

PCLOB CHAIR DAVID MEDINE ON THE 30% CLAIMS

As Ken Dilanian pointed out in his story on the claim that NSA only collects 30% of phone records, in his testimony before the House Judiciary Committee, David Medine suggested “virtually all telephone records of every American” are collected – and he suggests these records are collected under Section 215.

Yet his references are more ambiguous than that. He admits that only some telecoms receive Section 215 orders.

The FISC order authorizes the NSA to collect nearly all call detail records generated by certain telephone companies in the United States, and specifies detailed rules for the use and retention of these records.

But then he makes 3 further references to some form of comprehensive collection.

And while eliminating a U.S. nexus to foreign plots can help the intelligence community focus its limited investigatory resources in time – sensitive situations by channeling efforts where they are needed most, our report questions whether the American public should accept **the government's routine collection of all of its telephone records** because it helps in cases where there is no threat to the United States.

[snip]

Moreover, when **the government collects all of a person's telephone records**, storing them for five years in a government database that is subject to high – speed digital searching and

analysis, the privacy implications go far beyond what can be revealed by the metadata of a single telephone call.

[snip]

But while those rules offer many valuable safeguards designed to curb the intrusiveness of the program, in the Board's view they cannot fully ameliorate the implications for privacy, speech, and association that follow from **the government's ongoing collection of virtually all telephone records of every American.** [my emphasis]

With that in mind, I wanted to consider Medine's answer to Richard Blumenthal's questions about the 30% claims.

He starts by suggesting that if the claim were true it would not change PCLOB's analysis.

Blumenthal: Would the apparent revelation that perhaps only a proportion of this telephone data was collected change in any way the conclusions of your report?

Medine: I don't think we can address in public session the pros and cons of that conclusion but we'd be happy to meet with the committee in private session. But even if the reports are true it still means that hundreds of millions of telephone records are being collected and so, at least it's my view, that it would not change the recommendations of the board.

The implication from this passage is that PCLOB did not know the collection was partial when they made their recommendations.

Medine's dodges are more interesting in response to Blumenthal's suggestion the Government has made false representations to Courts about obtaining all records (though note my comments

on the ambiguity of that language here).

Blumenthal: Would it undercut the accuracy of the representations made by the United States Government to the Courts to justify this program?

Medine: Again, I don't want to comment on that because some of this matter still remains classified and I think there's more to be said on that but I don't think it can be said in public session.

It seems that Medine suggests the Government's claims are more complex than they might appear (though I may be reading into his answer my observation that the claims actually are ambiguous about how the government obtains its complete haystack).

Finally, Medine dodges again wholesale.

Blumenthal: Well, let me put it differently, wouldn't you agree with me that the United States government has misled the Courts, whether purposefully or inadvertently in justifying this program on the basis that all telephone records are collected?

Medine: Again, I'm not prepared to confirm any of the reports that have been made and so I don't want to draw any conclusions about representations that were made in court proceedings.

This answer may support the 30% claims more than earlier ones: it suggests Medine might be able to confirm such a claim.

Nevertheless, if the government has misrepresented the program, than so has Medine,

The one explanation that would address all this ambiguity, of course, is if the few providers that do receive orders provide the call records their backbones treat, not just the call records

their own customers generate.