MORE NOTICE PROBLEMS IN THE 215 DRAGNET WHITE PAPER

According to the 2009 Draft NSA IG Report, the telecoms asked for some kind of order for the telecom dragnet collection in 2005, just after the NYT revealed the illegal wiretap program.

> After the New York Times article was published in December 2005, Mr. Potenza stated that one of the PSP providers expressed concern about providing telephone metadata to NSA under Presidential Authority without being compelled. Although OLC's May 2004 opinion states that NSA collection of telephony metadata as business records under the Authorization was legally supportable, the provider preferred to be compelled to do so by a court order.

At least for the beginning of 2006, the government responded to these concerns with a letter from Alberto Gonzales.

> On 24 January 2006, the Attorney General sent letters to COMPANIES A, B, and C, [AT&T, Verizon, and MCI] certifying under 18 U.S.C. 2511 (2)(a)(ii)(B) that "no warrant or court order was or is required by law for the assistance, that all statutory requirements have been met, and that the assistance has been and is required.

The court first signed an order authorizing the collection of phone metadata on May 24, 2006 — 76 days after Congress had passed the reauthorization of the PATRIOT Act with the new "relevant to" language.

> The FISC signed the first Business Records Order on 24 May 2006. The order

> essentially gave NSA the same authority to collect bulk telephony metadata from business records that it had under the PSP. And, unlike the PRTT, there was no break in collection at transition.

But according to the March 2008 DOJ IG Report on Section 215 use, DOJ's Office of Intelligence Policy and Review was briefing changes to at least some of the use of the use of Section 215 that would be implemented by the reauthorization before PATRIOT was reauthorized.

> OIPR determined that substantive amendments to the statute undermined the legal basis for which OIPR had received authorization [redacted] from the FISA Court. Therefore, OIPR decided not to request [redacted] pursuant to Section 215 until it re-briefed the issue for the FISA Court.24
>
> 24 OIPR first briefed the issue to the FISA Court in February 2006, prior to the Reauthorization Act.

The import of the new "relevant to" may well have been the substantive change in question; so this February briefing may have been the start of stripping "relevant to" of all meaning.

Ron Wyden seems to want the government to admit this first court authorization just approved dragnet collection already going on.

When he and 25 other Senators sent James Clapper some questions about Section 215, they asked how long the NSA was conducting dragnet collection under the PATRIOT Act (which remember also includes the PW/TT statute used for the Internet dragnet).

> How long has the the NSA used PATRIOT Act authorities to engage in bulk collection of Americans' records? Was this collection under way when the law was reauthorized in 2006?

And Wyden called out Clapper when he refused to answer.

> In addition, the intelligence community's response fails to indicate when the PATRIOT Act was first used for bulk collection, or whether this collection was underway when the law was renewed in 2006.

Was the government using National Security Letters to collect this information between the NYT scoop and the FISC authorization, I wonder?

In any case, we know the government was collecting phone metadata going back years, we know the government was discussing changes instituted by PATRIOT reauthorization in February 2006, and we know the FISC approved using Section 215 for a phone dragnet in May 2006.

In an interview published yesterday, Ron Wyden (who had already been on the Senate Intelligence Committee for several years in 2006) revealed when he first learned about the phone dragnet.

> **You went from supporting the Patriot Act in 2001 to pushing relentlessly for its de-authorization. What was the tipping point?**
> My concerns obviously deepened when I first learned that the Patriot Act was being used to justify the bulk collection of Americans' records, which was in late 2006 or early 2007.

In other words, the government didn't get around to briefing all of the Intelligence Committee about this collection until months after it started, and possibly up to a year after they first briefed related issues to the FISC.

Here's how the White Paper turns that unforgivable delay into a boast.

> Moreover, in early 2007, the Department of Justice began providing all

> significant FISC pleadings and orders related to this program to the Senate and House Intelligence and Judiciary committees. By December 2008, all four committees had received the initial application and primary order authorizing the telephony metadata collection. Thereafter, all pleadings and orders reflecting significant legal developments regarding the program were produced to all four committees.

Translation: The Executive Branch stalled for an impermissibly long period of time after this dragnet started before briefing even the Intelligence Committee. And while we might blame the Bush Administration, remember that Keith Alexander was already running the dragnet by this period.

So not only didn't the government tell Congress it was using PATRIOT to conduct dragnet collection of Internet metadata when it reauthorized it in 2006, but it didn't even tell all members of SSCI until well after the phone dragnet moved under PATRIOT as well.