

THE 2009 LAST DITCH ATTEMPT TO UNDERCUT THE FISA COURT

As I laid out in this timeline, sometime in fall 2009, the NSA submitted an end-to-end report describing the Internet dragnet. Then, weeks later, David Kris wrote Reggie Walton, admitting that he had been collecting data outside the categories approved by Colleen Kollar-Kotelly in 2004 – that is, admitting that the rosy picture NSA had painted in its end-to-end report was entirely false. Sometime shortly thereafter, DOJ decided not to submit its Internet dragnet reauthorization application, effectively shutting down the Internet dragnet on or around October 30, 2009 until John “Bates-Stamp” Bates reauthorized it sometime around July 2010.

Which is why I find the discussion of the PATRIOT reauthorization during precisely that time period so interesting.

On October 1 the Senate Judiciary Committee had its first open hearing on PATRIOT reauthorization. At that point, an effort to require Section 215 have particular ties to terrorism got shut down in an action we now know served to preserve the phone dragnet. The discussion around it created the interest for a classified briefing. On October 7, they got that briefing. Also on October 7, the Obama Administration gave Jeff Sessions a bunch of changes they wanted off of what the bill had been on October 1.

On October 8, the Senate Judiciary Committee had another open hearing on PATRIOT reauthorization. The committee adopted Sessions changes over DiFi’s already watered down version of what Pat Leahy had originally pushed on October 1 (this is what elicited Russ Feingold’s concerns about SJC acting as the Prosecutors Committee). The changes limited Section 215 protections for libraries, fixed the gag order

problem with NSLs with a non-fix that is similar to one included in USA Freedom Act. Most significantly, they watered down what would have been new minimization procedures for the PRTT authority (which were ultimately stripped in any case), making clear minimization procedures should only be adopted in exceptional circumstances. As I guessed correctly at the time, this was probably done to protect the PRTT dragnet that was collecting vast amounts of Internet metadata (as well as, contrary to Jeff Sessions' claims in the hearing, content).

They absolutely gutted the minimization procedures tied to pen registers! Pen registers are almost certainly the means by which the government is conducting the data mining of American people (using the meta-data from their calls and emails to decide whether to tap them fully). And Jeff Sessions—I mean Barack Obama—simply gutted any requirement that the government get rid of all this meta-data when they're done with it. They gutted any prohibitions against sharing this information widely. In fact, they've specified that judges should only require minimization procedures in extraordinary circumstances. Otherwise, there is very little limiting what they can do with your data and mine once they've collected it.

By asserting it had the authority to impose minimization procedures on the Internet dragnet, the FISC tried, utterly unsuccessfully, to prevent the NSA from illegally wiretapping Americans. When the FISC again asserted its authority to impose minimization procedures, NSA just took its toys and went overseas, where it didn't have that meanie rubber stamp FISC to contend with.

I raise this not only because it suggests DOJ was making legislative efforts to undercut the FISC just as they discovered a huge problem with their Internet dragnet. But also because, in my

opinion, the USA Freedom Act makes a similar effort to withdraw any claim the court might make to be able to impose and review compliance with minimization procedures. I don't think it's an Internet dragnet this time – as I'll write later, I think it's either location (which is fairly banal) or more interesting flow analyses. But I think Congress – with the support of civil liberties NGOs, this time – is still trying to undercut the way that FISC has best been able to impose some controls on the government's spying.