

LEAHY FREEDOM ACT EXEMPTS FBI FROM COUNTING ITS BACK DOOR SEARCHES

As I said in my post last night, Pat Leahy's version of USA Freedom Act is a significant improvement over USA Freedom, the watered down House version. But it includes language that no one I've met has been able to explain. I believe it may permit the NSA to have its immunized telecom providers contact chain on (at least) location, and possibly worse. Thus, it may well be everyone applauding the bill – including privacy NGOs – are applauding increased use of techniques like location spying even as judges around the country are deeming such spying unconstitutional. I strongly believe this bill may expand the universe of US persons who will be thrown into the corporate store indefinitely, to be subjected to the full brunt of NSA's analytical might.

But that's not the part of the bill that disturbs me the most. It's this language:

'(3) FEDERAL BUREAU OF INVESTIGATION.–

Subparagraphs (B)(iv), (B)(v), (D)(iii), (E)(iii), and (E)(iv) of paragraph (1) of subsection (b) shall not apply to information or records held by, or queries conducted by, the Federal Bureau of Investigation.

The language refers, in part, to requirements that the government report to Congress:

(B) the total number of orders issued pursuant to section 702 and a good faith estimate of–

(iv) the number of search terms that included information concerning a United States person that were used to query

any database of the contents of electronic communications or wire communications obtained through the use of an order issued pursuant to section 702; and

(v) the number of search queries initiated by an officer, employee, or agent of the United States whose search terms included information concerning a United States person in any database of noncontents information relating to electronic communications or wire communications that were obtained through the use of an order issued pursuant to section 702;

These are back door searches on US person identifiers of Section 702 collected data – both content (iv) and metadata (v).

In other words, after having required the government to report how many back door searches of US person data it conducts, the bill then exempts the FBI.

The FBI – the one agency whose use of such data can actually result in a prosecution of the US person in question.

We already know the government has not provided all defendants caught using 702 data notice. And yet, having recognized the need to start counting how many Americans get caught in back door searches, Patrick Leahy has decided to exempt the agency that uses back door searches the most.

And if they're not giving defendants notice (and they're not), then this is an illegal use of Section 702.

There is no reason to exempt the FBI for this. On the contrary, if we're going to count back door searches on US persons, the first place we should start counting is at FBI, where it likely matters most. But the Chair of the Senate Judiciary Committee has decided it's a good idea

to exempt precisely those back door searches
from reporting requirements.