SECTION 215, UNDER USA FREEDUMB

This post attempts to do more than lay out how Section 215 will look if USA Freedumb were to pass in its current form. For sections that don't change, I just mark what they cover. Bolded text is new. My comments are in red. Please let me know if I've missed anything.

Update: An updated version of the Managers Amendment does define the term specific selection term:

> (2) SPECIFIC SELECTION TERM.—The term 'specific selection term' means a term used to uniquely describe a person, entity, or account.

This is far better than nothing. Though I have concerns about "entity" and I suspect there will be some pushback here, since not even phone numbers "uniquely describe a person," much less IPs.

(a) APPLICATION

(b) Recipient and contents of application
Each application under this section—

(1) shall be made to—
(A) a judge of the court established by section 1803 (a) of this title; or

(B) a United States Magistrate Judge under chapter 43 of title 28, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

(2) shall include—

(A) a specific selection term to be used as the basis for the production of the tangible things

sought;

Unless I'm mistaken, the term "selection term" is never defined in this bill, nowhere, in spite of the fact that this section and several others rely on it. I can assure you the intelligence community already goes far beyond the email address and phone number they claim to use. And think how broad this could be, without specific limitations. Is there anything preventing "selection term" to be "Area Code 202"? And once you're talking financial records, what prevents "specific selection term" to be "pressure cooker purchased with a credit card" or "Western Union transfer over $100"?

(B) **in the case of an application other than an application described in subparagraph (C), a statement** of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to—

(i) a foreign power or an agent of a foreign power;

(ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or

(iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation;

(C) in the case of an application for the production of call detail records created on or after the date of the application, a statement of facts showing that—

Note that this language limits prospective collection to call detail records, not Internet

data. That is one key improvement over RuppRoge – though see my comments below about how this might be gamed.

(i) there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection term required under subparagraph (A) are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to protect against international terrorism; and

(ii) there are facts giving rise to a reasonable, articulable suspicion that such specific selection term is associated with a foreign power or an agent of a foreign power; and

This is where the bill purportedly limits ongoing production to terrorist investigations. But remember how this "relevant to" term has blown up to include anything that could possibly have a tie to terrorism? Which makes this clause meaningless, leaving the only limitation on what call detail records you want to get to be the original selector having a tie to a foreign power. So it would be a cinch to use this language for other uses. One question I have about this is whether the judge approves just the argument that the records are necessary and the term is associated with a foreign power, or does the judge approve the term itself?

(**D**) an enumeration of the minimization procedures adopted by the Attorney General under subsection (g) that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available to the Federal Bureau of Investigation based on the order requested in such application.

(c) Ex parte judicial order of approval
(1) Upon an application made pursuant to this section, if the judge finds that the application meets the requirements of subsections (a) and (b), **and that the minimization procedures**

submitted in accordance with subsection (b)(2)(D) meet the definition of minimization procedures under subsection (g), the judge shall enter an ex parte order as requested, or as modified, approving the release of tangible things. Such order shall direct that minimization procedures adopted pursuant to subsection (g) be followed.

(2) An order under this subsection—
(A) shall describe the tangible things that are ordered to be produced with sufficient particularity to permit them to be fairly identified, including each specific selection term to be used as the basis for the production;

(B) shall include the date on which the tangible things must be provided, which shall allow a reasonable period of time within which the tangible things can be assembled and made available;

(C) shall provide clear and conspicuous notice of the principles and procedures described in subsection (d);
(D) may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things;
(E) shall not disclose that such order is issued for purposes of an investigation described in subsection (a); and

(F) in the case of an application described in subsection (b)(2)(C), shall—

(i) authorize the production of call detail records for a period not to exceed180 days;

(ii) provide that an order for such production may be extended upon application under subsection (b) and the judicial finding under paragraph (1);

(iii) provide that the Government may require the production of call detail records—

(I) using the specific selection term that satisfies the standard required under subsection (b)(2)(C)(ii) as the basis for production;

(II) using the results of the production under subclause (I) as the basis for production; and

(III) using the results of the production under subclause (II) as the basis for production;

This language, which serves to limit the ongoing call detail collection to 2 hops, seems dangerous. At a minimum, it means every new identifier (and again, this may be more than phone number, and it may involve correlations of identifiers) will be used as a new search term across all providers. But it also seems suspicious that the bill ditches the "selection term" language right when you get into exponential collection.

(iv) direct each person the Government directs to produce call detail records under the order to furnish the Government forthwith all information, facilities, or technical assistance necessary to accomplish the production in such a manner as will protect the secrecy of the production and produce a minimum of interference with the services that such person is providing to each subject of the production; and

As you'll see, this language is part of what the immunity language protects against in this bill. The "technical assistance" language requires the telecoms to be intelligence agents on the part of the government (potentially doing analysis of raw data for collection purposes) and — depending on how that facilities language is defined — may put NSA at your phone provider (Which is what RuppRoge does explicitly).

(v) direct the Government to destroy all call detail records produced under the order not later than 5 years after the date of the production of such records, except for records that are relevant to an authorized investigation

(other than a threat assessment) conducted in accordance with subsection (a)(2) to protect against international terrorism.

This is one of the funniest clauses in this entire bill. Every single call record turned over to the government is, by definition, relevant to an authorized investigation. Therefore, this language effectively says that once the government gets this call data, it has complete discretion as to whether it ever wants to destroy any of it.

(3) No order issued under this subsection may authorize the collection of tangible things without the use of a specific selection term that meets the requirements of subsection (b)(2)

Again, if you're going to have requirements on selection terms, then define what that means. Otherwise the restriction is pretty meaningless.

(d)Nondisclosure

(1) No person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order issued **or an emergency production required** under this section, other than to—

(A) those persons to whom disclosure is necessary to comply with such order **or such emergency production**;
(B) an attorney to obtain legal advice or assistance with respect to the production of things in response to the order **or the emergency production**; or

(C) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(2)
(A) A person to whom disclosure is made pursuant to paragraph (1) shall be subject to the nondisclosure requirements applicable to a person to whom an order **or an emergency production** is directed under this section in the same manner as such person.

(B) Any person who discloses to a person described in subparagraph (A), (B), or (C) of paragraph (1) that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order **or emergency production** under this section shall notify such person of the nondisclosure requirements of this subsection.

(C) At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under subparagraph (A) or (C) of paragraph (1) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(e) Liability for good faith disclosure; waiver (e) No cause of action shall lie in any court against a person who produces tangible things or provides information, facilities, or technical assistance pursuant to an order issued or an emergency production required under this section. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

This added language to the immunity provision provides some sense of where the providers' liability is: in providing facilities and technical assistance to the nation's spies.

(f) JUDICIAL REVIEW

For better or worse, RuppRoge provides a more thorough ability to contest claims, as it provides an appellate process not laid out here.

(g) MINIMIZATION PROCEDURES

(h) USE OF INFORMATION

Both of these two sections apply key issues just to FBI. This bill doesn't change that language, in spite of the fact that we know a number of other agencies (notably, NSA) are the primary recipients of these materials. Note too that the

bill puts judicial review for minimization procedures at c(1) rather than in either of the named sections.

(i) EMERGENCY AUTHORITY FOR PRODUCTION OF TANGIBLE THINGS.—

(1) Notwithstanding any other provision of this section, the Attorney General may require the emergency production of tangible things if the Attorney General—

(A) reasonably determines that an emergency situation requires the production of tangible things to obtain information for an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to protect against international terrorism before an order authorizing such production can with due diligence be obtained;

(B) reasonably determines that the factual basis for the issuance of an order under this section to approve such production of tangible things exists;

(C) informs, either personally or through a designee, a judge having jurisdiction under this section at the time the Attorney General requires the emergency production of tangible things that the decision has been made to employ the authority under this subsection; and

(D) makes an application in accordance with this section to a judge having jurisdiction under this section as soon as practicable, but not later than 7 days after the Attorney General requires the emergency production of tangible things under this subsection.

Does “this section” refer to the larger law?

(2) If the Attorney General authorizes the emergency production of tangible things under paragraph (1), the Attorney General shall require that the minimization procedures required by this section for the issuance of a judicial order be followed.

Same question: Does “this section” refer to Section 215 generally, or this clause, in which case there are no minimization procedures included. In any case, given that the real minimization procedures work is not in the minimization procedures section, it seems particularly important to point to what clause is binding.

(3) In the absence of a judicial order approving the production of tangible things under this subsection, the production shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 7 days from the time the Attorney General begins requiring the emergency production of such tangible things, whichever is earliest.

This seems to let the government keep the materials that are obtained if they get them before 7 days.

(4) A denial of the application made under this subsection may be reviewed as provided in this section.

(5) If such application for approval is denied, or in any other case where the production of tangible things is terminated and no order is issued approving the production, no information obtained or evidence derived from such production shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such production shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

Remember that the government has secretly redefined "serious bodily harm" to include "threat to property."

(6) The Attorney General shall assess compliance with the requirements of paragraph (5).

The Attorney General who initially approved the emergency production — not the Judge who has deemed this collection illegal — monitors whether or not the agency goes ahead and uses material gotten under the provision. How well do you think that will work?

(j) COMPENSATION.—The Government shall compensate, at the prevailing rate, a person for producing tangible things or providing information, facilities, or assistance in accordance with an order issued or an emergency production required under this section.

The first 2 phone dragnet orders illegally provided the telecoms compensation for their help; it remains unclear what gimmick the government used after that point to compensate the telecoms. But, whereas Freedumb doesn't fix the other parts of this bill that have proven to be problematic (the language limited to FBI, for example), it does fix the oversight of not paying the providers.

(k) CALL DETAIL RECORD DEFINED.—In this section, the term 'call detail record'—

(1) means session identifying information (including originating or terminating telephone number, International Mobile Subscriber Identity number, or International Mobile Station Equipment Identity number), a telephone calling card number, or the time or duration of a call; and

(2) does not include—

(A) the contents of any communication (as defined in section 2510(8) of title 18 United States Code);

(B) the name, address, or financial information of a subscriber or customer; or

(C) cell site location information.

This definition is, on its face inoffensive. But consider how it works with b(2)(C) above, which applies only to call detail records. Is there anything prohibiting people from using Section 215 for ongoing production of other records? That is, can the government use 215 to get ongoing production of cell site or Internet metadata-that-is-not-content or subscriber financial information in an ongoing production without the limitations imposed in b(2)(C) – such as they exist – precisely because they are not included in this definition? I don't know the answer to that.