

WAS DOJ HIDING A SECTION 215 GUN REGISTRY FROM CONGRESS?

Among other documents, ODNI released on Monday all the Attorney General Reports on Section 215 use from 2005 to 2011 (2006, 2007, 2008, 2009, 2010, 2011, 2012).

This is the classified version of a report that also gets released in unclassified form as part of a larger report to Congress on FISA numbers (2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012; ODNI did not release the report covering 2012 because it lay outside the scope of ACLU's FOIA). And the paragraph of each of these reports that lays out the following information remains redacted in all of them.

(3) the number of such orders either granted, modified, or denied for the production of each of the following:

(A) Library circulation records, library patron lists, book sales records, or book customer lists.

(B) Firearms sales records.

(C) Tax return records.

(D) Educational records.

(E) Medical records containing information that would identify a person.

Nevertheless, the reports show us two new things.

Year	Total	Combined		Modify		Congress
2005	155	141	91%	2	1%	X
2006	43	32	74%	4	9%	X
2007	17*	0	0	0	0	X
2008	13	0	0	0	0	
2009	21	0	0	9	43%	
2010	96	0	0	43	45%	
2011	205	0	0	176	86%	undated

*The 2007 report (submitted in April 2008) originally reported just 6 applications, none of which were combined or modified.

First, while we knew the number of modifications has gone up significantly in the last three years (we now know that many of the modifications in 2009 had to do with phone dragnet violations), the latest reports ODNI released say this:

The FISC modified the proposed orders submitted with forty-three such applications in 2010 (primarily requiring the Government to submit reports describing implementation of applicable minimization procedures).

The FISC modified the proposed orders submitted with 176 such applications in 2011 (requiring the Government to submit reports describing implementation of applicable minimization procedures).

Julian Sanchez had speculated that's what was going on in a post (I can't find the link right now) noting that NSL use had halved while Section 215 use had gone up. Remember, too, the government has not released a 2010 opinion on Section 215 that may explain why the FISC got much more involved in policing the government's minimization.

Still, it is almost certain that the need to double check government minimization stems from bulk collections. If those bulk collections were also on a 90-day renewal cycle, then we might be looking at 44 bulk collection programs in 2011.

One more thing. As was reflected in the ACLU Vaughn Index, it appears DOJ never provided these reports to Congress starting with the report covering 2008. It did do so for the report covering 2011, but the report isn't

dated, so it's not clear it was done in April 2012, when it should have been provided to Congress. Furthermore, that production was cc'ed to John Bates, which the tardy August 16, 2010 production of FISC opinions also was, which makes me wonder whether Bates had to force the Executive to fulfill the requirements in the PATRIOT Reauthorization (~~both these reports and the pre-2008 "significant constructions of law" requirement~~ stems from the 2006 reauthorization). [4/19/14 correction: The "significant constructions of law" stems from the FISA Amendments Act]

Now, maybe DOJ was just being lazy in not fulfilling the clear legal requirement. But given that it seems to have had no problem fulfilling the requirement for unclassified numbers during the same period, I wonder whether DOJ just didn't want to reveal that it was collecting on one or more of the specified categories, such as firearms sales records (though I've long wondered whether DOJ was also collecting DNA records).

As I noted in June, when Ron Wyden and 25 other Senators asked James Clapper for more details about how Section 215 is used, they emphasized gun records.

It can be used to collect information on credit card purchases, pharmacy records, library records, firearm sales records, financial information, and a range of other sensitive subjects. And the bulk collection authority could potentially be used to supersede bans on maintaining gun owner databases, or laws protecting the privacy of medical records, financial records, and records of book and movie purchases. [my emphasis]

And in September – when he started taking a more active role in legislatively defeating Section 215 – Jim Sensenbrenner joined the NRA in raising concerns about using the law to create a gun registry.

Congressman Jim Sensenbrenner (R-WI) sent a **letter** today to Attorney General Eric Holder regarding the National Security Agency's (NSA) bulk collection of data and the Administration's misinterpretation of Section 215 of the Patriot Act.

On Wednesday, Congressman Sensenbrenner and the National Rifle Association (NRA) filed separate amicus briefs in the American Civil Liberties Union's (ACLU) lawsuit against administration officials.

A Federal Bureau of Investigation's (FBI) training manual specifically lists gun sales as records the FBI can obtain under Section 215, the so-called business records provision.

Congressman Sensenbrenner: "The flawed logic the Obama administration relied on to support bulk collection of Americans' phone data would also support bulk collection of other personal data. Does the administration believe it has the authority to indiscriminately collect records of firearms sales?"

"The FBI, for example, could conclude that it is interested in firearms sales – not only in the type of firearms being purchased, but also in who is selling firearms to whom – thereby ascribing importance to the connections between the buyers and sellers. These connections would make firearms sales indistinguishable from phone records under the administration's analysis.

"The administration's legal view of Section 215 could potentially support building a national gun registry despite Congress's expressed disapproval and the Second Amendment. This view is beyond anything Congress ever intended and must be reined in."

Clearly, the people read into this program seem to have reason to be concerned about a gun registry created in defiance of Congressional refusal to create one.

And unless there's a specific FISC opinion addressing the issue, and unless it got shared with the oversight committees, then the Executive may well have done that in secret, hiding the fact by failing to fulfill a very basic reporting requirement.