

# THE RECLASSIFICATION OF DETAILS ON THE 2011 UPSTREAM FIGHT

As I noted in this post, Charlie Savage recently liberated more details on the resolution of the 2011 upstream 702 problems.

With respect to some details, however, the newly liberated documents represent a reclassification of details that were made public when the October 3, 2011 John Bates opinion was released in 2013. The government has provided entirely classified documents that are probably the early exchanges on the problem, including language that was unclassified in Bates' 2011 opinion. In addition, the government has redacted dates that were also made public in Bates' opinion.

I laid out both the timeline and the language cited from those early exchanges in this post. As I noted in this post, that timeline makes it clear that at the same time John Bates was asking NSA to assess the impact of upstream collection on US persons by sampling real NSA collection, Ron Wyden and Mark Udall were asking for the same thing.

I've laid out the combined timeline below. What it – and the newly released documents – show is just how brazen James Clapper's refusal to provide real numbers to Wyden and Udall was. Not only did their request exactly coincide with the government's request for more time so they could get more data – the count of US persons – to Bates (though Clapper's record quick response delivered his refusal before Bates got his first real numbers). But the 48-hour turnaround on analysis of SCTs in September shows how quickly NSA can get rough estimates of US person data when they need to.

There are more alarming things the reclassification of these details suggests, which I'll address in a follow-up. But for now, know that in 2011, the Intelligence Community

refused to treat Congress with the same respect due a co-equal branch of government as it was treating Bates (and that's the deep background to James Clapper's 2013 "not wittingly" response).

April 2011, unknown date: Wyden and Udall ask for estimate of US person collection verbally

April 19, 2011: Notice of two upstream overcollection violations [see PDF 144]

April 20, 2011: One recertification submission

April 22, 2011: Two more recertification submissions

May 2, 2011: Clarification letter first admits MCT problem

May 5, 2011: Government asks for extension until July 22, 2011

May 9, 2011: Court grants extension, issues briefing order

June 1, 2011: Government submits response to briefing order

June 17, 2011: Court presents follow-up questions

June 28, 2011: Government response to follow-up questions

July 8, 2011: Court (John Bates) meets with senior DOJ people, tells them he has serious concerns

July 14, 2011: Government files another extension; court grants extension to September 20, 2011

July 14, 2011: Wyden and Udall send letter to James Clapper asking (among other things):

- In a December 2007 Statement of Administration Policy on the FISA Amendments Act, the

Office of Management and Budget said that it would “likely be impossible” to count the number of people located in the United States whose communications were reviewed by the government pursuant to the FISA Amendments Act. Is this still the case? If so, is it possible to estimate this number with any accuracy?

- Have any apparently law-abiding Americans had their communications collected by the government pursuant to the FISA Amendments Act?

July 26, 2011: Clapper responds to Wyden and Udall, refusing to give numbers or describe compliance incidents

August 16, 2011: Government files supplement, presenting results of “manual review of statistically representative sample” for 6 months

August 22, 2011: Meeting between Court and government

August 30, 2011: Government makes another submission

September 7, 2011: Court has hearing

September 9, 2011: Government files additional submission, submitting results of analysis of SCTs completed in just 48 hours