

EFF: THE FOURTH AMENDMENT IS NOT TOP SECRET

EFF is requesting that the judge in its FOIA for the October 3, 2011 John Bates FISA Court opinion, Amy Berman Jackson, review the redactions currently in the document to ensure they are properly classified. (h/t Mike Scarcella) It argues the court should undertake such a review because disclosure of the things DOJ had previously claimed were Top Secret has now proven “the agency’s previous blanket withholding assertions were overbroad and wholly without merit.”

To support that case, they point to this passage originally withheld from production.

Upon even a cursory review of the Opinion, it is apparent, DOJ’s blanket exemption claims were far broader than the law allows. For example, this passage, according to the agency, was appropriately “classified at the TOP SECRET level” and withheld from the Opinion:

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Opinion at 67 (reciting Fourth Amendment); see also Bradley Decl., ¶ 5 (Opinion “withheld in full pursuant to

FOIA Exemptions b(1) and b(3)").

Now, I'm actually not sure about this argument. In recent years, after all, the Fourth Amendment has been almost entirely disappeared without a trace. I wouldn't be surprised if the government had disappeared it as a conscious policy decision. So perhaps they really do maintain that the Fourth Amendment must now be hidden pursuant to the Executive Order governing classified information.

Technically, the government previously argued that revealing the existence and text of the Fourth Amendment would cause exceptionally grave harm to the United States – that's what the Top Secret classification it withheld this material under means. [Update: Or, as Nigel puts it, that the opinion referenced the Fourth. Except that's even more absurd because the FOIA was a response to Ron Wyden's declassification of a statement that said the FISC had found in this opinion that the program violated the Fourth.]

We'll see whether Judge Jackson agrees that was a reasonable claim.