WARRANTS FOR INNOCENT PEOPLE ARE NOT LIKE WARRANTS FOR SUSPECTS

As Charlie Savage reports, Ron Wyden and Mark Udall have written Eric Holder scolding him for mischaracterizations DOJ has made about how the government is using the Patriot Act, in part to collect information on people's location.

They cite two examples of such mischaracterizations: First, when a number of Justice Department officials claimed,

> that the government's authority to obtain business records or other "tangible things" under section 215 of the USA Patriot Act is analogous to the use of a grand jury subpoena.
>
> [snip]
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> As you know, Section 215 authorities are not interpreted in the same way that grand jury subpoena authorities are, and we are concerned that when Justice Department officials suggest that the two authorities are "analogous" they provide the public with a false understanding of how surveillance is interpreted in practice.

What they don't say, but presumably mean to suggest, is that the claim Section 215 is like a grand jury subpoena is false, since the latter are routinely used to collect the "tangible things" (and even ephemeral things like cell phone tracking data) of completely innocent people.

Section 215 is not like a grand jury subpoena because you don't even have to be connected to a crime (or suspected terrorist or spy) to be caught in the surveillance it has been used to authorize.

Wyden and Udall's second complaint pertains to word games played by DOJ spokesperson Dean Boyd in speaking to Al Jazeera English; I've bolded the passage they object to.

> US Justice Department public affairs officer Dean Boyd dismissed the senators' allegations. "It's quite unfortunate that your facts are so incorrect," Boyd told Al Jazeera English when asked about Wyden and Udall's comments.
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> Boyd highlighted one provision of the Patriot Act in his response, Section 215. "Contrary to various claims in recent months and years, Section 215 is not a secret law, nor has it been implemented under secret legal opinions by the Justice Department," he said.

Boyd's dodge, it appears, is that DOJ hasn't gotten an OLC opinion; they're relying solely on FISC opinions.

> This statement is also extremely misleading. As the NSA General Counsel testified in July of this year, significant interpretations of section 215 of the Patriot Act are contained in classified opinions of the Foreign Intelligence Surveillance Court and these opinions—and the legal interpretations they contain—continue to be kept secret. In our judgment, when the government relies on significant interpretations of public statutes that are kept from the American public, the government is effectively relying on secret law.

There are two problems that Wyden and Udall's letter present, which they don't lay out themselves.

First, after noting that warrants for people who are not suspects are not like warrants for suspects, the Senators observe that DOJ officials have made misleading claims to the contrary to Congress. They seem to be reminding Holder that it is a crime to lie to Congress.

Or, at least, it used to be. Given DOJ's treatment of Scott Bloch, who as a DOJ employee lied to Congress, it's clear that DOJ is unlikely to allow its own employees to go to jail for lying to Congress. Perhaps Senators Wyden and Udall would like to make a stink about that? Otherwise, their implicit threat of legal consequences for these lies is completely impotent.

The other problem—one they probably can't lay out in an unclassified letter—is the precedent of the In re Sealed Case decision by FISCR. As I've laid out, Cheney's illegal wiretap program appears to have been in tension if not outright conflict with the FISCR for a year and a half, until Jack Goldsmith purportedly resolved that conflict with specious (though still classified) arguments. Given that DOJ has apparently not laid out what they're actually doing with Section 215 and geolocation in an OLC memo, it increases the likelihood that the language of the FISC opinions may not precisely apply to the behavior of DOJ (as an OLC opinion might). Furthermore, in that previous case, DOJ sent a bunch of lawyers who weren't even briefed into relevant activities to argue before the court.

There's no affirmative evidence DOJ is doing such things in this case. But the In re Sealed Case precedent, the unexplained chose not to get OLC to approve this activity, as well as the Obama Administration's precedent of overriding OLC when its lawyers counseled against continued Libyan bombing all raise real questions about the legal process by which the Administration came to claim this stuff has some kind of legal sanction.

In other words, while the bigger issue in this letter seems to be the government's continued pretense that warrants for surveiling innocent Americans are just like warrants for investigating suspects, I'm beginning to suspect the bigger story is the unusual means by which the Administration got "authority" to spy on innocent Americans.