

WSJ FALSELY PAINTS JOHN “BATES STAMP” AS AGGRESSIVE

WSJ wrote a badly flawed article yesterday describing John Bates’ 2010 opinion reauthorizing the Internet dragnet, claiming the memo – which was released last November – was just declassified.

Newly declassified court documents show one of the National Security Agency’s key surveillance programs was plagued by years of “systemic overcollection” of private Internet communications.

[snip]

Some of the problems with Internet metadata previously were reported and have been part of a broad critique of the NSA’s surveillance activities since the Sept. 11, 2001, terror attacks. The new document from Judge Bates offers the most detailed accounting—even with more than a dozen pages blacked out—of what those problems were.

Sure, ODNI didn’t explain that the opinion – and three other documents released – had been released before, one on multiple occasions. But those of us who read the opinion with the first release, rather than offering up unrepresentative quotes, recognized Bates’ memo as one of the seminal releases from last year. And contrary to WSJ’s claim, the public record (including Claire Eagan’s opinion, which cites from it) shows the opinion to date to 2010.

Even in this supposed actual reading of the document, however, WSJ gets it wrong.

The judge’s order ultimately reauthorized the program, with more stringent conditions than the government had sought.

Sure, Bates didn't permit NSA unrestricted access to illegally collected records. But Bates also approved what was described as an 11- to 24-fold increase in collection.

The current application, in comparison with prior dockets, seeks authority to acquire a much larger volume of metadata at a greatly expanded range of facilities, while also modifying – and in some ways relaxing – the rules governing the handling of metadata.

Best as we can tell given the redactions, Bates approved that part of the request. Aside from imposing a few more training requirements, his biggest denial pertained to some – but not all – of the Internet dragnet data the government collected since the beginning of the program.

So while it is true that Bates wrote a lot of scathing things about the conduct of the program, he also turned around and vastly expanded it.

I raise all this not to be an asshole (though it would be nice if the WSJ had issued a correction, as its author retweeted my tweeted correction). I raise it for two reasons.

First, the WSJ pitches this as “the Judge who doesn't like FISA reform was very critical of the Administration's performance.”

Judge Bates has been the designated spokesman for the judiciary opposing several proposed changes to the structure of the Foreign Intelligence Surveillance Court, particularly the addition of a special advocate to represent privacy interests.

By not reporting that Bates vastly expanded this program in spite of its persistent violations, WSJ wrongly pitches him as a credible judge of what makes the FISC effective, rather than as Exhibit One for why it should be abolished.

Moreover, the documents that actually *were* newly released the other day suggest a very different narrative for what happened between 2009 and 2010, for how Bates came to summarize the many failings of the program but expand the program.

They show, first of all, that Reggie Walton was dealing with the phone and Internet dragnets in tandem throughout; Bates had no discernible role – aside from his intervention on August 4, 2009, after Reggie Walton had already shut down part of the phone dragnet program. The documents released this week make it clear Walton, not Bates, was the fact-finder who discovered the Internet dragnet had never complied with FISC guidelines. Bates had to repeat that scathing language in his opinion, because Walton had already laid it out.

And then, after Walton shut down the Internet dragnet, at a time when NSA continued to ignore his orders, when orders were terse, things began to change.

That's when we begin to see solicitous letters – "Let me once again thank both you and your staff for your consideration" – to Bates, now the decision-maker on whether or not the government could resume a program that had illegally wiretapped Americans for 5 years.

It's that guy who capitulated to pretty talk, expanding both the Internet dragnet and the upstream 702 collection, even as he laid out how both had been illegally wiretapping Americans, who says an advocate actually speaking for privacy would ruin the FISC. That's the narrative we should get from this recent document dump, not that Bates was in any way anything but a Bates stamp.

Walton was by no means a perfect steward of the secret court. But Bates demonstrates why it cannot and does not fulfill its function.