THE FISC OPINION DANCE

Andrea Peterson calls attention to this cryptic Ron Wyden quote in WaPo's story on extant FISA Court opinions on bulk collection.

> "The original legal interpretation that said that the Patriot Act could be used to collect Americans' records in bulk should never have been kept secret and should be declassified and released," Sen. Ron Wyden (D-Ore) said in a statement to The Washington Post. "This collection has been ongoing for years and the public should be able to compare the legal interpretation under which it was originally authorized with more recent documents."

Before I speculate about what Wyden might be suggesting, let's review what opinions the article says exist.

There's the original Colleen Kollar-Kotelly opinion.

> In the recent stream of disclosures about National Security Agency surveillance programs, one document, sources say, has been conspicuously absent: the original — and still classified — judicial interpretation that held that the bulk collection of Americans' data was lawful.
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> That document, written by Colleen Kollar-Kotelly, then chief judge of the Foreign Intelligence Surveillance Court (FISC), provided the legal foundation for the NSA amassing a database of all Americans' phone records, say current and former officials who have read it.
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> [snip]

> Kollar-Kotelly's interpretation served as the legal basis for a court authorization in May 2006 that allowed the NSA to gather on a daily basis the phone records of tens of millions of Americans, sources say. Her analysis, more than 80 pages long, was "painstakingly thorough," said one person who read it. The date of the analysis has not been disclosed.

There's a 2006 one pertaining to Section 215 not written by Kollar-Kotelly.

> The Justice Department also is reviewing a 2006 court opinion related to the Section 215 provision to determine whether it can be released, said Alex Abdo, an ACLU staff lawyer. (A senior department official told The Post that no 2006 Kollar-Kotelly opinion is based on that provision.)

There are two more on Section 215 the government has disclosed the existence of to ACLU.

> Government lawyers have told the ACLU that they are withholding at least two significant FISC opinions — one from 2008 and one from 2010 — relating to the Patriot Act's Section 215, or "business records" provision.

Now compare how these map up with the two opinions referenced by Claire Eagan in her recent opinion.

> This Court had reason to analyze this distinction in a similar context in [redacted]. In that case, this Court found that "regarding the breadth of the proposed surveillance, it is noteworthy that the application of the Fourth Amendment depends on the government's

> intruding into some individual's reasonable expectation of privacy." Id. at **62**. The Court noted that Fourth Amendment rights are personal and individual, see id. (citing Steagald v. United States, 451 U.S. 204, 219 (1981); Rakas v. Illinois, 439 U.S. 128, 133 (1978) ("'Fourth Amendment rights are personal rights which … may not be vicariously asserted.,) (quoting Alderman v. United States, 394 U.S. 165, 174 (1969))), and that "[s]o long as no individual has a reasonable expectation of privacy in **meta data**, the large number of persons whose communications will be subjected to the … surveillance is irrelevant to the issue of whether a Fourth Amendment search or seizure will occur." Id. at 63. Put another way, where one individual does not have a Fourth Amendment interest, grouping together a large number of similarly-situated individuals cannot result in a Fourth Amendment interest springing into existence ex nihilo.
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> [snip]
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> This Court has previously examined the issue of relevance for bulk collections. See [6 lines redacted]
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> While those involved different collections from the one at issue here, the relevance standard was similar. **See 50 U.S.C. § 1842(c)(2)** ("[R]elevant to an ongoing investigation to protect against international terrorism …. "). In **both cases**, there were facts demonstrating that information concerning known and unknown affiliates of international terrorist organizations was contained within the **non-content metadata** the government sought to obtain. **As this Court noted in 2010**, the "finding of relevance most crucially depended on the conclusion that bulk

> collection is necessary for NSA to employ tools that are likely to generate useful investigative leads to help identify and track terrorist operatives." [redacted] Indeed, in [date redacted] this Court noted that **bulk collections such as these are "necessary to identify the much smaller number of [international terrorist] communications."** [redacted] As a result, it is this showing of necessity that led the Court to find that "the entire mass of collected metadata is relevant to investigating [international terrorist groups] and affiliated persons." [my emphasis]

These two both appear to rely on the Pen Register statute, and the first one Eagan cites is at least 63 pages long. Note that the government appears to have chosen to redact just one of two dates, leaving the 2010 one visible.

Given that we know Kollar-Kotelly authorized the initial use of Pen Register to collect Internet metadata in 2004 (and she's a serious enough judge it is inconceivable she would do so without a real opinion), given Wyden's allusion to the Patriot Act (which includes the Pen Register statute), and given that DOJ says Kollar-Kotelly didn't write any opinion on Section 215 in 2006 (remember, they're responding to ACLU's FOIA for Section 215 information, so they have an incentive to clarify on this point), I'm going to guess these opinions look like this:

- 2004 use of Pen Register for bulk collection of Internet metadata by Kollar-Kotelly
- 2006 use of Section 215
- 2008 use of Section 215
- 2010 use of Section 215
- 2010 use of Pen Register

Remember, too, that those other Section 215 opinions might not refer to metadata at all — they might authorize collection of things like beauty supply purchase records or credit card data. Also remember that Reggie Walton's 2008 Section 215 opinion was called a Supplemental one, so it may be a supplement to that 2008 opinion. And remember that 2010 is the year the NSA started testing out the collection of location phone data.

Finally, remember what David Kris said about the original bulk collection decision(s) in his paper purportedly on the phone dragnet (but which also covered the Internet dragnet).

> More broadly, it is important to **consider the context in which the FISA Court initially approved the bulk collection**. Unverified media reports (discussed above) state that bulk telephony metadata collection was occurring before May 2006; even if that is not the case, perhaps such collection could have occurred at that time based on voluntary cooperation from the telecommunications providers. **If so, the practical question before the FISC in 2006 was not whether the collection should occur, but whether it should occur under judicial standards and supervision, or unilaterally under the authority of the Executive Branch**. [my emphasis]

Kris refers to this initial decision as one approving bulk collection, and strongly implies it was issued primarily to provide some supervision of bulk collection where there had been none under the illegal program.

Elsewhere in the same paper, Kris admits the possibility that these opinion(s) may have been erroneous when initially issued.

> The briefings and other historical evidence raise the question whether

> Congress's repeated reauthorization of the tangible things provision effectively incorporates the FISC's interpretation of the law, at least as to the authorized scope of collection, such that even **if it had been erroneous when first issued**, it is now—by definition—correct. [my emphasis]

Finally, consider what the 2009 draft NSA IG Report says about the transition to FISC orders for Internet dragnet collection.

> (TS//SV/NF) According to NSA personnel, the decision to transition Internet metadata collection to a FISC order was driven by DoJ. At a meeting on 26 March 2007 [sic], DoJ directed NSA representatives from OGC and SID to find a legal basis, using a FISC order, to recreate NSA's PSP authority to collect bulk Internet metadata.
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> (TS//SV/NF) After extensive coordination, DoJ and NSA devised the PRITT theory to which the Chief Judge of the FISC seemed amenable. DoJ and NSA worked closely over the following months, exchanging drafts of the application, preparing declarations, and responding to questions from court advisers. NSA representatives explained the capabilities that were needed to recreate the Authority, and DoJ personnel devised a workable legal basis to meet those needs. In April 2004, NSA briefed Judge Kollar-Kotelly and a law clerk because **Judge Kollar-Kotelly was researching the impact of using PSP-derived information in FISA applications**. In May 2004, NSA personnel provided a technical briefing on NSA collection of bulk Internet metadata to Judge Kollar-Kotelly. In addition, General Hayden said he met with Judge Kollar-Kotelly on two successive Saturdays during the summer of 2004 to

> discuss the on-going efforts.
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> (TS//SV/NF) The FISC signed the first PRITT order on 14 July 2004. Although NSA lost access to the bulk metadata from 26 March 2004 until the order was signed, the order essentially gave NSA the same authority to collect bulk Internet metadata that it had under the PSP, except that **it specified the data links from which NSA could collect**, and it limited the number of people that could access the data. [my emphasis]

This adds two more details. Kollar-Kotelly was concerned — as public reports have also made clear — about the use of metadata-derived information to support FISA applications. Note the language about needing to find the "much smaller number of [international terrorist] communications," which seems to invoke the same relationship of using metadata to find the content to collect as would be implied in using Internet dragnet to support FISA applications.

This also makes it clear that the initial approval of Internet dragnet collection limited collection to certain switches — presumably those carrying primarily foreign content. In the phone dragnet, there is no limitation to calls most likely to involve a foreigner. That may be one more reason this initial opinion might be of particular interest right now.

All of which suggests three things about this initial opinion (and these are wildarse guesses):

- The opinion bears obvious signs of a trade-off between obviously bad law (Kris' erroneous opinion) and an unchecked Executive
- It assumes limits on the collection side (certain

switches) that don’t exist in the existing phone dragnet
- It clearly ties the use of metadata as to demonstrate probable cause that someone is an agent of a foreign terrorist organization (this is a relationship the White House tried to hide as recently as last December)

All this, of course, comes on top of the Administration’s effort to obscure as much of the Internet dragnet program as it can.

Ultimately, I suspect this will pit the FISC (which has, after all, decided to declassify a lot itself) and the Administration (which still gets to perform any declassification).