

WYDEN, UDALL, AND HEINRICH CALL OBAMA'S BLUFF

The three surveillance critics from the Senate Intelligence Committee – Ron Wyden, Mark Udall, and Martin Heinrich – wrote a letter to Obama on the developments in the NSA reform. Generally, they repeat exhortations that Wyden and Udall have already made in hearings to end the dragnet right now, as Obama has already claimed he wants to do.

I'm not entirely sure what to make of it, but I find some of the details in it to be of particular interest.

The Senators point out, for example, that several bills accomplish the goals Obama has publicly stated he'd support. Those bills include the original USA Freedom Act, and separate proposals advanced by both Udall and Wyden.

But they also include the original PATRIOT Reauthorization from 2005, which Dianne Feinstein once supported, as did a young Senator named Barack Obama (though the Senators don't mention either of those details). Wyden has long pointed obliquely to when the Executive first started using PATRIOT to conduct dragnets, and the record shows the Executive withheld information about how it was using the PRTT authority from even the Intelligence Committees during the 2005 reauthorization. So the Senators may be nodding towards Executive refusal to respect the will of Congress with this mention.

The Senators then both question claims from Administration officials that "in the absence of new legislation, there is no plan to suspend the bulk collection of Americans' phone records," and express their doubts "that the version of the USA Freedom Act that recently passed the House of Representatives would actually ban the bulk collection of Americans' records."

While they repeatedly reiterate their support for legislative reform, they also lay out a plan by which the President can immediately end the dragnet. Here's the part I find particularly interesting.

First, they say it is "highly likely" FISC would let them get 2-degrees of phone records, unless FISC has already prohibited that.

Unless the FISC has already rejected such a request from the government, it does not seem necessary for the executive branch to wait for Congress before taking action.

Isn't this already included in current orders? Shouldn't the Senators know if FISC has rejected such a request (especially Wyden, who has been on the committee through all this period)? Is Wyden saying it's possible there's something else limiting the dragnet? Is he pointing to a ruling he knows about?

Just as interesting, the Senators argue the Pen Register Authority – not Section 215 – could serve to carry out the prospective collection the bill claims to want to do.

FISC would likely approve the defined and limited prospective searches for records envisioned under your proposal pursuant to current USA PATRIOT Act Section 214 pen register authorities, given how broadly it has previously interpreted these authorities.

[snip]

Finally, although we have seen no evidence that the government has needed the bulk phone records collection program to attain any time-sensitive objectives, we agree that new legislation should provide clear emergency authorities to allow the government to obtain court approval of individual queries after the fact under

specific circumstances. The law currently allows prospective emergency acquisitions of call records under Section 403 of the Foreign Intelligence Surveillance Act (FISA), and the acquisition of past records without judicial review under national security letter authorities.

Of course, the PRTT authority (cited twice here) should always have been the appropriate authority for this collection; we've just never learned why the government didn't use that.

Basically, the Senators are laying out how the Executive could do precisely *what it says it wants to do* with existing authorities (indeed, with the PRTT authority that are actually targeted to the kind of record in question).

The Executive has all the authorities it needs, the Senators lay out, so why doesn't it end the dragnet – achieve the reform it claims it wants – immediately?

We believe the way to restore Americans' constitutional rights and their trust in our intelligence community is to immediately end the practice of vacuuming up the phone records of huge numbers of innocent Americans every day and permit the government to obtain only the phone records of people actually connected to terrorism or other nefarious activity. We support your March 27, 2014, proposal to achieve these goals, but we also view ending bulk collection as an imperative that cannot wait.

Damn! That's a very good question! Obama moved immediately to implement his first reform proposal – advance FISC approval and limits to two hops – back in February. So why isn't he moving immediately to implement the plan he says he wants now, as the Senators lay out he could

well do under existing authorities?

It may be the Senators are just pressuring Obama to implement changes now, and nothing here is meant to point to some underlying issue.

But I wildarseguess that they're trying to point out the differences between what they could do – under the PRTT orders they should have been using from the start – and what they want to do.

There's one difference we can point to right away, after all: immunity. If all the government wanted to do was to obtain call detail records, then they wouldn't need to give the telecoms immunity. That's something they do every day. But there's something they will do that has led the telecoms to demand immunity. That's the stuff that goes beyond traditional PRTT activity.

Then there's the stuff we don't know about: the "connections" based chaining. As I've said, I don't know what that entails. But it is an obvious explanation for why the telecoms need immunity – and for why a simple PRTT order won't suffice.

One way or another, the Senators are calling Obama's bluff. Obama says he wants nothing more than to obtain specific phone records going forward. If that's true, he could make the change today. Yet the Executive is clear they can't do that.

Update: One more detail. As Wyden's release on this makes clear, today's the day the March 28, 2014 phone dragnet order expires, so presumably the government got another one today. We've never seen that March 28 order, by the way.