

IT'S HARDER FOR FBI TO GET LOCATION DATA FROM PHONE COMPANIES UNDER FISA THAN OTHER WAYS

I was looking for something else on Ron Wyden's website yesterday and noticed this exchange between Wyden and Jim Comey from January 29, 2014 (see my transcription below). At first it seemed to be another of Wyden's persistent questions about how the government collects location data – which we generally assume to be via telephone provider or Stingray – but then realized he was asking something somewhat different. After asking about Cell Site Location Information from phone companies, Wyden then asked whether the FBI uses the same (order, presumably a Pen Register) standard when collecting location from a smart phone app.

Oh yeah! The government can collect location information via apps (and thereby from Google or WhatsApp other providers) as well.

Here's the FBI's response, which hasn't been published before.

The response is interesting for several reasons, some of which may explain why the government hasn't been getting all the information from cell phones that it wanted under the Section 215 phone dragnet.

First, when the FBI is getting *prospective* CSLI, it gets a full FISA order, based on a showing of probable cause (it can get historical data using just an order). The response to Wyden notes that while some jurisdictions permit obtaining location data with just an order, because others require warrants, "the FBI elects to seek prospective CSLI pursuant to a full content FISA order, thus matching the higher standard imposed

in some U.S. districts.”

Some of this FISA discussed in 2006 in response to some magistrates’ rulings that you needed more than an order to get location, though there are obviously more recent precedents that are stricter about needing a warrant.

This means it is actually harder right now to get prospective CSLI under FISA than it is under Title III in some states. (The letter also notes sometimes the FBI “will use criminal legal authorities in national security investigations,” which probably means FBI will do so in those states with a lower standard).

The FBI’s answer about smart phone apps was far squirrelier. It did say that when obtaining information from the phone itself, it gets a full-content FISA order, absent any exception to the Fourth Amendment (such as the border exception, which is one of many reasons FBI loves to search phones at the border and therefore hates Apple’s encryption); note this March 6, 2014 response was before the June 24, 2014 *Riley v. CA* decision that required a warrant to search a cell phone, which says FISA was on a higher standard there, too, until SCOTUS caught up.

But as to getting information from smartphone apps itself, here’s what FBI answered.

Which legal authority we would use is very much dependent upon the type of information we are seeking and how we intend to obtain that information. Questions considered include whether or not the information sought would target an individual in an area in which that person has a reasonable expectation of privacy, what type of data we intend to obtain (GPS or other similarly precise location information), and how we intend to obtain the data (via a request for records from the service provider or from the mobile device itself).

In other words, after having thought about how to answer Wyden for five weeks rather than the one they had promised, they didn't entirely answer the question, which was what it would take for the FBI to get information from apps, rather than cell phone providers, though I think that may be the same standard as a CSLI from a cell phone company.

But this seems to say that, in the FISA context, it may well be easier – and a lower standard of evidence – for the FBI to get location data from a Stingray.

This explains why Wyden's location bill – which he was pushing just the other day, after the Supreme Court refused to take Quartavious Davis' appeal – talks about location collection generally, rather than using (for example) a Stingray.

Wyden: I'd like to ask you about the government's authority to track individuals using things like cell site location information and smart phone applications. Last fall the NSA Director testified that "we—the NSA—identify a number we can give that to the FBI. When they get their probable cause then they can get the locational information they need."

I've been asking the NSA to publicly clarify these remarks but it hasn't happened yet. So, is the FBI required to have probable cause in order to acquire Americans' cell site location information for intelligence purposes?

Comey: I don't believe so Senator. We – in almost all circumstances – we have to obtain a court order but the showing is "a reasonable basis to believe it's relevant to the investigation."

Wyden: So, you don't have to show probable cause. You have cited another standard. Is that standard different if the government is collecting the location information from a smart phone app rather than a cell phone tower?

Comey: I don't think I know, I probably ought to ask someone who's a little smarter what the standard is that governs those. I don't know the answer sitting here.

Wyden: My time is up. Can I have an answer to that within a week?

Comey: You sure can.