

THE OPINION ACCOMPANYING THE LATEST DRAGNET ORDER

As I noted on Friday, the Administration got a new phone dragnet order on the same day that Senators Wyden, Udall, and Heinrich pointed out that – so long as the Administration only wants to do what it claims to want to do – it could stop holding phone records right away, just as it implemented Obama’s 2-hop mandate and court review in February right away.

From ODNI’s announcement they got a new dragnet order Friday (which they congratulate themselves as a great show of transparency), it’s clear they have no intention of doing so. On the contrary, they’re going to hold out HR 3361 – and their unconvincing claim it ends bulk collection as normal people understand the term – with each new dragnet order.

After carefully considering the available options, the President announced in March that the best path forward is that the government should not collect or hold this data in bulk, and that it remain at the telephone companies with a legal mechanism in place which would allow the government to obtain data pursuant to individual orders from the FISC approving the use of specific numbers for such queries. The President also noted that legislation would be required to implement this option and called on Congress to enact this important change to the Foreign Intelligence Surveillance Act (FISA).

Consistent with the President’s March proposal, in May, the House of Representatives passed H.R. 3361, the

USA FREEDOM Act, which would, if enacted, create a new mechanism for the government to obtain this telephony metadata pursuant to individual orders from the FISC, rather than in bulk. The bill also prohibits bulk collection through the use of Section 215, FISA pen registers and trap and trace devices, and National Security Letters.

Overall, the bill's significant reforms would provide the public greater confidence in our programs and the checks and balances in the system, while ensuring our intelligence and law enforcement professionals have the authorities they need to protect the Nation. The Administration strongly supports the USA FREEDOM Act. We urge the Senate to swiftly consider it, and remain ready to work with Congress to clarify that the bill prohibits bulk collection as noted above, as necessary.

Given that legislation has not yet been enacted, and given the importance of maintaining the capabilities of the Section 215 telephony metadata program, the government has sought a 90-day reauthorization of the existing program, as modified by the changes the President announced earlier this year.

But here's the bit I'm most struck by, particularly given that the government has not yet released the March 28, 2014 dragnet order which should be a slam dunk declassification process, given that its content has presumably all been released in the past.

In addition to a new primary order last Friday, FISC also wrote a memorandum opinion.

The Administration is undertaking a declassification review of this most recent court order and an accompanying memorandum opinion for publication.

I can think of two things that would explain a memorandum opinion: the program has changed in some way (perhaps they've changed how they interpret "selection term" or implement the automated process which they had previously never gotten running?), or the FISC considered some new legal issue before approving the dragnet.

As I noted last week, both *US v. Quartavious Davis*, in which the 11th Circuit ruled stored cell location data required a warrant), and *US v Stavros Ganias*, in which the 2nd Circuit ruled the government can't use data it seized under an old warrant years later, might affect both the current and future dragnets, as well as other programs the NSA engages in.

Thing is, whatever the subject of the opinion, then it'd sure be nice to know what it says before we pass this legislation, as the legislation may have to correct the wacky secret decisions of the FISC (most members of Congress are still not getting unredacted dragnet orders). But if the last order is any indication, we won't get this new order until months from now, long after the bill is expected to be rushed through the Senate.

Which is probably all by design.