RON WYDEN'S PAST PROVOCATIVE HEARING QUESTION ON CELL SITE LOCATION

As I've noted, yesterday Ron Wyden got Keith Alexander to refuse to answer a question about whether the NSA has ever collected or made plans to collect Americans' cell-site information in bulk.

> Wyden: Senators Udall, Heinrich and I and about two dozen other senators have asked in the past **whether the NSA has ever collected or made any plans to collect Americans' cell-site information in bulk**. What would be your response to that?
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> Gen. Keith Alexander (Alexander): Senator, on July 25, Director Clapper provided a non-classified written response to this question amongst others, as well as a classified supplement with additional detail. Allow me to reaffirm what was stated in that unclassified response. **Under section 215, NSA is not receiving cell-site location data and has no current plans to do so**. As you know, I indicated to this committee on October 20, 2011, that I would notify Congress of NSA's intent to obtain cell-site location data prior to any such plans being put in place. As you may also be aware, –
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> Wyden: General, if I might. I think we're all familiar with it. That's not the question I'm asking. Respectfully, I'm asking, **has the NSA ever collected or ever made any plans to collect Americans' cell-site information**. That was the question and we, respectfully General, have still not gotten an answer

> to it. Could you give me an answer to that? [my emphasis]

In addition to saying NSA is not doing so under Section 215, Alexander also pointed to two classified responses he would not repeat in unclassified setting.

Which I think confirms — as if there was any doubt — that the answer is yes, the NSA has at least planned, if not actually collected, cell-site location in bulk (though not necessarily under Section 215).

That said, many people are treating this as Wyden's first provocative hearing question on the topic. This one — from February 2012, just after the US v Jones decision found use of a GPS to constitute a search — may provide some important insight onto the timing and rationale behind such bulk collection.

> Wyden: Director Clapper, as you know the Supreme Court ruled last week that it was unconstitutional for federal agents to attach a GPS tracking device to an individual's car and monitor their movements 24/7 without a warrant. Because the Chair was being very gracious, I want to do this briefly. **Can you tell me as of now what you believe this means for the intelligence community**, number 1, and 2, would you be willing to commit this morning to giving me an unclassified response with respect to what you believe the law authorizes. **This goes to the point that you and I have talked, Sir, about in the past, the question of secret law**, I strongly feel that the laws and their interpretations must be public. And then of course the important work that all of you're doing we very often have to keep that classified in order to protect secrets and the well-being of your capable staff. So just two parts, 1, what you think the law means as of now, and will

> you commit to giving me an unclassified answer on the point of what you believe the law actually authorizes.
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> Clapper: Sir, the judgment rendered was, as you stated, was in a law enforcement context. We are now examining, and the lawyers are, what are the potential implications for intelligence, you know, foreign or domestic. So, **that reading is of great interest to us**. And I'm sure we can share it with you. [looks around for confirmation] One more point I need to make, though. In all of this, we will—we have and will continue to abide by the Fourth Amendment. [my emphasis]

I'm not aware that Clapper ever did provide the promised unclassified answer, but Clapper's suggestion that Jones pertained only to a law enforcement context may suggest the government's lawyers were going to latch onto language in Sam Alito's opinion to claim they could use cell-site location to track terrorists, because terrorism was an "extraordinary offense."

And remember, not long before Wyden asked this question and SCOTUS ruled on Jones, he had asked the following questions more broadly.

> What if instead of installing a tracking device, a government agent (or a private citizen) secretly uses a person's cell phone or GPS navigation device to ascertain that person's location? Is a warrant required for that? If so, should there be different rules for real-time tracking and getting records of someone's past movements?
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> More broadly, when should a cellular company give law enforcement access to a customer's geolocation records?

I'm particularly interested in Wyden's question about "records of someone's past movements," as that would describe cellphone metadata.

In 2012, Wyden asked Clapper about what seemed to be a current use of “secret law” to collect cell-site data, one that may have been reconsidered in light of Jones.

Given everything we’ve learned about “secret law” since, this seems like a fairly important guidepost about what the IC’s use of cell-site data at least used to be.