I CON THE RECORD: DROP THE LAWSUITS AND WE'LL RELEASE THE DATA HOSTAGES

I Con the Record just announced that the NSA will make the phone dragnet data it has "analytically unavailable" after the new system goes live in November, and unavailable even to techs three months later.

> On June 29, 2015, the Foreign Intelligence Surveillance Court approved the Government's application to resume the Section 215 bulk telephony metadata program pursuant to the USA FREEDOM Act's 180-day transition provision. As part of our effort to transition to the new authority, we have evaluated whether NSA should maintain access to the historical metadata after the conclusion of that 180-day period.
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> NSA has determined that analytic access to that historical metadata collected under Section 215 (any data collected before November 29, 2015) will cease on November 29, 2015. However, solely for data integrity purposes to verify the records produced under the new targeted production authorized by the USA FREEDOM Act, NSA will allow technical personnel to continue to have access to the historical metadata for an additional three months.
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> Separately, NSA remains under a continuing legal obligation to preserve its bulk 215 telephony metadata collection until civil litigation regarding the program is resolved, or the relevant courts relieve NSA of such obligations. The telephony metadata preserved solely because of preservation

> obligations in pending civil litigation will not be used or accessed for any other purpose, and, as soon as possible, NSA will destroy the Section 215 bulk telephony metadata upon expiration of its litigation preservation obligations.

As I understand it, whatever data has been found to be two or three degrees of separation from a baddie will remain in NSA's maw, but the data that has never returned off a search will not.

I'm pleasantly surprised by this, as I suspect it reflects a decision to accept the Second Circuit verdict in ACLU v. Clapper and to move to shut down other lawsuits.

As I noted, two weeks ago, the ACLU moved for an injunction against the dragnet, which not only might have led to the Second Circuit ordering the government to purge ACLU's data right away (and possibly, to stop collecting all data), but also basically teed up the Second Circuit to remind the FISC it is not an appellate court. I worried that would lead the FISC to ask FISCR to review its dragnet decisions under a provision newly provided under the USA F-ReDux.

Shortly after ACLU filed its request for an injunction, the government asked for an extension to … today, which the court granted.

So I assume we'll shortly see that filing arguing that, since the government has voluntarily set a purge date for all the dragnet data, ACLU should not get its injunction.

That doesn't necessarily rule out a FISCR fast track request, but I think it makes it less likely.

The other player here, however, is the EFF.

I believe both ACLU and EFF's phone dragnet client Council on American Islamic Relations, had not only standing as clients of dragnetted companies, but probably got swept up in the two-degree dragnet. But CAIR probably has an even stronger case, because it is public that FISC

approved a traditional FISA order against CAIR founder Nihad Awad. Any traditional FISA target has *always* been approved as a RAS seed to check the dragnet, and NSA almost certainly used that more back when Awad was tapped, which continued until 2008. In other words, CAIR has very good reason to suspect the entire organization has been swept up in the dragnet and subjected to all of NSA's other analytical toys.

EFF, remember, is the one NGO that has a preservation order, which got extended from its earlier NSA lawsuits (like Jewel) to the current dragnet suit. So when I Con the Record says it can't destroy all the data yet, it's talking EFF, and by extension, CAIR. So this announcement — in addition to preparing whatever they'll file to get the Second Circuit off its back — is likely an effort to moot that lawsuit, which in my opinion poses by far the biggest threat of real fireworks about the dragnet (not least because it would easily be shown to violate a prior SCOTUS decision prohibiting the mapping of organizations).

We'll see soon enough. For the moment, though, I'm a bit surprised by the cautious approach this seems to represent.

Update: Timeline on data availability fixed.

Update: Here's the government's brief submitted today. I'm rather intrigued by how often the brief claims USA F-ReDux was about bulk "telephony" data when it was supposed to be about all bulk collection. But I guess I can return to that point.

Update: They depart from describing USA F-ReDux as a ban bulk collection of telephony when they describe it as a ban on collection of bulk collection under Section 215, also not what the bill says.

> Part of the compromise on which Congress settled, which the President supported, was to add an unequivocal ban on bulk collection under Section 215 specifying that "[n]o order issued under" Section

> 215(b)(2) "may authorize collection of tangible things without the use of a specific selection term that meets the requirements" of that subsection.

Update: This is key language — and slightly different from what they argued before FISC. I will return to it.

> Plaintiffs assert that, by not changing the language of Section 215 authorizing the collection of business records during the transition period, Congress implicitly incorporated into the USA FREEDOM Act this Court's opinion holding that Section 215 did not authorize bulk collection. See Pls.' Mot. 7- 8. Plaintiffs rely on language providing that the legislation does not "alter or eliminate the authority of the Government to obtain an order under" Section 215 "as in effect prior to the effective date" of the statute. USA FREEDOM Act § 109, 129 Stat. at 276. That language does not advance plaintiffs' argument, however, because the statute says nothing expressly about what preexisting authority the government had under Section 215 to obtain telephony metadata in bulk. It is implausible that Congress employed the word "authority" to signify that the government lacked authority to conduct the Section 215 bulk telephony-metadata program during the 180-day transition period, contrary to the FISC's repeated orders and the Executive Branch's longstanding and continuing interpretation and application of the law, and notwithstanding the active litigation of that question in this Court. That is especially so because language in the USA FREEDOM Act providing for the 180-day transition period has long been a proposed feature of the legislation. It is thus much more

> plausible that the "authority" Congress was referring to was not the understanding of Section 215 reflected in this Court's recent interpretation of Section 215, but rather the consistent interpretation of Section 215 by 19 different FISC judges: to permit bulk collection of telephony metadata.