

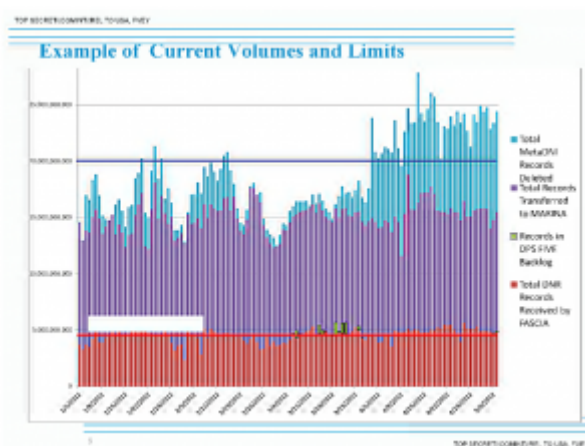
ON THE DAY RON WYDEN ASKED WHETHER NSA COMPLIED WITH US V. JONES, IT COLLECTED 4 BILLION CELL LOCATION RECORDS

As part of my new focus on leaked claims that the NSA can't

collect call data because of problems stripping out cell location data, I want to look at the two exchanges Ron Wyden and James Clapper have had about cell location data.

First, at the Global Threats Hearing 2 years ago just after the US v. Jones decision ruled GPS tracking a search (watching Ron Wyden discomfit Clapper at Threat Hearings used to be my exclusive beat, you know), they had this exchange.

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.

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]

We now have proof (as if Wyden's hints weren't enough of a tell, given his track record) that NSA was collecting cell location at the time of Wyden's question. While the exchange took place after (according to NSA's public claims) NSA's domestic experiments with cell data under Section 215 ended, it suggests the actual NSA collection took place outside of Section 215.

As it happens, NSA's own slide shows that on the day Wyden asked the question – January 31, 2012 – it collected around 4 billion cell location records (it was a slow day that day – NSA had been collecting closer to 5 billion records a

day in 2012). That collection presumably would have been conducted under E.O. 12333.

Given that we know NSA collected around 4 billion cell location records that day, I'm particularly struck by Clapper's emphasis on two things: First his suggestion that the legal analysis might be different for an intelligence use than for a law enforcement use. Given his claim the IC abided by the Fourth Amendment, I assume he imagines they have a Special Need to suck up all this cell location data that makes such searches "reasonable."

Also note his reference to "foreign or domestic." I'm guessing the IC was also busy arguing that, in spite of the US person cell locations they were ingesting, because they were doing so in a foreign location, it didn't violate the Fourth Amendment.

With all that in mind, consider Wyden's question to Keith Alexander on September 26, just before Alexander admitted to the past Section 215 experiments as some kind of limited hangout.

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?

Gen. Keith 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, –

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]

Alexander stated publicly that they were not then and had no plans to obtain cell location data under Section 215. Wyden's response – noting that Alexander's Section 215 response didn't answer their question at all – was a tell. NSA was collecting this data under a different authority, EO 12333.

Given this very recent history, I'd suggest assuming the Administration isn't conducting a similar limited hangout on cell data generally is naive.

One more point. When the WaPo revealed that (among other things) NSA collected 4 billion cell location records on the day Wyden and Clapper had that exchange, Robert Litt gave a new denial.

Robert Litt, general counsel for the Office of the Director of National Intelligence, which oversees the NSA, said "there is no element of the intelligence community that under any authority is intentionally collecting bulk cellphone location information about cellphones in the United States."

His statement could mean two things:

1. No element of the IC is intentionally collecting,

from collection points in
the US, bulk cellphone
location on US cellphones
2. No element of the IC is
intentionally collecting,
from collection points
anywhere in the world, bulk
data on cellphones located
in the US

Given the two years of word games we've gotten,
I'm going to assume this is another one.