

July 23, 2013

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Re: Amash-Conyers amendment to Defense Appropriations to stop bulk collection of Americans' telephone metadata.

The Amash-Conyers amendment would prohibit the NSA from bulk collection of telephone meta-data on Americans under section 215 of the Patriot Act, 50 U.S.C. 1861. (The text is below.)

- The NSA would still be permitted to use section 215 to obtain the telephone metadata on any American who is the subject of an investigation “to protect against international terrorism or clandestine intelligence gathering activities.”

As Representative Sensenbrenner has pointed out, Congress never intended to authorize the bulk collection of Americans' telephone meta-data under section 215 when it required that the tangible things sought under 215 be limited to those relevant to an authorized investigation.

- Restoring Congress' original understanding of the limits of 215 by enacting the Amash-Conyers amendment would still leave the NSA and FBI many means to obtain telephone meta-data on individual Americans. The FBI can use a National Security Letter to obtain such data in secret, including data on domestic to domestic calls without any court order. Section 702, the 2008 Foreign Intelligence Amendments Act, 50 U.S.C. 1881(a) also permits the bulk collection in real time of Americans' overseas telephone calls (and emails) including the meta-data associated therewith, so long as the government is targeting foreigners abroad. And the pen-register trap and trace authorities in the FISA also permit the real-time collection of telephone meta-data of Americans' domestic to domestic calls.
- The current bulk telephone meta-data collection was apparently begun as part of the NSA's warrantless wiretapping programs under the previous administration. It apparently began with no court authorization. After public disclosure of the NSA program by *The New York Times* in December, 2005, the government apparently sought and received sometime in 2006 or 2007, a FISA court order permitting the bulk collection of domestic telephone meta-data.
- One of the key features of this program is that it allows the collection of meta-data on all of Americans' domestic to domestic phone calls – not just domestic to foreign calls – and the creation of a database of such calls. One of its key uses apparently is to do “chain-link” analysis for 3 hops for each number which the database is queried about. While the NSA has repeatedly stated that it only queries the 215 domestic call database 300 times a year, each one of those queries apparently asks for all the phone numbers of individuals 3 hops away from the original suspect—an enormous number of Americans with no connection to terrorism (Testimony of John C. Inglis, Deputy Director, National Security Agency, House Judiciary Committee, July 17, 2013).

As *The Washington Post* reported, General Alexander apparently determined that the way to provide intelligence support to American troops fighting in Iraq was to collect every minute piece of information about everyone there.

“Rather than look for a single needle in the haystack, his approach was, ‘Let’s collect the whole haystack,’” . . . “Collect it all, tag it, store it. . . . (‘For NSA chief, terrorist threat drives passion to ‘collect it all,’ observers say,” Ellen Nakashima and Joby Warrick, *The Washington Post*, July 14, 2013)

He apparently believes that this war-fighting approach is constitutional and appropriate for the government to use against its own citizens.

- Enacting this amendment will not leave the NSA “in the dark.” As outlined above, there are other existing authorities that allow the collection of call data and such data is apparently already being kept by many of the major telephone companies for at least a year. Moreover, the government apparently already has an existing data-base of this information on millions if not billions of Americans’ phone calls going back at least five years. This amendment does not address the retention or use of that data-base.
- The Nugent amendment offered as an alternative would not end the NSA’s use of 215 to collect bulk telephone meta-data on Americans.

TEXT OF AMENDMENT TO H.R. 2397, AS REPORTED OFFERED BY MR. AMASH AND MR. CONYERS

“None of the funds made available by this Act may be used to collect tangible things pursuant to an order under section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) if such things do not pertain to a person who is the subject of an investigation described in such section.”