WIRETAPPING YOUR BUSINESS RECORDS: THE WHITE HOUSE DOESN'T WANT YOU TO BE CONFUSED

Sadly, whoever liberated the White House talking points on the FISA Amendments
Act extension didn't get them to TechDirt until after most of the so-called debate was over.

Particularly given this explanation for why the White House opposed Pat Leahy's efforts to shorten the extension to three years, which would have made the next extension coincide with the PATRIOT Act extension that will be debated in the year before a Presidential election.

> Aligning FAA with expiration of provisions of the Patriot Act risks confusing distinct issues.

TechDirt suggested the White House thinks Congress is stupid.

> Is the White House really arguing that Congress is too stupid to hold the specifics of the FAA separate from the specifics of the wider Patriot Act? If they're confused by those issues, then they shouldn't be in this job. Period.

But I think this talking point is far more telling. Because, in fact, there is a great deal of circumstantial evidence that FAA and one of the three things that will be up for extension in 2015—Section 215—are not at all distinct.

Section 215, remember, is the "Business Records" provision that allows the government to get any tangible thing that is **relevant to** a national security investigation. We know Section 215 has been used to collect records of acetone and

hydrogen peroxide purchases, and there's abundant reason to believe the government has used Section 215 to get cell geolocation data.

Moreover, Ron Wyden and Mark Udall have pointed to Section 215 as part of the "secret law" they've been complaining about, even while they also point to FISA Court opinions tied to that "secret law."

Historically, too, there seems to be a chronological tie. In the weeks after the May 11, 2004 hospital confrontation, Cheney had a secret meeting with just Robert Mueller; FBI started bypassing DOJ's Office of Intelligence Policy Review to get Section 215 orders; and FBI obtained its first ever Section 215 order. Then, in the months after the revelation of the illegal program in 2005 (and during that year's debate on PATRIOT renewal), the government used Section 215 to get subscriber information on trap and trace orders.

In other words, it seems possible that in response to Jim Comey and Jack Goldsmith's efforts to stop the data mining of US person call records collected without any legal basis, the government started collecting call records under FBI orders to accomplish the same result and they repeatedly turned to Section 215 to provide legal cover for the illegal collection they refused to stop.

In fact, (I'm trying to track this down) Jeff Merkley made a speech on Thursday that invoked the Section 215 relevance standard at one point, not the FAA foreign standard. So Merkley, at least, does seem to think there's a tie between Section 215 and FAA.

It seems, then, that the White House was (surprise!) being totally disingenuous with its purported worry that people would conflate the warrantless wiretap program with the collection it conducts using Section 215. More likely, they were worried that having these debates at the same time would make it more obvious that they're conducting part of their warrantless

surveillance program under FAA, and part of it under Section 215.

Update: I just now realize that Merkley's amendment, which would have forced the government to release either the FISC opinions or summaries of the decisions, applied to both section 702 (the warrantless wiretapping part) and section 501 (the Section 215 part) of FISA. Which is why he discussed the relevance standard.

Here's what he said, in part.

> In my opinion, there are serious reforms that need to be made before we consider renewing this law. This law is supposed to be about giving our government the tools it needs to collect the communications of foreigners, outside of our country. If it is possible that our intelligence agencies are using the law to collect and use the communications of Americans without a warrant, that is a problem. Of course, we cannot reach conclusions about that in this forum because this is an unclassified discussion.
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> My colleagues Senator Wyden and Senator Udall, who serve on Intelligence, have discussed the loophole in the current law that allows the potential of backdoor searches. **This could allow the government to effectively use warrantless searches for law-abiding Americans**. SenatorWyden has an amendment that relates to closing that loophole.
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> Congress never intended the intelligence community to have a huge database to sift through without first getting a regular probable cause warrant, but because we do not have the details of exactly how this proceeds and we cannot debate in a public forum those details, then we are stuck with wrestling with the fact that we need to have the sorts

> of protections and efforts to close loopholes that Senator Wyden has put forward.
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> What we do know is that this past summer, the Director of National Intelligence said in a public forum that on at least one occasion the FISA Court has ruled that a data collection carried out by the government did violate the fourth amendment. We also know that the FISA Court has ruled that the Federal Government has circumvented the spirit of the law as well as the letter of the law. But too much else of what we should know about this law remains secret. In fact, we have extremely few details about how the courts have interpreted the statutes that have been declassified and released to the public. This goes to the issue of secret law my colleague from Oregon was discussing earlier. If you have a phrase in the law and it has been interpreted by a secret court and the interpretation is secret, then you really do not know what the law means.
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> The FISA Court is a judicial body established by Congress to consider requests for surveillance made under the FISA Amendments Act, but, almost without exception, its decisions, including significant legal interpretations of the statute, remain highly classified. They remain secret.
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> I am going to put up this chart just to emphasize that this is a big deal. Here in America, **if the law makes a reference to what the boundary is, we should understand how the court interprets that boundary so it can be debated. If the court reaches an interpretation with which Congress is uncomfortable, we should be able to change that, but of course we cannot change it, not knowing what the interpretation is because the**

> **interpretation is secret**. So we are certainly constrained from having the type of debate that our Nation was founded on—an open discussion of issues.
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> These are issues that can be addressed without in any way compromising the national security of the United States. Understanding how certain words are interpreted tells us where the line is drawn. But that line, wherever it is drawn, is, in fact, relevant to whether the intent of Congress is being fulfilled and whether the protection of citizens under the fourth amendment is indeed standing strong.
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> An open and democratic society such as ours should not be governed by secret laws, and judicial interpretations are as much a part of the law as the words that make up our statute. The opinions of the FISA Court are controlling. They do matter. When a law is kept secret, public debate, legislative intent, and finding the right balance between security and privacy all suffer.
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> **In 2010, due to concerns that were raised by a number of Senators about the problem of classified FISA Court opinions**, the Department of Justice and the Office of the Director of National Intelligence said they would establish a process to declassify opinions of the FISA Court that contained important rulings of law. In 2011, prior to her confirmation hearing, Lisa Monaco, who is our Assistant Attorney General for National Security, expressed support for declassifying FISA opinions that include "significant instructions or interpretations of FISA."
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> So here we have the situation where the Department of Justice and the Office of the Director of National Intelligence said they would establish a process of

> declassifying opinions. They understood that Americans in a democracy deserve to know what the words are being interpreted to mean. We have the Assistant Attorney General for National Security during her hearings express that she supports significant instructions or interpretations being made available to the public. But here we are 2 years later since the 2010 expressions and a year from the confirmation hearings for Lisa, and nothing has been declassified—nothing.
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> The amendment I am offering today sets out a three-step process for sending the message it is important Americans know the interpretations of these laws.
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> [snip]
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> I again wish to emphasize that if any of my colleagues would like to come down and argue that this in any way compromises national security, I will be happy to have that debate because this has been laid out very clearly so the Attorney General has complete control over any possible compromise of information related to national security. Indeed, although I think it is important for this body to continue to express that the spirit of what we do in this Nation should be about citizens to the maximum extent possible having full and clear understanding of how the letter of the law is being interpreted.
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> **Let me show an example of a passage. Here is a passage about what information can be collected: " ….. reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation** (other than a threat assessment) conducted in accordance with subsection (a)(2)," and so on.

> Let me stress these words: “relevant to an authorized investigation.”
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> There are ongoing investigations, multitude investigations about the conduct of individuals and groups around this planet, and one could make the argument that any information in the world helps frame an understanding of what these foreign groups are doing. So certainly there has been some FISA Court decision about what “relevant to an authorized investigation” means or what “tangible things” means. **Is this a gateway that is thrown wide open to any level of spying on Americans or is it not? Is it tightly constrained in understanding what this balance of the fourth amendment is? We do not know the answer to that. We should be able to know.**
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> **If we believe that an administration and the secret court have gone in a direction incompatible with our understanding of what we were seeking to defend, then that would enable us to have that debate here about whether we tighten the language of the law in accordance with such an interpretation.** Again, is this an open gateway to any information anywhere in the world, anytime, on anyone or is it a very narrow gate? We do not know.
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> American citizens should have the ability to know, and certainly a Senator working to protect the fourth amendment should know that as well. We have always struck a balance in this country between an overbearing government and the important pathway to obtaining information relevant to our national security.
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> The amendment I am laying forth strikes that balance appropriately. [my emphasis]

Note that Merkley is neither a member of the Senate Intelligence nor Judiciary Committees, which are the only committees that have seen the FISC opinions. So he can say we need to know what the authorized investigation standard is, because he doesn't know. Rather, he doesn't formally know: but Wyden (who is a cosponsor of the amendment) does. And so do cosponsors Mike Lee, Al Franken, Chris Coons, and Dick Durbin, who are on the Judiciary Committee.