WHAT'S MISSING FROM THE EFF DOCUMENT DUMP: WHITEHOUSE'S DECLASSIFICATION REQUESTS

I'm still plugging away on the EFF Document Dump. But before I delve into the next chunk of emails, I want to note something that hasn't, thus far, shown up in the document dump (and almost certainly should have been included in the communications between Congress and OLC): Two separate requests (or one extended one) on the part of Sheldon Whitehouse to declassify some of the underlying legal authorities for Bush's illegal surveillance program.

On December 7, 2007, Whitehouse revealed three paraphrases of OLC opinions that Bush had relied on to authorize his surveillance program.

> 1. *An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it.*
> 2. *The President, exercising his*

> *constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II.*
>
> *3. The Department of Justice is bound by the President's legal determinations.*

Whitehouse made it clear—between the time SSCI approved its version of FAA on October 26, 2007 and the time the full Senate approved it on February 12, 2008—that these three OLC opinions authorized at least one earlier incarnation of Bush's surveillance program (though it's not clear whether they authorized the PAA or the totally illegal programs).

> For years under the Bush Administration, the Office of Legal Counsel within the Department of Justice has issued highly classified secret legal opinions related to surveillance. This is an administration that hates answering to an American court, that wants to grade its own papers, and OLC is the inside place the administration goes to get legal support for its spying program.
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> As a member of the Senate Intelligence Committee, I was given access to those opinions, and spent hours poring over them. Sitting in that secure room, as a lawyer, as a former U.S. Attorney, legal counsel to Rhode Island's Governor, and State Attorney General, I was increasingly dismayed and amazed as I read on.
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> To give you an example of what I read, I have gotten three legal propositions

> from these OLC opinions declassified.

These are the opinions, then, that the SSCI got to review as part of the negotiations over the PAA and FAA.

Then, on April 30, 2008, Whitehouse revealed he was still trying to get language from one OLC opinion similarly declassified, this one on exclusivity.

> I'm doing it again with a piece of language that relates to exclusivity. There is a sentence that describes whether or not the FISA statute's exclusivity provision is really exclusive enough for the OLC and that is, we're still going through this process. I'd like to be able to tell you more about this.

This effort took place before the ultimate compromise bill was introduced on June 19, 2008 (it passed the Senate on July 9, 2008).

In other words, Whitehouse's efforts—which surely include the OLC (though the OLC would almost certainly not have had final declassification authority)—were part of DOJ discussions with Congress about passing FAA. But they don't show up in the OLC documents, or (as far as I have seen) in the EFF documents more generally.

Though there may be reasonable explanations (I'm going to do some follow-up on this point), it does seem a curious omission. Not least, because these four opinions (and therefore, presumably the discussions about declassifying some summary of them) are really keys to understanding much of the discussion in the emails. They explain both the discussions about 12333 and "2.5" authority, specifically regarding whether the government could wiretap Americans overseas. As well as some of the discussion about the debate over the exclusivity provision.