

SUNSETS GIVE WAY TO DAWN ON SECTION 215

In my last post, I showed how Section 215 authority grew over time, potentially in response to legal challenges to other domestic surveillance programs. I'm going to look at what that might mean for the expanded use of 215 authority in 2006 in a later post.

But first, I want to look at one passage in the 2007 IG Report on Section 215 that is relevant to current efforts to reauthorize PATRIOT. The report explains how—faced with a looming reauthorization fight—DOJ scrambled to actually make use of the Section 215 authority.

By early 2005, the Department faced the "sunset provision" of Section 215, pursuant to which the authority would lapse or "sunset" unless Congress affirmatively renewed the provision. In April 2005, FBI officials testified before Congress about the FBI's use of the authorities provided by the Patriot Act. This generated a renewed emphasis within the FBI's Office of General Counsel on the use of the Section 215 provision.

By this point, the FBI was just using tens of Section 215 orders a year. In 2005 that expanded (partly through the use of combo orders designed to get subscriber information for trap and trace orders), and in 2006 it blossomed into at least one entirely new, secret program.

Meanwhile, remember what else happened. The Senate Judiciary, after a hearing including testimony from Robert Mueller in April 2005, unanimously supported new limits on Section 215, which would have required some specific tie to terrorism or a foreign power before an order could be used to obtain records pertaining to a person. The House, on the other hand, supported small changes which nevertheless still allowed

use of Section 215 to access records of people with no tie to terrorism. That fall, the conference process was gamed to make sure the House bill would prevail.

In other words, at the same time someone was pushing Congress to keep the more permissive standard for Section 215, FBI was scrambling to actually use the authority—perhaps at least partly to justify its continued existence!

And somehow, out of that process, Section 215 came to be used to legally authorize entirely new programs in 2006, after the reauthorization process.