

THE “HEROES” OF THE HOSPITAL CONFRONTATION BRIEF THE FISC

I’m going to have several posts on the documents released yesterday, starting with the Internet dragnet opinion and the phone dragnet application.

But to give those two background, I want to look at a passage in the Internet dragnet opinion, in which Colleen Kollar-Kotelly describes a fascinating briefing that she received in advance of authoring what Orin Kerr describes as a “quite strange” opinion.

After describing some declarations she received (including one from a person whose title remains redacted) and some questions she posed, she describes this briefing.

The Court also relies on information and arguments presented in a briefing to the Court on [redacted] which addressed the current and near-term threats posed by [redacted reference to Al Qaeda and others], investigations conducted by the Federal Bureau of investigation (FBI) to counter those threats, the proposed collection activities of the NSA (now described in the instant application), the expected analytical value of information so collected in efforts to identify and track operatives [redacted] and the legal bases for conducting these collection activities under FISA’s pen register/trap and trace provisions. 4

4 This briefing was attended by (among others) the Attorney General; [redacted] the DIRNSA; the Director of the FBI; the Counsel to the President; the Assistant Attorney General for the Office of Legal Counsel; the Director of the Terrorist

Threat Integration Center (TTIC); and
Counsel for Intelligence Policy.

That is, right at the beginning of her opinion, Kollar-Kotelly tells us that she had a briefing with:

- AG John Ashcroft
- [redacted]
- DIRNSA Michael Hayden
- FBI Director Robert Mueller
- Counsel to the President Alberto Gonzales
- AAG for OLC Jack Goldsmith
- TTIC Director John Brennan
- Counsel for OIPR James Baker

On page 30, Kollar-Kotelly seems to refer to the same redacted person again, which in the context of the reference to CIA v. Sims in that footnote, seems to suggest this is a reference to CIA Director George Tenet, which suggests the redacted author of the brief she relied on was authored by Tenet. (I leave open the more tantalizing possibility that it's someone like Dick Cheney, but highly doubt it.)

So before she approved the use of FISA's Pen Register to collect much of the Internet metadata in the US, she had a meeting with at least one of the villains – Alberto Gonzales – of the hospital confrontation at which DOJ refused to reauthorize the Internet metadata program that was part of the President's illegal wiretap program, and at least three of its "heroes:" Ashcroft, Mueller, and Goldsmith.

Interestingly, this meeting does not appear – at least not described as such – in the Draft NSA IG Report description of the transition to a FISC order.

After extensive coordination, DoJ and NSA devised the PRITT theory to which the Chief Judge of the FISC seemed

amenable. DoJ and NSA worked closely over the following months, exchanging drafts of the application, preparing declarations, and responding to questions from court advisers. NSA representatives explained the capabilities that were needed to recreate the Authority, and DoJ personnel devised a workable legal basis to meet those needs. In April 2004, NSA briefed Judge Kollar-Kotelly and a law clerk because Judge Kollar-Kotelly was researching the impact of using PSP-derived information in FISA applications. In May 2004, NSA personnel provided a technical briefing on NSA collection of bulk Internet metadata to Judge Kollar-Kotelly. In addition, General Hayden said he met with Judge Kollar-Kotelly on two successive Saturdays during the summer of 2004 to discuss the on-going efforts.

Was this “briefing” one of the Saturday meetings Hayden had with FISC’s Presiding Judge?

Remember, David Kris described the genesis of the bulk collection programs this way, in a paper emphasizing the role of the Internet dragnet.

More broadly, it is important to consider **the context in which the FISA Court initially approved the bulk collection**. Unverified media reports (discussed above) state that bulk telephony metadata collection was occurring before May 2006; even if that is not the case, perhaps such collection could have occurred at that time based on voluntary cooperation from the telecommunications providers. **If so, the practical question before the FISC in 2006 was not whether the collection should occur, but whether it should occur under judicial standards and supervision, or unilaterally under the**

authority of the Executive Branch.

[snip]

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. [my emphasis]

The Internet dragnet was illegal. At least 3 of the people who conveyed the importance of authorizing this program had said so – in very dramatic fashion – less than four months before she would do so.

And yet she wrote a memo saying it was legal.

Update, 8/12/14: This application confirms that George Tenet was the redacted declaration submitter.