

EFF TO REGGIE WALTON: STUART DELERY AND JOHN CARLIN ARE STILL MATERIALLY MISLEADING FISA COURT

In my latest post in DOJ's apparent effort to destroy evidence pertinent to EFF's several lawsuits in Northern District of CA, I noted that even after being ordered to explain their earlier material misstatements to the FISA Court, Assistant Attorneys General John Carlin and Stuart Delery left a lot of key details unsaid. Significantly, they did not describe the full extent of the evidence supporting EFF's claims in the dispute (and therefore showing DOJ's actions to be unreasonable).

Notwithstanding a **past comment** about preservation orders in the matters before Judge Walton, the government claims EFF's suits are unrelated to the phone dragnet.

[T]he Government has always understood [EFF's suits] to be limited to certain presidentially authorized intelligence collection activities outside FISA, the Government did not identify those lawsuits, nor the preservation order issued therein, in its Motion for the Second Amendment to Primary Order filed in the above-captioned Docket number on February 25, 2014. For the same reasons, the Government did not notify this Court of its receipt of plaintiffs' counsel's

February 26, 2014, e-mail.

Note, to sustain this claim, the government withheld both the state secrets declarations that clearly invoke the FISC-authorized dragnets as part of the litigation, even though the government's protection order invokes it repeatedly, as well as Vaughn Walker's preservation order which is broader than DOJ's own preservation plan. Thus, they don't give Walton the things he needs to be able to assess whether DOJ's actions in this matter were remotely reasonable.

Apparently, EFF agrees. EFF Legal Director Cindy Cohn wrote AAGs Stuart Delery and John Carlin to complain that they hadn't referenced the evidence submitted by EFF to support its claims.

[W]e were dismayed to see that the government's response to the FISC on pages 3-5 repeated its own arguments (plus new ones) about the scope of the Jewel complaint without referencing, much less presenting, plaintiffs' counter-arguments. As you know, especially in our reply papers (doc. 196) in support of the TRO, plaintiffs presented significant argument and evidence that contradicts the government's statement to the FISC that plaintiffs only "recently-expressed views" (pages 2, 7) regarding the scope of the preservation orders. They also also undermines [sic] the few paragraphs of the Jewel Complaint and some other documents that the government has cherry-picked to support its argument.

In addition, Cohn complains that the government has left the impression this dispute pertains solely to phone records.

[W]e are concerned that the FISC has not been put on notice that the scope of the

dispute about the preservation order in Jewel (or at least the scope of the plaintiffs' view of the preservation order) reaches beyond telephone records into the Internet content and metadata gathered from the fiberoptic cables of AT&T. This is especially concerning because the FISC may have required (or allowed) destruction of some of that evidence without the knowledge that it was doing so despite the existence of a preservation order covering that information issued by the Northern District of California.

Cohn's invocation of Internet data is particularly important as it raises the second of two known illegal practices (the other being watchlisting US persons in the phone dragnet without the legally required First Amendment review) the data for which would be aging off now or in the near future: the collection of Internet content in the guise of metadata. I believe the Internet dragnet continued until October 30, 2009, so if they were aging off data for the 6 months in advance, might be aged off in the next week or so.

I'm really curious whether this spat is going to be resolved before Reggie Walton finishes his service on FISC on May 19.

But one thing is certain: it's a lot more fun to watch the FISC docket when ex parte status starts to break down.