HOW MIKE ROGERS' EXCESSIVE SECRECY IN 2011 MIGHT KILL THE DRAGNET

The FISA Court just released an August 29, 2013 opinion that reaffirms the court's prior support for the Section 215 dragnet.

There's a lot to say about the general legal interpretation of the opinion, which I may return to.

More importantly, though, the opinion relies on a demonstrably false claim to reaffirm the program: that Congress was briefed on the program.

> Prior to the May 2011 congressional votes on Section 215 re-authorization, the Executive Branch provided the Intelligence Committees of both houses of Congress with letters which contained a "Report on the National Security Agency's Bulk Collection Programs for USA PATRIOT Act Reauthorization" (Report).
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> The Report provided extensive and detailed information to the Committees regarding the nature and scope of this Court's approval of the implementation of Section 215 concerning bulk telephone metadata.
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> Furthermore, the government stated the following in the HPSCI and SSCI Letters: "We believe that making this document available to all Members of Congress is an effective way to inform the legislative debate about reauthorization of Section 215…" Id. HPSCI Letter at 1;

> SSCI Letter at 1. It is clear form the letters that the Report would be made available to *all* Members of Congress and that HPSCI, SSCI, and Executive Branch staff would also be made available to answer any questions from Members of Congress. Id. HPSCI Letter at 2; SSCI Letter at 2.
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> In light of the importance of the national security programs that were set to expire, the Executive Branch and relevant congressional committees worked together to ensure that *each* Member of Congress knew or had the opportunity to know how Section 215 was being implemented under this Court's Orders.

But as I have shown, because of Mike Rogers' actions, a very large block of Congresspersons — the 93 freshmen legislators elected in 2010, save the 7 who were on the Intelligence or Judiciary Committees — appear to have had no such opportunity to learn about the program. Indeed, 65 members who voted in favor of PATRIOT reauthorization appear to have had no way of learning about the dragnet. Furthermore, we have documentary evidence that then FBI General Counsel Valerie Caproni (who was informed about abuses in the program on January 23, 2009), and then FBI Director Robert Mueller (who had to write a brief responding those abuses in August 2009) lied about whether there had been abuses in response to a question clearly designed to learn about the secret use of Section 215 during a May 13, 2011 hearing purportedly designed to replace the letter the Administration sent.

This opinion relies on a claim that has now been proven false (and actually had been by the time the opinion was written).

Judge Claire Eagan seems to know she's basing her argument on false claims, because in a footnote she invokes the presumption of regularity.

> It is unnecessary for the Court to inquire how many of the 535 individual Members of Congress took advantage of the opportunity to learn the facts about how the Executive Branch was implementing Section 215 under this Court's Orders. Rather, the Court looks to congressional action on the whole, not the prepatory work of Individual Members in anticipation of legislation. In fact, the Court is bound to presume regularity on the part of Congress.
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> [snip]
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> The ratification presumption applies here where each Member was presented with an opportunity to learn about a highly-sensitive classified program important to national security in preparation for upcoming legislative action.

But even here, Eagan relies on a false premise, that all members of Congress had the opportunity to be informed about the dragnet.

The record shows — even the Administration White Paper shows — they did not.

I'm not entirely sure how we use these facts to overturn the dragnet. But either the FISC lives up to every claim that it's a rubber stamp, or this decision must be revisited.

Update: Orin Kerr, who accepts the claims that I've shown to be false as true, still finds the argument about congressional consent unpersuasive.

> Finally, I was deeply unimpressed by the last section of the opinion (pages 23-27), which argues that the FISC's reading of the statute is presumptively correct because Congress knew about what the FISC was doing and didn't amend the statute when it reenacted Section 215 in 2011. While it's true that statutory

> reenactment has been construed a kind of silent approval of prior interpretations in some caselaw, I don't know how on earth that can apply to secret court rulings by a district court that were merely made available to members of Congress, most of whom never learned of the opinions and would have no idea what they were looking at if they did. The idea underlying the doctrine of ratification is that established cases become part of the background understandings of the law. But it's hard for me to see how decisions from a non-precedential secret court can form that background understanding, especially given that few members of Congress knew of the opinions and no one in the public did.

Update: And predictably, in a post called "Congress has no clothes," Ben Wittes, who has been informed repeatedly that the record shows the House was not alerted to the 2011 letter, nevertheless gets his rocks off on Judge Eagan's use of that false claim to argue the program is legal.

> Perhaps the most remarkable feature of the opinion is Judge Eagan's insistence that Congress cannot run away from her interpretation of the statute.
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> [snip]
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> All told, it's an excellent opinion for the government. It affirms the program's legality. It pulls the folding screen away from Congress even as members seek delicately to change, leaving them nakedly implicated in a program whose memory they seem so eager to abandon on the laundry pile.

Who's naked here, Ben?