WORKING THREAD, INTERNET DRAGNET DUMP 2: 2004 DOCUMENTS

This will be a closer working thread on documents released yesterday.

X: Initial Dragnet Application (prior to July 14, 2004)

(2) From the start, the government said they wanted to disseminate the dragnet info, perhaps to tag into FBI's investigative authorities.

(2) The footnote defining metadata hides all the stuff not associated with "standard e-mails."

(4) The application discusses the briefing I discussed here, attended by (among others) John Brennan.

(5) The application is not submitted by a lawyer, but by Michael Hayden.

(6) The government hasn't released a Tenet submission; back in November it hid that this submission was from him.

(16) ODNI maintains that the fictional example of metadata is classified.

(18) Originally access was restricted by making the metadata accessible only by 2 admin login accounts. That's probably a carry-over from the compartments of the illegal program.

(20) RAS approval assigned to the same 7 authorizers that were in place for the beginning of the phone dragnet in 2006.

(21) They're hiding at least one kind of Internet metadata.

(23) Metadata originally accessible for only 18 months. Is that what they used for the illegal dragnet?

Y. Memo of Law in Support of Original Dragnet Application, before July 14, 2004

(4) The government claims that only email metadata related to terrorism will be seen. By definition, that means anything returned in a query would be related to counterterrorism and therefore game for dissemination.

(4) This is the jist of the illegal use of PRTT for the dragnet:

> Nevertheless, it involves nothing more than adapting the traditional tools of FISA to meet an unprecedented challenge and does so in a way that promotes both of the twin goals of FISA: facilitating the foreign-intelligence collection needed to protect American lives while at the same time providing judicial oversight to safeguard American freedoms.

This claim is followed by a 5-page redaction, which is mighty interesting as it would have to explain why this judicial review was so useful.

(9) Footnote 5 again makes it clear that this involves email and other online communications.

(12) This language is remarkable for a secret court document.

> Collecting and archiving meta data is thus the best avenue for solving this fundamental problem: although investigators do know know *exactly* where the terrorists' communications are hiding in the billions of bits of data flowing through the United States today, we do know that they *are there*, and if we archive the data now, we will be able to use it in a targeted way to find the terrorists tomorrow.

(20) This language is particularly important given debates about USA Freedom.

> Nothing in the definitions of pen registers or trap and trace devices requires that the "instrument" or "facility" on which the device is placed carry the communications solely of a single user.

(20) This section really tries to constrain the Court.

> Unlike certain other certifications made in other contexts under the statute, *see, e.g.*, U.S.C. § 1805(a)(5), FISA does not subject the certification of relevance to any review by the Court.

(21) Again, this language is critical for USAF debates, as it ties SST to minimal effective.

> The meta data collection has been targeted as narrowly as the NSA believes it can be while maintaining effectiveness.; the type of data at issue is not constitutionally protected; and even though it would be collected it would never even be *seen* by any human unless a terrorist connection were first established.

(21) And it invokes executive authority.

> Reading FISA to preclude the collection of the intelligence information described in the attached Application, which falls within the President's constitutional powers as Commander in Chief and Chief Executive, would raise grave constitutional questions that this Court should avoid by interpreting Title IV to authorize the proposed collection.

(23-4) Footnote 14 – we know from K-K's opinion – discusses some category of "metadata" that FBI has never tried to obtain under previous FISA PRTTs.

(27) Why is the reference to the AG statement redacted?

(29) Footnote 18 claims the legislative record says the Court has no authority to review relevance, but it also points to the Court's authority to review whether someone is the agent of a foreign power, authority it doesn't exercise in the dragnet.

(29) The application makes typical broad claims about the Court's ability to judge whether something is foreign intelligence or not.

(48) The overbreadth in what is presumably a traditional FISA docket is interesting, given how it precedes the even bigger overbreadth orders.

(50) Some of this language is lifted directly from Jack Goldsmith's 5/6/04 memo.

(51) Note this line:

> Nor is there an attempt to censor the communications from which meta data will be acquired.

(51-2) Curious they had to redact further language about balance.

(56) Here's how they claim Congress has been creating a Constitutional crisis:

> Here, construing FISA to preclude the signals intelligence activities that the Executive Branch has concluded are vital to wartime defense of the Nation would raise a grave constitutional question about whether the statute, as so construed, impermissibly impinges on the President's constitutionally assigned authorities as Commander in Chief and Chief Executive.

(61) This is laughable (especially since DOJ had to dig in old or British dictionaries to find definitions of relevant that applied).

> Here, by contrast, reading the term "relevant" to permit the collection of this critical information during wartime is a construction rooted in the text that requires no stretching of the ordinary meaning of the terms of the statute at all. In fact, for all the reasons outlined above, interpreting section 402 to authorize the collection the Government has requested in the best reading of the plaint terms of the Act.

(61) Wow:

> In almost all cases of potential constitutional conflict, if a statute is construed to restrict the Executive, the Executive has the option of seeking additional clarifying legislation from Congress. In this case, by contrast, the Government cannot pursue that route because seeking legislation would inevitably compromise the secrecy of the collection program the Government wishes to undertake.

Z. Declaration of Michael Hayden

(2) Remember that in later years, Hayden would testify to Congress that subject lines were metadata. He didn't here!

(15) While much of it is classified, there's clearly discussion here of using the dragnet to find new internet addresses of suspects.

(16) Remember that the government would go onto use (or planned to use, from the start) the word "archive" to get two bites at the data.

(18) It's pretty ridiculous that ODNI still classifies NSA's assumptions about how many email contacts someone has.

(19) NSA started with having 10 analysts able to do queries (though their security scheme — a shared email login — seems bizarre).

(20) Hayden claimed they would net 1 new lead a day, and 400 email addresses (which it doesn't consider leads!) provided to CIA and FBI a year.

(20) Hayden claimed 25% of email addresses passed on were US persons.

A. Colleen Kollar-Kotelly opinion

(2) We haven't been given the addendum, in which the government responds to such things as whether K-K could modify minimization procedures, as well as First Amendment considerations.

(7) K-K takes the governments email metadata merging into other stuff and categorizes it — the notion of categories doesn't appear to have been in the application.

(10-11) In both the Memo of Authorities and Hayden's declaration, ODNI has redacted all reference to the stuff K-K discusses here. She also notes that some of the references in Hayden's declaration didn't make it into the application.

(30-1) K-K dodges the govt's claims about foreign intelligence by hiding behind the fact she was not in position of having to determine probable cause. That's a dangerous precedent.

(39) After reading Hayden's claims this production will be "low bandwidth," K-K calls it "enormous."

(39) Not sure where K-K gets here "less than half" claim.

(46) Footnote 33, given all the future problems with dissemination, is a pretty broad endorsement of info sharing.

(69) Hadn't noticed how K-K distinguished this 1A based search from that of NAACP and derivatives. In footnote 49 she says none of this is political.

(71) Note how K-K took Hayden's 18 months online and turned it into 4.5 years of retention, with no requirement it move to tape at 18 months.

(85) In footnote 58, K-K notes what the government didn’t – that normally the court reviews seeds.