

TIME FOR AN EXECUTIVE BRANCH INTERNET DRAGNET

As George Zornick and Josh Hicks laid out (saving me the trouble) the news that IRS lost Lois Lerner's emails from the period during which she reviewed the tax status of political groups is not all that surprising. After all, there's a long history of the Executive Branch "losing" emails from a period that ends up being scandalous, including:

- John Yoo's emails from the period when he was working with David Addington to pre-authorize torture
- SEC's emails on the earliest non-investigations of Bernie Madoff
- OVP's emails from the days after DOJ initiated an investigation into the CIA leak case (and 5 million other emails)

I'd add two things to their list. This whole tradition started when the Reagan and Bush White House tried to destroy emails concerning the Iran-Contra scandal. And there's a parallel tradition of having White House political staff conduct official business on non-White House emails, as both Bush and Obama's White House have done.

And unfortunately, Steven Stockman hasn't been paying attention. He asked NSA Director Mike Rogers for the metadata from Lerner's missing emails. But NSA has already claimed they destroyed all their Internet dragnet records when they shut down the program in 2011. Perhaps Stockman should ask FBI whether they've got an

Internet dragnet that might have collected on Lois Lerner?

Stockman is a nut.

But he might be onto something here. The government argues it is reasonable to collect all the records of all Americans in order to protect against the worst kinds of crimes people in the US might commit. Yet every time emails go missing, they do so amidst allegations of the worst kind of bad faith from the Executive Branch. If the threat of terrorism justifies comprehensive dragnets, based in part on the possibility the culprits will destroy evidence, then doesn't the Executive Branch's serial inability to fulfill its archival responsibilities under the law in the face of allegations of abuse of office do so too?

Besides, making a central repository of all the Executive Branch's emails would address an asymmetry that corrodes democracy. Such a dragnet would ensure that the governed – and those who represent their interests – will always be able to exercise the same kind of scrutiny on those who govern as the government does on them.

Of course this will never happen, in part for justifiable reasons (cost, the privacy of federal employees), in part for unjustifiable reasons (the Executive would never agree to this). But given that it won't happen, doesn't it suggest the NSA's dragnets shouldn't either?

Update: In somewhat related news, Ron Wyden and Chuck Grassley are concerned that ODNI's plan to continually monitor employees to prevent leaks will improperly chill whistleblowers. If someone besides the Intelligence Community tracks that information, then access to the records could be provided more due process.