“CONGRESS WAS FULLY BRIEFED” … AT THE LAST MINUTE

On September 30, 2009, Silvestre Reyes, then the Chair of the House Intelligence Committee, requested that DOJ provide a description of the Section 215 metadata dragnet program.

Reyes sent that request 8 days after September 22, when Patrick Leahy introduced the Senate’s version of PATRIOT Act reauthorization in the Senate, arguing for new limits on both Section 215 and the Pen Register/Trap and Trace authorities then being used to collect Internet metadata.

> This bill adopts the reasonable constitutional standard that I supported in 2006 for 215 orders. First, it would eliminate the presumption in favor of the government’s assertion that the records it is seeking are relevant to its investigation. This bill would require the Government to make a connection between the records or other things it seeks and a suspected terrorist or spy before it is able to obtain confidential records such as library, medical and telephone records. Section 215 orders for tangible things permit the Government to collect an even broader scope of information than NSLs. For that reason, it is critical that the Government show that the records it seeks are both relevant to an investigation and connected to at least a suspected terrorist or spy.
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> This bill would also establish more meaningful judicial review of Section 215 orders. First, it repeals the requirement in current law that requires a recipient of a Section 215 nondisclosure order to wait for a full

> year before challenging that gag order. There is no justification for this mandatory waiting period for judicial review, and this bill eliminates it. It also repeals a provision added to the law in 2006 stating that a conclusive presumption in favor of the Government shall apply where a high level official certifies that disclosure of the order for tangible things would endanger national security or interfere with diplomatic relations. These restraints on meaningful judicial review are unfair, unjustified, and completely unacceptable. I fought hard to keep these two provisions out of the 2006 reauthorization, but the Republican majority at that time insisted they be included.
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> This bill will strengthen court oversight of Section 215 orders by requiring court oversight of minimization procedures when information concerning a U.S. person is acquired, retained, or disseminated. Requiring FISA Court approval of minimization procedures would simply bring Section 215 orders in line with other FISA authorities—such as wiretaps, physical searches, and pen register and trap and trace devices—that already require FISA court approval of minimization procedures. This is another common sense modification to the law that was drafted in consultation with Senators FEINGOLD and DURBIN. If we are to allow personal information to be collected in secret, the court must be more involved in making sure the authorities are used responsibly and that Americans' information and personal privacy are protected.
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> Finally, this bill addresses concerns over the use of pen register or trap and trace devices "pen/trap". The bill

> raises the standard for pen/trap in the same manner as it raises the standard for Section 215 orders. The Government would be required to show that the information it seeks is both relevant to an investigation and connected to a suspected terrorist or spy. This section also requires court review of minimization procedures, which are not required under current law, and adds an Inspector General audit of the use of pen/trap that is modeled on the the audits of Section 215 orders and NSLs.

On October 8, the Senate Judiciary Committee started consideration of the PATRIOT Reauthorization. On October 13, a substitute bill was adopted, gutting some of these additional limits on Section 215 authority. On October 28, that bill was reported to the Senate, with a report including minority views, including a complaint from Russ Feingold, Dick Durbin, and Arlen Specter that Leahy's new limits on Section 215 authority weren't passed.

> New sunsets, audits, reporting requirements and executive branch procedures are positive reforms, but ultimately Congress must set the rules for when the Executive Branch can use investigative tools that have implications for Americans' privacy rights. That is why we were disappointed that the Committee rejected amendments that would have imposed stricter statutory standards for obtaining any tangible things under Section 215 of the USA PATRIOT Act and for obtaining sensitive personal records under the NSL statutes—standards that would have protected against government fishing expeditions.
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> The standard under current law for both authorities is mere relevance to an investigation to protect against international terrorism or clandestine

> intelligence activities. That is a very broad standard, which does not provide, in our view, adequate protection against unnecessary, overbroad, or otherwise inappropriate demands for records.

When the Senate Judiciary Committee passed this bill out of committee, DOJ had not yet responded to Reyes' request.

It was only around this period that the House started on its version of bill. John Conyers submitted it on October 20, and it was reported to the House Judiciary, Intelligence, and Financial Services Committees.

On November 5, the Judiciary Committee marked up and passed the bill. On that day — 36 days after Reyes had made his request — DOJ had still not responded to Reyes' request.

It was not until December 14, 75 days after Reyes had submitted a request tied to critical legislation, that DOJ responded to Reyes' request.

> Thank you for your letter of September 30, 2009, requesting that the Department of Justice provide a document to the House Permanent Select Committee on Intelligence (HPSCI) that describes the bulk collection program conducted under Section 215 00 the "business records" provision of the Foreign Intelligence Surveillance Act (FISA).

DOJ introduced their letter, acknowledging neither the delay nor that two crucial committees had already voted out their bill in the interim. It continued,

> We agree that it is important that all Members of Congress have access to information about this program, as well as a similar bulk collection program conducted under the pen register/trap and trace authority of FISA, when

> considering reauthorization of the expiring USA PATRIOT Act provisions.

Four pages into the attached document, DOJ admits that the Judiciary Committees — both of which had passed out the bill by this point — had not been briefed on the compliance problems described in the document.

The cover letter to the document indicates its intent "to provide the same document to the Senate Select Committee on Intelligence (SSCI) under similar conductions [in which the intelligence committee staffers must watch as members of Congress read the document in Intelligence Committee chambers], so it may be made available to the Members of the Senate." But unlike the 2011 version, the 2009 document includes no proof that it was actually provided.

So 75 days after the House Intelligence Chair asked for a document that even DOJ claimed to agree was important for all members of Congress to have access to, DOJ finally provided it.

Two days later, on December 16, the House Judiciary Committee reported its bill; at the time the Intelligence and Financial Services Committees got an extension to January 29, 2010, which was just days before the PATRIOT provisions expired. And while those committees ultimately discharged the bill on January 29, it wasn't that bill that got considered in the House or Senate. Rather, Congress pushed through a one year extension of PATRIOT as it existed, thereby avoiding any of the new limits on the dragnet collection passed by the Judiciary Committees.

DOJ played similar games the following year, when Congress tried to pass real extensions. That time around, DOJ provided its document on February 2, a week after Jim Sensenbrenner introduced another emergency bill to extend the PATRIOT Act long enough so it could be extended for real later that year.

> We believe that making this document available to all members of Congress, as we did with a similar document in December 2009, is an effective way to inform the legislative debate about reauthorization of Section 215.

DOJ said, as they handed over information about an emergency debate that had already started.

This is what counts as good faith briefing of Congress, providing highly controlled documents to Congress well after important parts of the debate have already taken place.

But don't worry. All three branches of government have approved the dragnet.