THE EFF FOIA WORKING THREAD

Update: Here's the Vaughn Index so you can see what DOJ claimed it was handing over.

I'm just now getting to reading the documents from the EFF FOIA.

The two sets of documents are:

- Draft legislation to amend FISA
- Correspondence about amendinng FISA

MadDog and Jim White have a bunch of comments on the documents in this thread.

Here are some of my thoughts, starting with the latter of the two collections.

Statutes of Limitation

As MD points out, there's a document that appears to have been sent on June 11, 2008 that discusses statutes of limitation.

> (3) In any event, there is a very good chance that many of the claims would be barred by the relevant statutes of limitations.

I'm interested in this for two reasons. First, if they are speaking of specific claims being barred by statutes of limitation, they must be tracing those claims to dates of actual illegal wiretapping, right? In other words, this seems to be an admission that there were valid claims.

But the other interesting thing is the date: June 2008. The statute of limitations on this stuff is 5 years long. Which means they're saying that "many" of the claims—and therefore much of the illegal wiretapping—took place on or before June 11, 2003. Which is earlier than you'd think.

Update, from below: bmaz suggests they're talking about civil SOLs.

> Ah, but when you assume a five year statute of limitation, you are applying the *criminal* SOL. They are quite likely, and sure appear to be, talking about the *civil* SOL, which is generally two years for actions against the Federal government.

But Mary reminds that we're not just talking about suits against the government, but in fact primarily against the telecoms.

> bmaz, is that the sol for a civil action not involving gov (like against telecoms) as well?

Physical Searches, Acquisition of, and "Political Reasons"

This entire email from David Grannis—who appears to have been working for the Democrats on SSCI in 2008 (and, given the subject, possibly for DiFi)—is worth reading:

> Please find attached the leg counsel version of the exclusivity language we discussed last night. A quick note on the text:
>
> Instead of repeating the phrase "physical search of stored electronic communications or stored electrionic data in the custody of an electronic communications service provider," I propose that we use the phrase "acquisition of stored electronic communications" and then add a definition for "stored electronic communications" that uses all of the first term. This avoids repeating a very unwieldy phrase four times in the amendment, and it does not speak directly to the question of whether the acuisition of a stored communication is

> surveillance or a search, which I understand to be a plus for DOJ.
>
> On a general note—we have tried to take the concerns of the ODNI and DOJ very seriously in drafting this language. I think this gives the Executive all the authority and flexibility that you said would be needed, but with reasonable constraints, trigger mechanisms, and oversight that is necessary to substantive and political reasons. If there is something we have missed, let's talk, but we really hope this language will be acceepted and we can finally put the exclusivity debate behind us.

Okay, several points on this. First, the "unwieldy" phrase suggests some of the area where Bush was playing fast and loose—suggesting a distinction between, for example, a physical search and some other kind, and a distinction between stored electronic communications and stored electronic data. In other words, it's possible that Bush bypassed FISA's exclusivity provision by claiming they were searching "data" and not "communications"—which makes sense, since the vacuumed data was searched at a metadata level, and Bush and other Republicans like to insist that metadata never contains any content.

Next, note that DOJ didn't want to have to commit to whether collecting and searching this data was surveillance or an actual search. In the prior email, John Demers at DOJ says:

> I prefer spelling out "electronic surveillance or the physical search of stored electronic communications or data…"—the way you have it. THe reason for that is that it strengthens the idea that acquiring stored electronic communications is a physical search, a legal question we may need to revisit for reasons best discussed in a classified setting and unrelated to FISA

> modernization.

That is, DOJ wants it to be a search, not surveillance. I'll come back to this one—but I suspect it has to do with remaining fluidity about how they're legally justifying this stuff.

Finally, look at what this Dem staffer in the Senate was trying to do: impose constraints for "substantive and political" reasons. Funny, isn't it, how he doesn't mention legal reasons? You know—the pesky Fourth Amendment and all?

Protection for foreign power staffers, but not average Americans?

This seems like a fairly random concern on the part of SSCI members:

> To address some of our colleagues' concerns that there could be collection under 705 on an employee of a foreign power that doesn't involve foreign intelligence, we added in a certification by the AG that the information is FI and a significant purpose of the acquisition is to obtain FI. Review on this certification is limited to whether the certification contains all required elements.

At first, I got really conspiratorial, imagining this was an attempt to protect the foreign citizen staffers of certain choice foreign countries (Israel and Saudi Arabia, for example). But I suspect the concern is actually more mundane: that the Americans who work at—say—foreign embassies should be immune from wiretaps on non-political conversations.

Still, given how thin the protections are for all Americans, this seems like a misplaced concern.

An earlier email seems to address this same issue, from the reverse.

> We are working on getting you

> information on our 2.5 practice. A quick look reveals that about one-third of the AG-approved requests this year would not have met the FISA definition of an agent of a foreign power (as required in the bill) — the problem is FISA section 1801(b)(1)(a).

~~Jay Rock's~~ Jello Jay's preference for an intelligence Inspector General

In an email discussing plans for the House bill that got kicked back to the Senate, a Rockefeller staffer writes the following:

> The IG provision is included—as the text had been developed by Senator Leahy, with the House modification that the IGs should select one of them who is presidentially appointed and Senate confirmed to coordinate the review. Not to mix up legislative issues, but we would be happy of that turned out to be an Inspector General for the Intelligence Community.

Since just about the only non-Intelligence IG involved in this review was DOJ's Glenn Fine, this seems to be an expression of not wanting Fine as much as it is support for anyone else. Note, of course, that Fine still did his own IG report that was melded into the others (though we didn't get it).

Courts can't authorize because of laws in other countries

Don't know what to make of this (page 8). This is an email from an SSCI staffer to their legislative counsel, but appears to be passing on DOJ's objections to a draft of the bill.

> I think we have to go back to the language similar to the original formulation here for the order. Your formalation has the court authorizing the acquisiton. We can't have the Court

> actually authorizing acquisitions in this context, because the means of surveillance might violate the laws of some foreign country. Thus, the Court can only issue and order stating that the required elements have been met.

Huh? Are they saying that these FISA orders are used in other countries? And that they can't claim that our AG and/or Courts authorized them?

The means of collection are secret

In this email from Jack Livingston to John Demers (page 47), he suggests there's an issue with telling FISC how they're going to collect communications.

> I'm thinking we might need to add a limited certification to the 705 procedures that would include a limited certification that a significãnt purpose of the
> acquisition is to obtain foreign intelligence information. Nothing in the certification will refer to the means, as do current FISA certification requirements.

Does that mean they didn't want to either reveal or be heald accountable for how they had told FISC they were going to collect this information? (Note, too, page 51, where they avoid adding in language pertaining to stored data.)

The providers did not act in good faith

That's the implication, anyway, from this passage (page 6), in an email from Kathleen Rice to John Demers.

> John-one suggestion that keeps coming up with the immunity/substitution discussion is to have the FISC determine whether the providers acted in good faith. We think this is not a good idea for obvious reasons. lt would be good to

> have the AG ready to respond in case a question comes up about this in today's briefing

After all, if it would be too dangerous for the FISC to determine whether the providers acted in good faith, then it's pretty likely at least some of them did—that is, knowing full well they were breaking the law.

The Courts can't weigh minimization

Here's another reference I don't understand very well. In an email to Ben Powell (GC DNI) about Sheldon Whitehouse's efforts to put real minimization in the bill, Jack Livingston asks (page 37),

> Is there a risk that this coud un-do our attempt to limit the court's assessment of compliance to dissemination in the 705 context?

Section 705 involves joint applications and concurrent applications:

> SEC. 705. JOINT APPLICATIONS AND CONCURRENT AUTHORIZATIONS.

> `(a) Joint Applications and Orders- If an acquisition targeting a United States person under section 703 or 704 is proposed to be conducted both inside and outside the United States, a judge having jurisdiction under section 703(a)(1) or 704(a)(1) may issue simultaneously, upon the request of the Government in a joint application complying with the requirements of sections 703(b) and 704(b), orders

> under sections 703(c) and 704(c), as appropriate.
>
> `(b) Concurrent Authorization- If an order authorizing electronic surveillance or physical search has been obtained under section 105 or 304, the Attorney General may authorize, for the effective period of that order, without an order under section 703 or 704, the targeting of that United States person for the purpose of acquiring foreign intelligence information while such person is reasonably believed to be located outside the United States.

Particularly given related language about how the Courts can't "authorize" surveillance because the means may not be legal in other countries, this seems to refer to collection in both the US and overseas. Is this just referring to whether we partner with—say—the UK's GCHQ on collection (to maximize collection on US persons), but that DOJ doesn't want to have to show its work because it never minimizes stuff collected by the UK?