2ND CIRCUIT DECISION STRIKING DOWN DRAGNET SHOULD REQUIRE TIGHTER "SPECIFIC SELECTION TERM" LANGUAGE IN USA F-REDUX

When I wrote up the hearing in ACLU v. Clapper back in September, I noted that Judge Gerard Lynch got the problem with the definition of "relevant to" FISC had rubber stamped in secret. There's nothing distinct about phone records. So if the government can hoover up all of those, then it can collect everything.

> … You can collect everything there is to know about everybody and have it all in one big government cloud.
>
> [snip]
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> I just don't understand an argument as to what's so special about telephone records that makes them so valuable, so uniquely interactive or whatever, that the same arguments you're making don't apply to every record in the hands of a third party business entity of every American's everything.

Lynch made a very similar, albeit extended, observation in his opinion ruling the dragnet violated the Section 215 statute.

> The interpretation urged by the government would require a drastic expansion of the term "relevance," not only with respect to § 215, but also as that term is construed for purposes of subpoenas, and of a number of national security-related statutes, to sweep

> further than those statutes have ever been thought to reach. For example, the same language is used in 18 U.S.C. § 2709(b)(1) and 20 U.S.C. § 1232g(j)(1)(A), which authorize, respectively, the compelled production of telephone toll-billing and educational records relevant to authorized investigations related to terrorism. There is no evidence that Congress intended for those statutes to authorize the bulk collection of every American's toll-billing or educational records and to aggregate them into a database — yet it used nearly identical language in drafting them to that used in § 215. The interpretation that the government asks us to adopt defies any limiting principle. The same rationale that it proffers for the "relevance" of telephone metadata cannot be cabined to such data, and applies equally well to other sets of records. If the government is correct, it could use § 215 to collect and store in bulk any other existing metadata available anywhere in the private sector, including metadata associated with financial records, medical records, and electronic communications (including e-mail and social media information) relating to all Americans.
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> Such expansive development of government repositories of formerly private records would be an unprecedented contraction of the privacy expectations of all Americans. Perhaps such a contraction is required by national security needs in the face of the dangers of contemporary domestic and international terrorism. But we would expect such a momentous decision to be preceded by substantial debate, and expressed in unmistakable language.

This is important because the “relevant to” language not only does show up elsewhere (as Lynch notes) but has been used elsewhere to conduct dragnets (as with the DEA’s dragnet).

It’s also the most important part of the opinion for the ongoing debate about USA F-ReDux. That’s because USA F-ReDux does not actually change that “relevant to” definition. And as I have argued (though bill boosters dispute this), because the bill only prohibits the use of *communications* corporate person names as specific selection terms, but not other kinds of corporations, the bill doesn’t actually prohibit bulk collection of non-communication tangible things.

In an ideal world, the decision would give reformers the opportunity to tighten up that part of the SST and provide a bit more guidance about what a suitably narrow SST constitutes. That’s probably not going to happen, but it should.