DAVID KRIS JOINS BEN WITTES IN HIS NAKED! CHOIR

I know, I know. I've promised my substantive post on David Kris' paper on the phone and Internet dragnets.

I know, I know. My repeated harping on the failure to inform the 2011 House freshmen about the dragnet is getting tedious.

But Kris dedicated 16 pages of his 67 page paper to arguing that the statutory requirements for briefing Congress about the dragnets (which Kris says require only Intelligence and Judiciary Committee briefing) have been met. He ultimately makes a half-hearted attempt to make the same argument Claire Eagan did about Congress adopting judicial interpretation. And he lays out the fatally weak case Ben Wittes has in the past to justify his wails of NAKED!

In doing so, Kris claims that, "all Members were offered briefings on the FISC's interpretation."

> 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. There is a basic principle of statutory construction that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change,"208 as it did repeatedly with the tangible things provision.
>
> [snip]

> Of course, it would be ridiculous to presume that Congress adopted a classified interpretation of a law of which it could not have been aware. As described above, however, the historical record shows that many Members were aware, and that all Members were offered briefings on the FISC's interpretation, even if they did not attend the briefings.

And yet, in all those 16 pages, he offers not one whit of evidence that the 93 members of Congress elected in 2010 (save the 7 on the Intelligence and Judiciary Committees) could have learned about the program save two briefings offered in May 2011.

Unless you count this argument, which suffers from a basic logic problem.

> In an unclassified report published in March 2011, the Senate Intelligence Committee emphasized that it had offered a briefing to all Members of Congress concerning the bulk telephony metadata collection:
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> > Prior to the extension of the expiring FISA provisions in February 2010, the Committee acted to bring to the attention of the entire membership of the Senate important information related to the nature and significance of the FISA collection authority subject to sunset. Chairman Feinstein and Vice Chairman Bond notified their colleagues that the Attorney General and the DNI had provided a classified paper on intelligence collection made possible under the Act and that the Committee was providing a secure setting where the classified paper could be reviewed by any Senator prior to the vote on passage of what became Public Law

> 111–141 to extend FISA sunsets. [my bold]

The entire membership of the Senate, after all, is not the same thing as "all Members of Congress."

Ultimately, though, Kris concedes (citing just the white paper, and not citing me, the Guardian, any other reporting, or Justin Amash's public statements to the effect) that just maybe this information wasn't passed on in 2011 — but don't worry, the Executive did its job!

> Although the House Intelligence Committee did notify Members of the House of the classified documents and briefings in 2010 (when it was led by Chairman Sylvestre Reyes), it may not have done so in 2011 (when it was led by Chairman Mike Rogers). See White Paper at 18 n.13.
>
> [snip]
>
> Regardless of any intracongressional issues in 2011, as a matter of inter-branch relations, it is clear that the Executive Branch provided the materials with the intent that they be made available to all Members of Congress, as they had been in 2009.

Now, Kris is a much better lawyer than the flunkies who wrote the Administration's far weaker White Paper on Section 215, and his argument here betrays not only that, but, I suspect, a hint that he realizes the flaw in his argument.

Notice in his claim that "all Members were offered briefings on the FISC's interpretation," he doesn't argue all members got the Executive Branch notices on the program. He doesn't argue that all members got briefed on the content on the notices. Rather, he claims only that they were offered briefings

on the FISC's interpretation.

As I have noted, the public record is — given the redactions in documents released under FOIA to ACLU — unclear on whether Kris' claim is true or not (though I suspect the apparent absence of an NSA briefer indicates it was not a full briefing on the program).

But one thing is clear. In response to a question that should have elicited descriptions of the many violations in 2009 — violations Kris was a key player in cleaning up — the Executive Branch prevaricated.

> Comment — Russ Feingold said that Section 215 authorities have been abused. How does the FBI respond to that accusation?
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> A — To the FBI's knowledge, those authorities have not been abused.

Kris doesn't, notice, claim that members were offered a full briefing, perhaps because he knows the record shows the contrary.

If the Executive Branch lied in one of these briefings, can Kris really claim the Executive intended to fully inform every member of Congress?

There may be one more problem with this claim, though. As I previously argued — and Marty Lederman now adopts as well — it appears there was no substantive judicial opinion on the phone dragnet, at least, before any of the PATRIOT reauthorizations.

> For all that appears, for instance, Judge Eagan's opinion was the *first* instance in which a FISC judge engaged in a sustained analysis of the very difficult statutory and constitutional problems raised by this program — seven years after the program was first brought before the court. In the very first order that has been made available, for example—issued by Judge

> Howard in August 2006—the court merely stated in a single conclusory sentence that the statutory standard had been satisfied (see paragraph 3). Each subsequent order thus far released—until Judge Eagan's opinion one month ago—repeated that same perfunctory conclusion, without any statutory or constitutional analysis. I do not mean to suggest that the FISC judges never took seriously the legal questions. DOJ apparently filed a memorandum on those questions in 2006 (see the reference on pages 18-19 of Judge Eagan's opinion), and it's fair to assume that the FISC judges read the government's arguments carefully. The judges might even have pushed back *orally* on certain of DOJ's arguments, as the FISC reportedly is in the habit of doing. But careful, serious consideration of the constitutional and statutory questions? It appears that Judge Eagan was the first to do so, at least in writing.

Now, I suspect (hope) that the two Pen Register/Trap and Trace opinions that Eagan cited —one of which was written in 2010 — included a substantive legal argument supporting bulk collection. And to the extent the Administration noticed Congress on both programs, they might have claimed the judicial interpretation governing the Internet dragnet applied to the phone dragnet too.

Though it's a different statute.

But seriously, if even a former OLC lawyer agrees that there was no judicial interpretation on this specific program, then how the hell could Congress be said to have endorsed it?