

BY “APPLICATION” THE ADMINISTRATION DIDN’T MEAN “MEMORANDUM OF LAW”

This is a very minor point.

But, perhaps to rebut my observation that the government withheld significant constructions of law from the oversight committees until after the PATRIOT Act was reauthorized in 2010, ODNI released these this July 22, 2009 document, approving the unsealing of the original application for the phone dragnet so it could be shared with the Judiciary and Intelligence Committees as mandated by the FISA Amendments Act over a year earlier.

That makes it clear the oversight committees did have the application, at least, before they started discussions to reauthorize PATRIOT.

But it also shows several other things.

It shows how misleading the White Paper was when it implied the oversight committees had everything by December 2008.

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. [my emphasis]

It seems that reference to “application” in the White Paper referred only to the formal application, absent the underlying legal memorandum revealing just how radical this request was, which the Executive Branch withheld for another 7 months (even as the program was showing serial violations).

It also shows that the government took over a year after FAA required this sharing before it actually shared the document.

And it shows that, while we don’t know what the government withheld for over another year, the government was still withholding substantive information from Congress until after PATRIOT was reauthorized in February 2010.

Unlike some of the documents released by the government, the original Colleen Kollar-Kotelly opinion doesn’t reveal when it got released to Congress. I wonder when the Executive decided to share that?

Update: I may have spoken too soon. FISC unsealed this, but I don’t see the submission recorded on the Vaughn indices. Will update soon.

Update: Here’s what the ACLU Vaughn Index (there are differences with the EFF Vaughn Index, but not on this point) shows as far as Congressional submissions of pre-FAA material.

- October 3, 2008, 31 pages of post FAA matters, all apparently on Section 215
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- December 1, 2008, at least 1084 pages of pre FAA matters, 378 of which

pertain to Section 215

- August 16, 2010, 236 pages of Section 215 matter plus more on other topics, pre FAA matters
- February 4, 2011, 39 pages, all apparently on Section 215, unclear whether this is pre or post FAA materials

In other words, if the Vaughn Index is accurate, FISC unsealed this opinion on July 22, 2009, but the Executive Branch didn't provide it to the oversight committees until August 16, 2010.