

YES, SECTION 215 MIGHT BE USED TO GET DICK PICS — OR PORN SEARCHES AND DICK UPLOADS

John Oliver did an interview with Edward Snowden that aired on his show last night. After showing Snowden that most random people stopped in Times Square didn't know or care what Snowden had done (starting at 22:30), Oliver then showed that they *would* care if this were all about the government collecting dick pics.

So Snowden goes through and describes (after 28:00) what authorities the government might use to collect dick pics, focusing largely on different aspects of Section 702 and EO 12333. But (at 30:00), Snowden says the NSA (Oliver should have been asking about the government, not NSA) couldn't use Section 215 to get dick pics, though they could use the phone dragnet to find out if you've been calling a penis enlargement center.

Not so fast, Ed!

It is, hypothetically, possible that the government (more likely FBI than NSA) could use Section 215 to get dick pics, provided there were some entity that had a collection of dick pics it was interested in. It would only 1) need to find that entity that had these dick pics as records, 2) come up with some reason why they needed the dick pics for either a counterterrorism or counterintelligence purpose, and 3) convince the rubber stamp FISA Court that these dick pics were "relevant to" a counterterrorism or counterintelligence FBI investigation (which we know FISC interprets unbelievably broadly) but that FBI wasn't seeking the dick pics solely on the basis of the target's First Amendment protected, um, speech.

Hypothetically possible, at least, if unlikely.
A dick pic *is* a tangible thing.

Furthermore, it is almost certain that the FBI (again, not the NSA, but if the FBI does it, it is more likely *targeted* at an American) is using Section 215 to get URL searches and data flows – along with fairly comprehensive online profiles – on users. So in addition to Snowden's explanation of using the phone dragnet to see if you've called a penis enlargement center, the FBI may be using Section 215 to track a user's porn watching habits and even if they've been uploading their own dick pics to some server. There likely are dick pics in this collection (though the FISC almost certainly requires minimization if the collection, so may limit the FBI's ability to retain dick pics unless it can claim it needs them for an investigative purpose). (Though note, a recent Shane Harris story reveals NSA needs its own porn room because its analysts spend so much time analyzing what they collect.)

Again, Section 215 is far more than the phone dragnet, it is designed to support fairly creative collection of "tangible things" so long as there is an attenuated national security purpose to do so, and we know it supports a great deal of collection on users' Internet use.

And while dick pics might be just a hypothetical case, far easier to imagine would be FBI using Section 215 to obtain DNA – perhaps from hospitals, perhaps from hotels where targets had stayed, obviously from cops (though they could get that through info sharing). DNA is, after all, a tangible thing. And we know that the government has a DNA database of Gitmo detainees, so they have been amassing DNA to positively ID both the targets but also family members of targets.

One more note. Several of the ways the NSA has gotten dick pics – via Yahoo video chats, stealing from Google servers overseas – may have become less accessible to the government overseas as companies move to encrypt more of

their traffic. I assume they'll find some new way to get these. But for the moment, the government may be ingesting fewer dick pics than they were in 2013.