COLLEEN KOLLAR-KOTELLY ATE THE SERPENT'S FRUIT OF JUDICIAL "OVERSIGHT" IN LIEU OF LAW

Sometime next week, I will have a post on what known documents the government chose not to release in yesterday's dump — a significant chunk, for example, almost certainly show how the dragnet programs are tied inextricably to the content programs.

But for now, we're getting increased clarity on the phone and Internet dragnet program.

One thing that seems clear is that there is no opinion authorizing the phone dragnet, as I suggested two months ago.

What passes as the government's application for the phone dragnet — it is described as "Production to Congress of a May 23, 2006 Government Memorandum of Law," but for a number of reasons, I have my doubts we've gotten even precisely that, which I'll lay out at a future time — is dated May 23, 2006, the day before Malcom Howard approved the application. That doesn't leave time for Howard to have written a fulsome opinion on the practice (and indeed, the timing makes me wonder whether this was approved because of urgent legal deadlines facing the telecoms). [Update: And when John Bates cites the "precedent" in his June-July 2010 opinion (75) he doesn't cite an opinion.]

And the application makes it clear it relies on Kollar-Kotelly's opinion as its legal justification. The first instance of doing so, tellingly, makes it clear FISC approval is designed primarily to give legal sanction for the program, not to assess whether the program actually is legal.

> The Application is completely consistent with this Court's ground breaking and innovative decision [redacted] in [redacted]. In that case, the Court authorized the installation and use of pen registers and trap and trace devices to collect bulk e-mail metadata [redacted]. The Court found that all of "the information likely to be obtained" from such collection is "relevant to an ongoing investigation to protect against international terrorism." 50 U.S.C. § 1842(c)(2); [redacted] 25-54. The Court explained that "the bulk collection of meta data—i.e., the collection of both a huge volume and high percentage of unrelated communications—is necessary to identify the much smaller number of [redacted] communications." Id. at 49. Moreover, as was the case in [redacted], this Application promotes both 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.

Let's pause and reflect on this point for a moment.

We can now say with some certainty that a great many dragnet applications stem from the Kollar-Kotelly opinion. That's because we have almost certainly identified the two opinions named in Claire Eagan's opinion from earlier this year.

> This Court has previously examined the issue of relevance for bulk collections. See [6 lines redacted]
>
> While those involved different collections from the one at issue here, the relevance standard was similar. See 50 U.S.C. § 1842(c)(2) ("[R]elevant to an ongoing investigation to protect against international terrorism …. "). In both cases, there were facts

> demonstrating that information concerning known and unknown affiliates of international terrorist organizations was contained within the non-content metadata the government sought to obtain. As this Court noted in 2010, the "finding of relevance most crucially depended on the conclusion that bulk collection is necessary for NSA to employ tools that are likely to generate useful investigative leads to help identify and track terrorist operatives."

An earlier reference in Eagan quotes the Kollar-Kotelly opinion directly (and the page number lines up), and while I have not found the citation from this passage in the Bates opinion also released yesterday yet (I think it may appear in the redactions on page 76), that opinion discusses relevance at length and was clearly written between 2009 and 2011. [~~Update: the quote appears to be a rough transcription of Bates' cherry picked quote from Kollar-Kotelly that appears on page 9.~~ Update 2: The quote comes from page 73, which is Bates' own transcription of his citation of K-K, but Eagan missed the word "analytic" before tools.]

[Update] Another thing suggests the Bates opinion dates to 2010. The language in the December 2009 notice to Congress suggests ongoing problems, and includes the Internet metadata problems, whereas the February 2011 notice includes far more redacted discussion (yet still treats an active Internet metadata program.

In addition, we know from the geolocation materials that the government didn't get an opinion dedicated to that application before they started.

> DOJ advised in February 2010 that obtaining the data for the described testing purposes was permissible based upon the current language of the Court's

> BR FISA order requiring the production of' all ca11 detail records.' It is our understanding that DOJ also orally advised the FISC, via its staff, that we had obtained a limited set of test data sampling of cellular mobility data (cell site location information) pursuant to the Court-authorized program and that we were exploring the possibility of acquiring such mobility data under the BR FISA program in the near future based upon the authority currently granted by the Court.

There are ~~2004~~, 2006, 2008, 2010, and 2013 opinions that relate to Section 215 (and, I suspect, other activities as well; updated with typo fixed). But at the very least, Kollar-Kotelly's opinion authorized gathering substantially all the phone and (by 2010) Internet metadata in the country, as well as (starting in 2010) some subset of geolocation data).

Kollar-Kotelly, then, is the primary analysis the government has always relied on to construct maps charting the relationships of every American.

Which is why I find it so troubling that the application here is unashamed that the point of the opinion is not to assess the legality of a practice, but instead to "provid[e] judicial oversight to safeguard American freedoms." (Side note: these opinions argue these practices are "necessary" to protect American lives, but the phone dragnet has never once done so, as far as we know, and the government has since purportedly canceled the Internet dragnet program because it was unnecessary, though that is almost certainly a lie.)

Guaranteeing the government doesn't violate the Constitution was supposed to safeguard American freedoms. But with the Kollar-Kotelly opinion and all that follows from it, impotent oversight has came to substitute for defending the

Constitution.