

# TWO DATA POINTS ON SECTION 215 AND BUSH'S ILLEGAL PROGRAM

I've been working on adding some of the dates from this FOIA to my warrantless wiretap FOIA, and I wanted to elaborate on two coincidences of timing I pointed out in this post. Mind you, I think we have to assume they're just coincidences at this point, not causally related. But they do show that they show how Section 215 authority paralleled the events following the hospital confrontation.

First, as I had suggested earlier, the first Section 215 was granted just as the legal issues surrounding Bush's illegal program came to a resolution following the hospital confrontation. In fact, the first 215 Order was granted the day after a big CYA document from Ashcroft, and 15 days after the new OLC memo for the program.

May 6, 2004, OLC memo from Jack Goldsmith for John Ashcroft: OLC 54 which consists of six copies, some with handwritten comments and marginalia, of a 108-page memorandum, dated May 6, 2004, from the Assistant Attorney General for OLC to the Attorney General, as well as four electronic files, one with highlighting, prepared in response to a request from the Attorney General that OLC perform a legal review of classified foreign intelligence activities. According to the IG Report, much of this was replicated in the January 6, 2006 White Paper.

May 20, 2004: Ashcroft writes memo stating it was not until Philbin and later Goldsmith explained to him that aspects of the NSA's Other Intelligence Activities were not accurately described

in the prior Authorizations that he realized that he had been certifying the Authorizations prior to March 2004 based on a misimpression of those activities.

May 21, 2004: FBI gets its first business record in response to Section 215 of the PATRIOT Act.

The other coincidence is earlier—and while almost certainly a coincidence, much more intriguing. Dick Cheney orders Robert Mueller to meet with him at the same time as FBI officials start referring to a new policy of bypassing OIPR, the legal review office, on Section 215 orders.

**March 16, 2004, from Comey to Gonzales, cc'ed to Card:** OLC 63 [the same as FBI 4] is a two-page memorandum (and related electronic file) dated March 16, 2004, from the Acting Attorney General to the Counsel to the President, copied to the President's Chief of Staff, containing legal recommendations regarding classified foreign intelligence activities. IG Report **explains**, Comey advised that DOJ remained unable to find a legal basis to support certain Other Intelligence Activities (data mining) that had been authorized as part of the program and that such activities should be discontinued immediately. Comey cautioned that he believed some ongoing activities under the program raised "serious issues" about congressional notification, "particularly where the legal basis for the program is the President's decision to assert his authority to override an otherwise applicable Act of Congress." Gonzales replied:

Your memorandum appears to have been based on a misunderstanding of the President's expectations regarding the conduct of the Department of

Justice. While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve effectively the goals of the activities authorized by the Presidential Authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential Authorization the interpretation of the law.

March 17, 2004: Bush modifies certain PSP intelligence-gathering activities and discontinues certain Other Intelligence Activities by issuing two modifications to his March 11, 2004 Presidential Authorization.

**March 22, 2004. from Goldsmith to Comey:**

OLC 114 consists of two copies of a three-page memorandum dated March 22, 2004, to the Deputy Attorney General from the Assistant Attorney General for OLC, which confirms oral advice provided by OLC on a particular matter concerning classified foreign intelligence activities.

March 23, 2004: Mueller meets with Cheney, at his request, in his office.

March 24, 2004: Email to FBI General Counsel referring to "recent changes" to Section 215 allowing FBI to bypass OIPR.

When I say this is almost certainly a coincidence, I'm saying only that I think the Cheney meeting with Mueller cannot be related to the policy to bypass OIPR—the timing is too close. As to the rest of it—the efforts to put Bush's illegal surveillance on more sound legal footing—might well have to do with the decision—I have no idea one way or another.

What I find interesting, though, is that at the same time that Goldsmith and Comey were trying

to fix a program that worked by bypassing the FISA Court, and around the same time that Thomas Tamm, working in OIPR, discovered that program, at least one FBI office believed they had a green light to bypass OIPR itself on another counter-terrorism program.

Now, I need to go back to see whether FBI really **did** bypass OIPR—or at least, whether Glenn Fine reported as much in his report (I think they actually did work with OIPR on these). But the timing is mighty curious.