working on behalf of the Administration, gutted things further in the Senate markup. It was fairly clear then that the IC – if not the Administration personally – wanted to make sure this oversight did not get added to the PATRIOT Act.

And it didn't.

The next year, Glenn Fine – who, of course, was the guy who recommended increased oversight in the first place – said he'd do the reviews anyway.

We intend to initiate another review examining the FBI's use of NSLs and Section 215 orders for business records. Among other issues, our review will assess the FBI's progress in responding to the OIG's recommendations in the prior reports. In addition, we intend to examine the number of NSLs issued by the FBI from 2007 through 2009, and we will closely examine the automated system to generate and track NSLs that the FBI implemented to address the deficiencies identified in the OIG reports.

In addition, our review will cover the FBI's use of Section 215 orders for business records. It will examine the number of Section 215 applications filed from 2007 through 2009, how the FBI is using the tool today, and describe any reported improper or illegal uses of the authority. Our review will also examine the progress the FBI has made in addressing recommendations contained our prior reports that the FBI draft and implement minimization procedures specifically for information collected under Section 215 authority.

We also intend to conduct a programmatic review of the FBI's use of its pen register and trap and trace authority under the FISA. That part of the review will examine issues such as how the FBI uses the authority to collect information, what the FBI does with the information it collects, and whether there have been any improper or illegal uses of the authority either reported by the FBI or identified by the OIG. *[my emphasis]*

Writing in 2010, when both metadata collection programs were still ongoing under these authorities, this basically laid out a plan to review all the secret metadata collection hidden inside these authorities.

Fine wrote that in June; in November of that year, he announced his resignation, saying he wanted to pursue new professional challenges.

Which brings us to the point just over two months ago when Fine's replacement, Michael Horowitz (who, to be fair, was only nominated on July 29, 2011, 6 months after Fine left, and it took almost a year to get confirmed) announced the status of that investigation.

The OIG is again examining the FBI's use of national security letters (NSLs) and Section 215 orders for business records. Among other issues, this review is assessing the FBI's progress in responding to the OIG's recommendations in its first and second reports on the FBI's use of NSLs, and in its report on the FBI's use of exigent letters and other informal requests for telephone records. A focus of this review is the NSL subsystem, an automated workflow system for NSLs that all FBI field offices and Headquarters divisions have been required to use since January 1, 2008, and the effectiveness of the subsystem in reducing or eliminating noncompliance with applicable authorities. The current review is also examining the number of NSLs issued and Section 215 applications filed by the FBI between 2007 and 2009, and any improper or illegal uses of these authorities. In addition, the review is examining the FBI's use of its pen register and trap-and-trace authority under FISA. [my emphasis]

It has been 3 years since this investigation was announced. Horowitz has been on the job for 14

months.

Not only is that investigation not done, but even with the delay, Horowitz' investigation only covers the period Fine originally laid out.

Through 2009.

So we're getting a review of a collection that was declared illegal in its last incarnation. But we're going to learn what went on 4 years ago.

And, of course, we now know that between 2006 (when the last review went through) and 2007, the Bush Administration expanded the analysis of Internet metadata two degrees of separation into American online activity (and Obama sustained that practice for two years of his Administration).

You'd think if one of the recommendations coming out of a review of prior illegal behavior was, "you'd better watch the programs that illegal behavior morphed into," Congress and the Executive would make sure they watch the programs that illegal behavior morphed into.

Don't be silly.