IN WHICH BEN WITTES PROVES BEN WITTES IS NAKED

160 days ago, Jim Sensenbrenner released a letter to Eric Holder expressing concern about the way DOJ had interpreted Section 215. In it, he did some creative editing to hide that he had had an opportunity to learn about that interpretation before he voted to reauthorize the PATRIOT Act.

160 days ago, I was (I believe) the first person to point out that obfuscation.

In those 160 days, I have also documented the serial lies and obfuscations of people like Keith Alexander, James Clapper, Robert Mueller, Mike Rogers, Valerie Caproni, Dianne Feinstein, Raj De, and Robert Litt. (one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three; trust me, this is just a quick survey). The most recent of these lies came last week when Raj De and Robert Litt claimed Congress had been fully informed about the authorities they were voting on, a claim which the Executive Branch's own record proves to be false.

In spite of the clear imbalance between the lies NSA critics have told and those NSA apologists have told, Ben Wittes has made it a bit of a hobby to use Sensenbrenner's single (egregious) lie to try to discredit NSA critics (without, of course, pointing out the serial, at times even more egregious, lies NSA apologists were telling). Of late, Wittes has harangued that, because he told a lie 160 days ago, Sensenbrenner is operating in bad faith when he criticizes NSA's programs now. (See also this

post.)

> I have never questioned the good faith of Senators Patrick Leahy, Ron Wyden, or Rand Paul. They are legislators with a perspective. That's how Congress works.
>
> Rep. James Sensenbrenner is a different matter.
>
> Since the bulk metadata program broke, the former chairman of the House Judiciary Committee has been on a campaign of denunciation of both agency activity under the Patriot Act—the law he helped write. And he has been denouncing the administration for having misled him about how Section 215 is being used too. He has done so with a **breathtaking dishonesty** that puts him in a different category from those members who have a policy dispute with the administration. [my emphasis]

Mind you, Wittes did not examine the content of Sensenbrenner's more recent claims. Had he done so, he might have realized that the record supports Sensenbrenner's complaints, even if the messenger for those complaints might be less than perfect.

> It ignored restrictions painstakingly crafted by lawmakers and assumed a plenary authority never imagined by Congress. Worse, the NSA has cloaked its operations behind such a thick cloud of secrecy that, even if our trust was restored, Congress and the American people would lack the ability to verify it.

Note, we're still learning the full extent of how the Executive Branch blew off limits placed on the PATRIOT authorities.

Wittes might even have noted Sensenbrenner's apparent commitment to do his own job better.

> "I hope that we have learned our lesson and that oversight will be a lot more vigorous," Sensenbrenner said.

Even ignoring Wittes' remarkable double standard, in which he suggests Sensenbrenner's one lie should disqualify him from speaking on this topic forever while Clapper and Alexander's seeming addiction to lies apparently shouldn't even be mentioned in polite company, a highly regarded expert recently laid out new evidence for why Sensenbrenner has good reason to be angry, regardless of his role in passing PATRIOT in 2001 or 2006 or 2010 or even 2011.

The expert?

Ben Wittes.

You see, Ben Wittes at least lent his name to this Lawfare post, which purported to describe the documents released by I Con on October 28. To be sure, the post is shockingly uninformed about the NSA programs in general, suggesting that a reference to the Internet metadata program — which has been mentioned in two earlier Executive Branch documents, the draft NSA IG report, statements in hearings, David Kris' paper, and a slew of Ron Wyden statements — might be a new disclosure. (There are some other errors to that aren't central to my point here.)

Nevertheless, the post at least managed to make two observations that show why Sensenbrenner has every reason to accuse the Executive Branch of undue secrecy.

The post notes that on August 16, 2010, DOJ provided all four key oversight committee chairs with various FISC materials that lay out "significant constructions or interpretations of any provision of FISA" dating back to before July 10, 2008.

> In this August 16, 2010 letter from Weich, the Department of Justice informs the chairmen of the congressional

> judiciary and intelligence committees—Senators Leahy and Feinstein, and Representatives Conyers and Reyes—along with the respective ranking minority members and Judge Bates that pursuant to 50 U.S.C. §1871, it is "providing the Committees with copies of remaining decisions, orders, or opinions issued by the [FISC], and pleadings, applications, or memoranda of law associated therewith, that contain significant constructions or interpretations of any provision of FISA during the five-year period ending July 10, 2008." The Department also let these chairmen know that the materials would only be redacted to the extent necessary to protect "the identities of targets and information concerning sensitive sources and methods."

The letter itself doesn't say it, but the government's Vaughn Index in the ACLU FOIA that elicited release of this letter reveals this disclosure included 236 pages of documents pertaining to Section 215 (though the I Con makes it clear the documents pertain to Section 215; there may be other documents pertaining to other FISC authorities, including the Pen Register program, that were provided that date too, but those wouldn't show up in the ACLU Vaughn).

In other words, a post that Wittes bylined establishes proof that the government withheld 236 pages of "significant constructions or interpretations of FISA" pertaining to Section 215 dating back years from even the four main oversight committees until months after PATRIOT was reauthorized in February 2010. There is reason to believe that package of documents may have included the original opinion authorizing the phone dragnet, an opinion former Assistant Attorney General David Kris has suggested may have been erroneous.

If I were Sensenbrenner, receiving "significant

constructions or interpretations" of a law I had just reauthorized, if I didn't receive those documents until 2 years after the Executive Branch was first obliged to provide them with the passage of the FISA Amendments Act, I'd be justifiably furious. I might even accuse the government of "cloak[ing] its operations behind [] a thick cloud of secrecy."

But that's not all.

The post, bylined by Ben Wittes, also reveals that the government did not tell the Judiciary Committees that it was using Section 215 to track location until at least 18 months after it first started considering obtaining the data and several days after it started doing so. And, once again, the Executive branch did not tell a key oversight committee — much less the rest of Congress — until after they had reauthorized PATRIOT twice, in February 2010 and again in May 2011.

> More than a year later, on September 1, 2011, Ethan Bauman, the Director of NSA's Legislative Affairs Office, sent a notification memorandum to the staff director and minority staff director of the congressional judiciary committees. In them, Bauman informs the committees that "in addition to the telephony metadata the [NSA] has been acquiring since 2006 under its counterterrorism Business Records (BR) [FISA] program, NSA has begun to acquire and analyze telephony metadata derived from cellular network or 'mobility' call detail records (CDRs)."

In other words, what this post bylined by Ben Wittes shows is that in spite of months of Ben Wittes accusing Congress of being NAKED, in fact the Executive Branch did not keep even the Judiiciary Committees adequately informed of both their legal interpretations of Section 215 or of what they were doing with the authority.

I do hope that Ben Wittes can explain to Ben Wittes that he has laid out several reasons why House Judiciary Committee member Jim Sensenbrenner has good reason to be angry.

After all, Wittes is perfectly entitled to continue to apply a double standard to those who lie about FISA programs; he is perfectly entitled to continue tilting at whatever windmills he chooses.

But given that no lesser authority than Ben Wittes has shown that the Executive Branch has failed to adequately inform even Jim Sensenbrenner and the rest of the Judiciary Committees about these NSA programs, I would hope that Ben Wittes would stop making false claims that the Executive has adequately informed Congress.