

DIFI'S CIRCULAR DEFENSE OF THE PHONE DRAGNET'S LEGALITY PROVES IT IS ILLEGAL

In the report on her own Fake FISA Fix, DiFi makes this case that the phone dragnet program is not illegal.

First, in reference to the call records program, some people will say that the FISA Improvements Act codifies an illegal program. It does not. This legislation does not provide any new legislative authority with which the government may acquire call records or any other information under Section 215—in fact, it narrows the existing authority for it. Section 2 of the FISA Improvements Act clearly prohibits the use of the Business Records authority to collect bulk communication records except through the supplemental procedures and restrictions required by this section, as are detailed in this report.

As part of this previously classified program, in 2006, the Department of Justice sought approval from the FISA Court to collect call records in large number under the Section 215 Business Records provision. The FISA Court approved that request, and has reviewed and renewed that authority every 90 days for the past seven years. These renewal applications have been approved by at least 15 different federal court judges selected by the Chief Justice of the United States to serve on this Court.

The Department of Justice's legal analysis of the call records program has recently been publicly released, as have

the two most recent opinions by the FISA Court as part of the reauthorization of the program every 90 days.

Critics of the program may dispute the legal reasoning, but there should be no disagreement that this program currently is authorized under law and has been determined to be legal and Constitutional by the Executive and Judicial branches. [my emphasis]

Her rebuttal that this doesn't codify the program is pretty funny given that just 1 paragraph earlier she talks about "codifying existing privacy protections," which is the equivalent claim.

I'm more interested in what she doesn't address.

She lays out how DOJ applied for and got authorization to collect this data in 2006 (she doesn't say what date).

She points to two FISC court opinions – the one that forgot to address Jones and the one that cleaned up that obvious error – and the Administration White Paper. And she claims that's "the legal reasoning."

But of course, it's not. There was either legal reasoning dated February 24, 2006 that they're hiding, or there was an absence of legal reasoning, which ought to be a major giveaway in either case.

Moreover, all three documents DiFi points to as "the legal reasoning" suffer from a critical flaw. They all point to Congress' "fully informed" reauthorization of the law to justify the validity of the law today.

But that "fully informed" reauthorization didn't happen.

Indeed, DiFi's own comments on the Fake FISA Fix twice tacitly admit that, when she notes that every member of the Senate got a chance to read notice on the dragnet, while remaining silent

about the House.

In addition, information concerning the bulk telephone metadata program has been made available to every member of the Senate prior to the reauthorization of Section 215, most recently in 2011.

[snip]

For example, the NSA telephone metadata program was approved by federal judges and overseen by Congress, where every member of the Senate had access to information concerning how the programs were conducted and an opportunity to voice objections and debate their efficacy.

The White Paper goes even further. It obliquely admits not just that Mike Rogers refused to allow the House to learn about the dragnet before they voted on it.

An updated version of the briefing paper, also recently released in redacted form to the public, was provided to the Senate and House Intelligence Committees again in February 2011 in connection with the reauthorization that occurred later that year. See Letter from Assistant Attorney General Ronald Weich to the Honorable Dianne Feinstein and the Honorable Saxby Chambliss, Chairman and Vice Chairman, Senate Select Committee on Intelligence (Feb. 2, 2011); Letter from Assistant Attorney General Ronald Weich to the Honorable Mike Rogers and the Honorable C.A. Dutch Ruppertsberger, Chairman and Ranking Minority Member, House Permanent Select Committee on Intelligence (Feb. 2, 2011). The Senate Intelligence Committee made this updated paper available to all Senators later that month. See Letter from Sen. Diane Feinstein and Sen. Saxby Chambliss to

Colleagues (Feb. 8, 2011). [my emphasis]

But it also, even more obliquely, admits that the Executive did not provide the legal reasoning in question until August 16, 2010, after PATRIOT was reauthorized the first time.

Moreover, in early 2007, the Department of Justice began providing all significant FISC pleadings and orders related to this [Section 215] 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. [my emphasis]

So to sum up DiFi's legal defense of the dragnet:

1. Three documents say it is legal
2. All 3 documents say it is legal largely because Congress has reauthorized a previously legally suspect program
3. One of those 3 documents that says it is legal because Congress reauthorized a legally suspect program admits (obliquely) that Congress was not fully informed either time it reauthorized that suspect program
4. DiFi's document pointing to

these 3 documents claiming
it is legal because Congress
reauthorized a legally
suspect program also admits
Congress was not fully
informed when it
reauthorized that suspect
program

I'm convinced! DiFi has made the case! The
program does not, because of the ample notice
problems in the past, fulfill the standards
which the 3 documents require it would need to
meet to be legal.

But it might be if her Fake FISA Fix becomes
law.