

THE FBI'S BLACK HOLE OF DEVISED IGNORANCE SURROUNDING AMERICANS SUBJECT TO SECTION 215

Over at VICE, I've got a long piece summarizing all the ways (well, probably just some of them) FBI refuses to count its intelligence surveillance, meaning there's a black hole about what FBI does with some of its most intrusive surveillance.

Among other things in the piece, it includes this explanation of why FBI doesn't want to count how many Americans get sucked up in Section 215 collection under USA Freedom Act (though the FBI improbably depicted that as a independent decision of Congress).

The bill also exempts the FBI from counting how many US persons get swept up in its use of another authority, Section 215 of the Patriot Act, the statute currently used to collect some significant subset of all Americans' phone records. In addition to those phone records, FBI also uses Section 215 for other "tangible things," which it can collect in significant bulk. The FBI says it won't start counting the Section 215 records obtained because the records it collects (which include email metadata, hotel records, and sales transactions, in addition to phone records) "typically do not indicate the location of the sender or recipient at the time of communication or collection." So learning the location would "require the FBI to scrutinize certain communications or take additional investigative steps to determine the location of the

communicants." Basically, FBI says tracking what it is doing would, by itself, be a privacy invasion.

The FBI's comments on why it should not track how many Americans get sucked up in Section 215 collection is worth further focus, however.

The types of business records collected under a Section 215 order rarely contain information sufficient to determine the location of the person(s) referenced in the records. The FBI collects a variety of information from FISA business records orders, from hotel records to sales transactions to e-mail metadata – many of which provide little or no information regarding the location of those referenced in the records. The majority of communications collected by business records are related to e-mail metadata. This information is only provided in a to-from format and does not include subscriber information for the communicants. In addition, the records typically do not indicate the location of the sender or recipient at the time of communication or collection. Imposing a reporting requirement to track the number persons located in the U.S. whose information had been collected under Section 215 would thus require the FBI to scrutinize certain communications or take additional investigative steps to determine the location of the communicants. In many instances, the FBI would otherwise have elected not to scrutinize these communicants or take additional investigative steps. The imposition of a reporting requirement, therefore, could actually result in a greater intrusion of privacy on certain communicants. It simply does not make sense for a reporting requirement designed to monitor privacy impact on

U.S. persons to result in further scrutiny or investigative activity that may not otherwise be pursued.

First, because FBI confirms how it is using Section 215 (though much of this has been made public, much of it covered here first).

- Email metadata
- Hotel records
- Sales transactions (which would include explosives precursors like acetone, hydrogen peroxide, fertilizer, and pressure cookers)

(Note the silence about money transfers; but maybe FBI just disavows that program, which is a CIA focus.)

Given many things the government has said in legal filings, I would understand "email metadata" very broadly to include "Internet communications metadata."

The rest of the statement expands on arguments (that are implicit in USAF's refusal to count a US-based IP address as US location) about why the Intelligence Community can't count how many Americans are subject to Section 215 surveillance: Because it professes to be unable to track whether email participants are in the US.

So they argue that their devised helplessness in determining where email takes place makes it counterproductive for them to give any sense of how many Americans' email they're surveilling.

Of course, there's another side to this devised ignorance.

John Bates has twice told the Intelligence Community that illegal wiretapping of email in the US is only illegal if the government knows

that the emails in question are domestic. So by refusing to find some solution to their devised ignorance, the FBI also ensures that it can never be held to account if it happens to start collecting things – like content as metadata – that it should not legally be able to obtain without a warrant.

It's a brilliant scheme, this black hole of FBI surveillance. Not only doesn't it have to alert Americans to how many Americans the FBI is surveilling. But unlike every American the FBI might target, it can claim that ignorance is a defense.