

OH, SO THAT'S WHY THE GOVERNMENT IS SO INSISTENT SECTION 215 HAD A ROLE IN THE ZAZI CASE?

There's a remarkable passage in the Primary Order for the Section 215 dragnet that Judge Reggie Walton signed on September 3, 2009.

In addition, the Custodian of Records of [redacted] shall produce to NSA upon service of the appropriate Secondary Order an electronic copy of the same tangible things created by [redacted] for the period from 5:11 p.m. on July 9, 2009 to the date of this Order, to the extent those records still exist.

In an order authorizing the prospective collection of phone records until October 30, 2009, Walton also authorizes the retroactive collection of phone records generated between July 9 and September 3, 2009, if the telecom(s) haven't destroyed them yet.

This seems to suggest that in an Order on July 9 (which we don't get, but which the government references in its August 19 submission) Walton halted the program.

Boom. 5:11, July 9. No more phone records, from at least one telecom.

We don't know why he did so either. In his June 22 Order, he referenced a May 29 Order (another one we didn't get), responding to NSA's very delayed disclosures that unminimized results had been shared with NSA analysts unauthorized to receive them and that CIA, FBI, and NCTC had access to the dragnet databases. He had assigned the government a new report, due on June 18. But in that, too, the government

revealed new abuses (including one – described on page 4 – that may pertain to the Internet dragnet rather than the phone dragnet; recall that the NSA offered to “review” that program at the same time they did the phone dragnet). Walton issued new homework to the NSA, requiring the government to provide a weekly report of the dissemination that occurred, with the first due July 3 and therefore the second due July 10, the day after Walton appears to have stopped the collection.

In the government’s August submission, this line seems to indicate querying has been halted.

Based on these findings and actions, the Government anticipates that it will request in the Application seeking renewal of docket number BR 09-09 authority that NSA, including certain NSA analysts who obtain appropriate approval, be permitted to resume non-automated querying of the call detail records using selectors approved by NSA.

But it doesn’t seem to reflect that collection stopped. (Note, Walton’s June Order had a docket number of 09-06, whereas the August submission bears the docket number 09-09).

So while we can’t be sure, it appears the discoveries submitted to Walton in June 2009, as well as new ones in early July, may have led him to halt production of new phone records.

And that collection was turned back on on September 3, 2009. 3 days before the NSA intercepted Najibullah Zazi’s frantic emails to Pakistan trying to get help making TATP he planned to use in a September 11 attack on NYC’s subways.

According to Matt Apuzzo and Adam Goldman’s superb Enemies Within, after discovering Zazi’s emails, FBI had used travel records to find Zazi’s suspected accomplices, Zarein Ahmedzay and Adis Medunjanin.

But when the government tried to justify the dragnet earlier this year, they pointed to the fact that Medunjanin came up in the Section 215 collection as proof of the dragnet's value, as in this July 17 House Judiciary Committee hearing where FBI National Security Division Executive Assistant Director Stephanie Douglas testified.

Additionally, NSA ran a phone number identifiable with Mr. Zazi against the information captured under 215. NSA queried the phone number and identified other Zazi associates. One of those numbers came back to Adis Medunjanin, an Islamic extremist located in Queens, New York.

The FBI was already aware of Mr. Medunjanin, but information derived from 215 assisted in defining his – Zazi's network and provided corroborating information relative to Medunjanin's connection to Zazi. Just a few weeks after the initial tip by NSA, both Zazi and Medunjanin were arrested with – along with another co-conspirator. They were charged with terrorist acts and a plot to blow up the New York City subway system.

As I noted 4 years ago, Dianne Feinstein immediately started using the Zazi investigation to successfully argue that Section 215 must retain its broad relevance standard, defeating an effort by Pat Leahy to require some tie to terrorism.

Now, it may be that the FBI also used Section 215 to collect records of 3 apparently innocent people buying beauty supplies. The government has neither explained what happened to these apparently innocent people or on what basis (it may have been the Section 215 dragnet) they claimed they were associates of Zazi.

But the public case that backs up DiFi's claims

that Section 215 dragnet was central to the Zazi investigation is now limited to the fact that the FBI used the dragnet to find a Zazi associate they already knew about.

Yet imagine! What if Reggie Walton's stern action in response to the government's blatantly violating dissemination rules on the dragnet prevented the FBI from finding Zazi's associates (which wasn't a problem, and would have been less of a problem if the NYPD hadn't tipped off Zazi, but never mind)? What if Walton's effort to rein in the government had prevented the FBI from thwarting an attack?

That, it seems to me, is the implicit threat. The government claims – in spite of all the evidence to the contrary – that Section 215 played a key role in thwarting one of the only real terrorist attacks since 9/11. And, I'd bet they warn in private, they might have been prevented from doing so because a pesky FISA judge halted the program because they hadn't followed the most basic rules for it.

That, I'm guessing, is why they claim the Section 215 dragnet was central to the Zazi investigation. Not because it was. But because it raises the specter of a judge's effort to make the government follow the law interfering with FBI's work.