

USA FREEDUMBER APPEARS TO STRENGTHEN RUPPROGE'S AFFIRMATIVE ENDORSEMENT OF AN INTERNET DRAGNET

Working on a detailed comparison of the difference between the USA Freedumb and USA Freedomber bills, one of the most alarming changes is the gutting of Pen Register minimization procedures. They took language not only adding minimization procedures to Pen Register orders,

(b) APPLICATION.—Section 402(c) (50 U.S.C. 1842(c)), as amended by section 201 of this Act, is further amended by adding at the end the following new paragraph:

(4) a statement of proposed minimization procedures.

(c) ORDER.—Section 402(d) (50 U.S.C. 1842(d)) is amended—

(1) in paragraph (1), by inserting “and that the proposed minimization procedures meet the definition of minimization procedures under this title”

But permitting the court to review whether the government met those minimization procedures.

(h) At or before the end of the period of time for which the installation and use of a pen register or trap and trace device is approved under an order or an extension under this section, the judge

may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was retained or disseminated.'

They even specified the government had to follow those minimization procedures!

USA Freedomer changed that by letting the Attorney General review what are now called "privacy procedures."

(h) The Attorney General shall ensure that appropriate policies and procedures are in place to safeguard non-publicly available information concerning United States persons that is collected through the use of a pen register or trap and trace device installed under this section. Such policies and procedures shall, to the maximum extent practicable and consistent with the need to protect national security, include protections for the collection, retention, and use of information concerning United States persons.

They limit the extent of these "privacy procedures" "to the extent practicable ... with the need to protect national security." That is, they don't have to follow these "privacy procedures" if it'll harm national security, and the change seems to show legislative intent to deprive the FISC of any review.

That's alarming for a number of reasons:

- From the very beginning of the Internet dragnet, the government claimed FISC had almost no authority over the approval process (much less compliance) on Pen Registers
- This language comes right

out of – but makes worse – the section of Mike Rogers’ RuppRoge bill that affirmatively approves the (re)creation of an Internet dragnet

- There’s a curious entry in the NSA classification guide showing FBI conducting a PRTT program after the time NSA’s program got shut down

NSA versus FISC

According to a footnote in the 2010 John Bates opinion on the Internet dragnet, when the government first applied to Colleen Kollar-Kotelly for a FISC order to authorize the dragnet, they claimed she had no authority to do anything but rubber stamp the application.

¹⁰ The government argued that “FISA prohibits the Court from engaging in any substantive review of this certification,” and that “the Court’s exclusive function” was “to verify that it contains the words required” by the statute. [REDACTED] Opinion at 26. The Court did not find such arguments persuasive. *Id.* However, because the government had in fact provided a detailed explanation of the basis for the certification, the Court did not “decide whether it would be obliged to accept the applicant’s certification without any explanation of its basis” and instead “assume[d] for purposes of this case that it may and should consider the basis” of the certification of relevance. *Id.* at 27-28.

We know that, having made that argument, the government got caught in violating the rules Kollar-Kotelly placed on the collection, but then continued to violate the rules for at least 5 more years, until 2009, when it got shut down for a while.

It would seem that the original language in USA Freedom Act would have clarified this issue, and made clear the FISC could exercise real oversight over any PRTT collection.

Adopting RuppRoge’s Internet Dragnet language

This language adopts the nomenclature from the HPSCI’s RuppRoge bill. (See page 18.)

But these “privacy procedures” seem qualitatively worse than the RuppRoge bill in several ways. RuppRoge provides loosey goosey

judicial review of the privacy procedures. And it did not include the “extent practicable” language.

Given the background – given the fact that the government has already told the FISC it shouldn’t have real oversight over PRTT – this language seems to lay clear legislative intent that FISC should have no role whatsoever, especially not with minimization procedures (which, after all, is what they fought with the FISC over for at least years).

The secrecy behind the FBI’s PRTT orders on behalf of NSA

1.8. (S//REL TO USA, FVEY) The fact that FBI obtains FISA counterterrorism court orders on behalf of NSA.	SECRET//REL TO USA, FVEY	1.4(c)*	25 Years*	(TS//SI//NF) For FBI Pen Register Trap Trace (PR/TT), classification is TOP SECRET//SI//NOFORN.
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Finally, there’s a series of entries on the classification guide for FISA programs leaked by Edward Snowden.

These entries show that FBI obtained counterterrorism information using PRTTs for NSA – which was considered Secret.

But that the FBI PR/TT *program* – which seems different than these individual orders – was considered TS/SI/NOFORN.

2.19. (TS//SI//NF) The fact that NSA receives or requests from FBI Pen Register Trap Trace (PR/TT) FISA warrants in order to get data about terrorist groups.	TOP SECRET//SI//NOFORN	1.4(c)*	25 Years*	(TS//SI//NF) The classification level is TOP SECRET//SI//NOFORN regardless of whether the terrorist group is specified for which NSA is seeking or obtaining FISA PR/TT authority.
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If you compare these entries with the rest of the classification guide, you see that this information – the fact that NSA gets PRTT information from FBI (in addition to information from Pen Registers, which seems to be treated differently at the Secret level) – is treated with the same degree of secrecy as the actual targeting information or raw collected data on all other programs.

This is considered one of the most sensitive secrets in the whole FISA package.

2.24. (S//REL TO USA, FVEY) Statistics or statistical trends relating to FBI FISA targets, including numbers of court orders, targets, facilities, or selectors, or combinations or subcategories thereof, without mention of techniques involved.	SECRET//REL TO USA, FVEY	1.4(c)*	25 Years*	(TS//SI//NF) For FBI Pen Register Trap Trace (PR/TT), the classification is TOP SECRET//SI//NOFORN.
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Even minimized PRTT data is considered TS/SCI.

3.13. (TS//SI//NF) Minimized evaluated FBI PR/TT FISA data that does not disclose specific methods or techniques.	TOP SECRET//SI//NOFORN	1.4(c)*	25 Years*	(U) Methods are governed by the classification guides applicable to the specific methods involved.
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Now, it is true that this establishes an exact parallel with the BR FISA program (which the classification guide makes clear NSA obtained directly). So it may be attributable to the fact that the existence of the programs themselves was considered a highly sensitive secret.

So maybe that's it. Maybe this just reflects paranoia about the way NSA was secretly relying on the PATRIOT Act to conduct massive dragnet programs.

Except there's the date.

This classification guide was updated on February 7, 2012 – over a month *after* NSA shut down the PRTT program. Also, over a month after – according to Theresa Shea – the NSA destroyed all the data it had obtained under PRTT. (Note, her language seems to make clear that this was the NSA's program, not the FBI's.)

That is, over a month after the NSA ended its PRTT program and destroyed the data from it (at least according to sworn declarations before a court), the NSA's classification guide referred to an FBI PRTT program that it considered one of its most sensitive secrets. And seemed to consider active.

If FBI had a PRTT program active in 2012 that was separate from the NSA PRTT program (I'm not sure that's the case; it could be they just didn't update this part of the classification guide), then is it still active? Has the Internet dragnet just moved to FBI?

If so, it's no wonder why the Intelligence

Community would want to guarantee that FISC had no review of it.

Update: Note, too, that the bill removes reporting requirements related to PRTT.