

MIKE ROGERS: USA FREEDOM ACT ONLY CHANGES PHONE DRAGNET

In my analysis of the HR 3361 – hailed by reformers as the USA Freedom Act – I have posited the possibility that the claim to forbid “bulk collection” across a number of authorities actually changes almost nothing. I based that on a two-part argument.

First, the bill only promises to eliminate bulk collection as the intelligence committee defines it – that is, it only eliminates collection that has no discriminator, and therefore collects all of a certain kind of record (so, all phone records). It does not promise to eliminate what you and I might consider bulk collection – the collection of very untargeted information (say, all phone records in the 202 Area Code).

Then I noted that we know of no other program that operates without discriminators. All NSL programs – save perhaps the financial records one and the subscriber records one – build in discriminators (and the financial records one is based on “entities,” which is what the bill’s definition of a discriminator uses anyway). And we don’t know enough about the other Section 215 programs to know if they use discriminators or not.

If this logic is correct, then the bill changes very little, in spite of the broad promises.

In his report on the bill, Mike Rogers confirms that I am right. (h/t Katherine Hawkins)

It notes that the prohibition on “bulk” collection only applies to indiscriminate collection, but not to the collection of “a large number of communications records or other tangible things.”

This bill first bans the bulk collection of tangible things under Section 215 of the USA PATRIOT Act. This ban is intended to stop the use of Section 215 to acquire bulk call detail records and to prohibit any future attempt to acquire bulk electronic communications records. The Committee recognizes that “bulk” collection means indiscriminate acquisition. It does not mean the acquisition of a large number of communications records or other tangible things—it would be nonsensical and dangerous for our intelligence agencies’ collection authorities to contract as the number of our adversaries expands.

The report then implicitly reveals (or at least claims as part of the legislative record) that no other collection program operates without discriminators, because the bill will not end any other current program.

The Committee’s decision to end the bulk collection of telephone metadata does not extend to any other intelligence programs currently conducted under FISA, including access to business records through Section 215 for foreign intelligence, counterterrorism, and counterintelligence purposes, and the targeting of persons outside the United States under Section 702.

The report also makes clear that any ban on bulk NSL collection is not meant to affect any ongoing NSL program.

Second, this bill contains amendments to other collection authorities, including Section 402 of FISA and National Security Letter authorities. These amendments respond to concerns that those existing authorities could somehow contain a “loophole” that would permit the reconstitution of a bulk telephone

records program. The Committee does not intend these prophylactic amendments to affect any programs currently authorized by Section 402 or the use of National Security Letters.

So: no changes to any existing Section 215 collection programs, and no changes to any existing NSL programs (though the report also makes clear that the government should not try to use NSLs to replicate the existing phone dragnet).

One more thing: Rogers' report makes it clear that the government can still use Section 215 to collect as much historical phone data as it wants.

The government can continue to obtain specified historical call detail records through the existing Section 215 authority.

This means the government has the ability to obtain far more than 5 years of call data on selected targets, and can do so by obtaining any records that transit AT&T backbones, because AT&T keeps records for years and years. While there is a 5 year age off requirement in the bill, that only applies to data that is not relevant to an investigation, and as we've learned, everything can be deemed relevant to an investigation.

So don't take my word for it, take Mike Rogers' (which will serve as the legislative record in any case). This bill only changes the phone dragnet's prospective collection.

Update: Note that Rogers is still working on some "technical changes" to preserve operational equities, which may mean there are some programs that would be affected but he's going to massage the bill to exempt them.