EFF FOIA WORKING THREAD, TWO

This will be another working thread on the EFF FOIA Documents. Here was the first working thread.

The two sets of documents are:

- Draft legislation to amend FISA
- Correspondence about amendinng FISA

And here's the Vaughn Indices DOJ earlier submitted on these documents to help you figure out what they said they had.

For more on what's in the EFF docs, MadDog and Jim White have a bunch of comments on the documents in this thread.

More efforts to prevent Glenn Fine from doing the IG review

In yesterday's thread, I noted that Rockefeller's office was making efforts to ensure that an intelligence IG led the IG audit. On page 7 of this OIP document, there's more detail as to why they were trying to do so, from another of Rockefeller's staffers.

> On Wednesday, you indicated that the Oversight sectlon (section o) would be problematic lf the DOJ lG was empowered to review NSA's compliance with acquisition and minimization procedures. Does the language in Wednesday's draft solve this. problem? The draft indicates that the various lGs (includlng the DOI lG) are authorlzed to revlew "the compliance of their agency or element," The addltlon seems to prevent the DOJ lG from reviewing NSA complíance, but we wanted to get a sense of whether you thought the revlsed language would work.

The question is, why did they want to do that? Because Fine would have found something illegal?

More on foreign power employees

Also yesterday I pointed to some concerns about how to wiretap employees of foreign powers overseas. Here's more (page 8) on that from a Rockefeller staffer.

> An authorization under subsection (a) shall not be used to direct surveíllance at a person reasonably believed to be located outside the Uníted States who is known to be a United States person, unless the Attorney General determines that there is probable cause to believe that the person is a foreígn power, agent of a foreign power, or an officer or employee of a foreign power.

Again, the distinction between agent and employee is critical to them for some reason.

More discussion of other ways to conduct surveillance

In an earlier thread, we had some discussion (page 11) about what the other ways to conduct surveillance would be—including a physical search of stored communication. Does that cover all of this reference?

> Does that put us in a place whre we have to use electronic methods when perhaps there is a better non-electronic way to do it? (And could be more precise to do it that way).

Bush's super-human means

I'm struck by this passage (page 40) on SJC's attempt to strengthen the exclusive means language.

> When I think about lt, maybe the title ls helplng us because lt talks about "exclusive statutory "authorities" which

> ls not the authorlty relled upon by the President (constitutional authorities). Maybe they are unwittingly maklng an argument that will help us, My recollection ls that the debatè over exclusive means was over whether to use exclusive means or exclusive statutory means, Exclusive means won. Thís might inject even more doubt Into the process, although it has the unpleasant effect of providing less flexibility in this area,

First, this is just one of many examples where the DOJ folks treat Congress as the opponent.

But it also reiterates that there's stuff going on that Bush wasn't authorizing by statute, but through his own AUMF bullshit power.

Recall, too, that Feingold has repeatedly tried to get Holder to fulfill his promise to withdraw the White Paper and related opinions from 2006 basing authority on AUMF. I wonder if this is why. Which means Obama—then in the Senate—had no clue that there was this extra-legal shit when he pushed for FISA.

Exclusive means for some kinds of electronic surveillance

This passage (page 52) seems to get at why they had to rewrite exclusivity—and how Bush claimed to have not violated the exclusivity provision already under FISA.

> Louis's point is that the Administration and the Vice Chairman had agreed to the 1978 statement on exclusivity,
>
> OK, Strike thc title VII rcfercnce, but make clear that thc reference to eleclronic surveillance is as defined in 1978, i.e., not as limited by thc PAA or this bill.
>
> For exampte, "electronic surveillance (as dcãncd by section 101, without the limitation in section 701)," (or as defined in section 101, as originally

> enacted in the FISA of t978).
>
> The net would be this: exclusívity would be no lcss than it was in 1978. If there are acquisition activities that never fell under FISA, FISA would not be oxclusive for them, But if they would be elechonic surveillance but for the PAA and this bill, FISA would continue to be exclusive for them.

It's from Mike Davidson, a Rockfeller staffer. He seems to be working against a background in which McConnell and the Bush Administration had to be convinced to even keep exclusivity in the bill. But that they're carving out space—with apparent Democratic acquiescence—such that FISA is only exclusive for some sorts of activities. Perhaps, for example, it's exclusive for wiretapping, but not for collection of signals themselves?

And here's an email (page 54) from the same general chain, in which DiFi's staffer tries to nail down precisely what is going on.

> Chapters 119 and 121 of title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance (as defined in Section 101(f), regardless of the limitation of section 701) and the interception of domestic wire, oral, or electronic communications may be conducted.
>
> I am interested in following-up, when the information is available, on any type of collection for which this authority would not be exclusive (as we started to discuss last night).

So at this point DiFi's staffer didn't even know what they were trying to carve out.