THE GOVERNMENT SPOLIATIONING FOR A FIGHT WITH EFF

On November 6, 2007, Judge Vaughn Walker issued a preservation order in EFF's challenge to what we now know to be Stellar Wind, the Shubert case (which would be applied to the Jewel case after that). Nevertheless, in spite of that order, in 2009 the NSA started destroying evidence that it had collected data outside of the categories Judge Colleen Kollar-Kotelly authorized way back in 2004.

Also in 2009, NSA shifted records showing 3,000 people — which highly likely included CAIR's staff and clients — had been dragnetted without the First Amendment review mandated by Section 215 (CAIR wasn't a plaintiff on EFF's earlier suits but they are on EFF's phone dragnet suit, *First Unitarian United*). When they did, the government even appeared to consider the existing protection order in the EFF case; I have FOIAed their deliberations on that issue, but thus far have been stonewalled.

Finally, in 2011, NSA destroyed — on very little notice and without letting their own IG confirm the destruction of data that came in through NSA's intake process — all of its Internet dragnet data.

In other words, on three known occasions, the NSA destroyed data covered by the protection order in Northern California, one of them even after admitting a protection order might cover the data in question. In two of those cases, we know the data either exceeded FISA's orders or violated the law.

In fact, it wasn't until 2014, when the government started asking Judge Reggie Walton for permission to destroy the phone dragnet data and EFF complained mightily, that NSA started complying with the earlier protection order. Later that same year, it finally asked FISC to

keep the Protect America Act and FISA Amendments Act data *also* included under that order in its minimization procedures.

These posts provide more background on this issue: post, post, post, post.

In other words, on three different occasions (even ignoring the content collection), NSA destroyed data covered by the protection order. spoiling the evidence related to EFF's lawsuits.

Which is why I find this claim — in the January 8 filing I've been waiting to read, but which was just posted on March 4 (that is, 5 days after the NSA would have otherwise had to destroy everything on February 29 under USA Freedom Act).

> The Government remains concerned that in these cases, absent relief from district courts or explicit agreement from the plaintiffs, the destruction of the BR Metadata, even pursuant to FISC Order, could lead the plaintiffs to accuse the Government of spoliation. In Jewel, the plaintiffs have already moved for spoliation sanctions, including an adverse inference against the Government on the standing issue, based on the destruction of aged-off BR Metadata undertaken in accordance with FISC Orders. See Jewel Pls.' Brief Re: the Government's Non-compliance with the Court's Evidence Preservation Orders, ECF No. 233.

Gosh, after destroying data on at least three different occasions (again, ignoring at least two years of content they destroyed), the government is worried that if it destroyed *more* it might get in trouble? Please!

Elsewhere, the strategy in this filing seems to be to expand the possible universe they'd have to set aside under the three cases (plus Klayman) for which there is a protection order as to make it virtually impossible to set it

aside so as to destroy the rest. In addition, having let the time when they could have set aside such data easily pass because they were still permitted to access the data (say, back in 2014, when they got caught violating their protection order), they now claim that the closure of the dragnet makes such a search virtually impossible now.

It’s a nifty gimmick. They can’t find a way to destroy the data because they already destroyed even legally suspect data. And we learn about it only now, after the data would otherwise be destroyed, but now can’t be because they didn’t find some better resolution 2 years ago.