

THE GOVERNMENT WANTS YOU TO FORGET IT WILL STILL COLLECT YOUR PHONE RECORDS IN BULK

I Con the Record released two statements to mark the end of the Section 215 phone dragnet (which will take place at midnight tomorrow night): a statement and a “fact” sheet. They’re a curious mix of true statements, false statements, and probably false statements.

Here’s the true statement that USAF boosters aren’t retweeting (but which Jim Comey recently mentioned in congressional testimony):

Moreover, the overall volume of call detail records subject to query pursuant to court order is greater under USA FREEDOM Act.

Right now, the Section 215 phone dragnet is not getting some cell records, probably not getting all VOIP, and probably not getting non-telephony messaging. Even just the cell records creates holes in the dragnet, and to the extent it doesn’t collect Internet based calls and messaging, those holes would be especially problematic.

Which is why I’m struck by this language.

adopted the new legal mechanism proposed by the President regarding the targeted production of telephony metadata

[snip]

With respect to the new mechanism for the targeted production of telephony metadata,

[snip]

When will NSA implement the new, selected telephony metadata process required by the USA FREEDOM Act?

As I've noted, USA Freedom Act is technology neutral – the language of the law itself would permit collection of these other kinds of metadata. And while the House report says it applies to "phone companies," it would be hard to argue that the maker of the most popular phone handset, Apple, is not a phone company, or handset/software manufacturers Google or Microsoft. So I suspect this is technically inaccurate.

Then there's the deliberately misleading language, which is most notable in these passages but appears throughout.

On November 29, the transition period ends. Beginning Sunday, November 29, the government is prohibited from collecting telephone metadata records in bulk under Section 215, including of both U.S. and non-U.S. persons.

[snip]

That approach was enshrined in the USA FREEDOM Act of 2015, which directs that the United States Government will no longer collect telephony metadata records in bulk under Section 215 of the USA PATRIOT Act, including records of both U.S. and non-U.S. persons.

I'm sure the government would like terrorists and the press to believe that it "will no longer collect telephony metadata records in bulk ... including records of both U.S. and non-U.S. persons." In which case, this construction should be regarded as a huge success, because some in the press are reporting that the phone dragnet will shut down tomorrow night.

False.

Just a tiny corner of the phone dragnet will

shut down, and the government will continue to collect “telephony metadata records in bulk ... including records of both U.S. and non-U.S. persons” under EO 12333. Hypothetically, for every single international call that had been picked up under the Section 215 dragnet *and more* (at a minimum, because NSA collects phone records overseas with location information), a matching record has been and will continue to be collected overseas, under EO 12333.

They’re still collecting your phone records in bulk, not to mention collecting a great deal of your Internet records in bulk as well. BREAKING.

There’s one more misleading passage.

The legal framework permits providers to return call detail records which are either one or two “hops” away from a FISC-approved, terrorist-associated selection term. First hop selection terms (e.g., those that are in direct contact with a FISC-approved selection term) may be obtained from providers as well as from information identified independently by the government. These first hop selection terms may then be sent by NSA as query requests to the providers to obtain second hop records.

I Con the Record offers “those [call detail records] that are in direct contact with a FISC-approved, terrorist approved selection term” as an example of what it gets at each hop. But the language no longer requires that a “contact” be made – only that a connection be made. So it’s quite possible NSA will collect call detail records (which only need be a session identifier, so it doesn’t require any call actually be placed) of people who have never technically “contacted” the target.

There’s a reason they call this “I Con the Record,” you know.