

USA F-REDUX: DIANNE FEINSTEIN RAISES THE DATA HANDSHAKE AGAIN

As I noted last November, in her defense of USA Freedom Act last year, Dianne Feinstein suggested the telecoms (principally, Verizon) had agreed to retain their data for longer than their business purposes required without any mandate – what I dubbed the “data handshake.”

On Tuesday, Nov. 18, Feinstein explained how she had resolved the problem presented by telecoms like Verizon that don't hold these records as long as the NSA currently does. She and Chambliss had written the country's four biggest telecom companies a letter – she didn't say when – asking whether the companies would retain phone records longer than they currently do. Two said yes; two said no. “Since that time, the situation has changed,” Feinstein said. “Not in writing, but by personal testament from two of the companies that they will hold the data for at least two years for business reasons.” President Barack Obama even vouched for the telecom companies' willingness to hold the data. “The fact is that the telecoms have agreed to hold the data. The president himself has assured me of this,” Feinstein said.

Taken in context, Feinstein's comments reveal how proponents of the USA Freedom Act solved the intelligence community's problem with the reform bill – that the period of time that records would be held would shrink dramatically. Rather than a legal mandate requiring that telecoms hold onto the data – which some members of the Senate Intelligence

Committee demanded in June – the reform bill would use a “data handshake.”

The terms of the data handshake are the most interesting part. This promise is not in writing. According to Feinstein, it is a “personal testament.” (And of course it wasn’t in the bill, where privacy advocates might have objected to it.) The telecom companies could say they were retaining the data for business purposes, though, until now, they’ve had no business purpose to keep the records.

While some, like Bob Litt, have suggested one challenge for having telecoms retain phone records concerned whether telecoms would retain enough of their call records to do pattern analysis, the issue of data retention has largely been unspoken in this round of debate over USA F-ReDux.

But Dianne Feinstein just raised it again this morning on Meet the Press, again endorsing a “data handshake” behind USA F-ReDux and seemingly referring to the assurances the President got from telecoms they would keep the data.

CHUCK TODD:

Senator, while I have you, the Patriot Act, obviously the big, bulk data collection was struck down, in Court. Not quite saying it was unconstitutional, basically saying that the law doesn’t cover what the administration has said it covers, which is this idea of bulk data collection. And says, “If Congress wants to be able to do this, then they need to explicitly pass a law that forces telephone companies to do this or not.” Where are you on this? Are you willing to pass a specific law that allows for bulk data collection, whether held by the phone

companies or the government?

SENATOR DIANNE FEINSTEIN:

I think here's the thing. The president, the House and a number of members of the Senate believe that we need to change that program. And the way to change it is simply to go to the FISA Court for a query, permission to go to a telecom and get that data. The question is whether the telecoms will hold the data. And the answer to that question is somewhat mixed. I know the president believes that the telecoms will hold the data. I think we should try that.

CHUCK TODD:

An act of Congress could force them to do that, correct?

SENATOR DIANNE FEINSTEIN:

An act of Congress could force them to do that.

CHUCK TODD:

And can that pass this Congress?

SENATOR DIANNE FEINSTEIN:

Well, that's the problem. The House does not have it in their bill. Senator Leahy does not have that in his bill.

If I had to bet on the most likely outcome for the USA F-ReDux bill, it would be USA F-ReDux, with some more shit added in because USA F-ReDux boosters are reluctant to talk about how much more it gives the Intelligence Community than what they have now, and with data retention mandates. As I have said, I think that's one of the ultimate purposes of Mitch McConnell's PATRIOT gambit.

One thing is clear, however, which is that Intelligence insiders like Feinstein are talking about data mandates among themselves, even if

they're not discussing them publicly.