

WHY TICE?

It has taken me a day or so to report that Russell Tice has been subpoenaed, mostly because I'm still puzzling through it. I'm wondering why Tice. Why not other people almost certainly involved with the leaks to Risen and Lichtblau. I mean, I'd bet my hat that James Comey was a source for Eric Lichtblau, but I haven't heard about Comey getting subpoenaed. Why not the former technology manager who seems to be a key source for both Risen and Lichtblau and Harris and Naftali?

A former technology manager at a major telecommunications company said that since the Sept. 11 attacks, the leading companies in the industry have been storing information on calling patterns and giving it to the federal government to aid in tracking possible terrorists.

"All that data is mined with the cooperation of the government and shared with them, and since 9/11, there's been much more active involvement in that area," said the former manager, a telecommunications expert who did not want his name or that of his former company used because of concern about revealing trade secrets.

He or she must have had clearance and must be senior enough to track down fairly easily. Another real doozy of a witnesses would be Mark Klein, who gave explicit details on the AT&T program to Wired News, which then published those details.

Of course, that's the thing. We don't know whether Tice is the only supposed Risen-Lichtblau source getting subpoenaed, or whether he's simply the only one going public about the fact.

Sibel Edmonds' National Security Whistleblowers Coalition suggests the Tice subpoena relates

specifically to the cases against AT&T currently working their way—or not—through the courts.

In addition, the timing of the subpoena appears to be more than a little suspect. On July 25, 2006, Judge Matthew Kennelly upheld the government's assertion of the state secrets privilege in *Terkel v. AT&T*. The crucial issue in the case was whether or not the government's program of surveillance had been publicly acknowledged, and Kennelly wrote "the focus should be on information that bears persuasive indication of reliability." If there were reliable public reports of the program then the fact of the program's existence could not be a state secret. Kennelly found that there were no reliable sources of public information about the contested program's existence sufficient to thwart the government's need for secrecy. In other words, the existence of the program had not been conclusively established, and the government therefore had a right to prevent probing into the matter. This stops a case that represented a serious threat to the Bush administration.

Professor William Weaver, NSWBC Senior Advisor, stated: "Russ Tice is the only publicly identified NSA employee connected to the *New York Times* in its December 2005 story publicizing warrantless Bush-ordered surveillance. Tice is also publicly perceived as someone who could authoritatively establish the existence of the program at issue in *Terkel*; Tice could remedy the defect in the plaintiff's case cited by Kennelly that allowed the government's assertion of the state secrets privilege to be successful. Later, on the same day Kennelly's opinion was filed, the Department of Justice sent out Tice's subpoena. The

date on the subpoena is July 20th, before Kennelly's decision was filed, but the issue in the Terkel case was so pregnant that it would be easy for the government to anticipate the ruling and only issue the subpoena to Tice if necessary. It has now become necessary, and the government seems to be moving to put pressure on Tice not to reveal information that would confirm the electronic surveillance program at issue in *Terkel* by threatening him with investigation and possible indictment."

Though I'd suggest an equally relevant court case and date might be the Hepting v. AT&T case; on July 20th, the same day as Tice's subpoena got written, Judge Walker allowed the Hepting (the Electronic Freedom Federation) case to go forward.

But I'm not entirely convinced. Mostly, I'm not convinced because I don't think Tice is the source for the specific details about tapping into the phone switches. For example, in this Reason interview, Tice talks in well-informed but hypothetical terms about a program resembling what we understand to be the AT&T program.

If you wanted to, you could suck in an awful lot of information. The biggest constraint you're going to have is the computing power you need to do it. You need to have some huge computers to crunch that kind of stuff. **More than likely you're talking about picking it up in a digital format and analyzing it** depending on how the program is written depending on whether it's audio or digital recognition you're talking about, the computing power is phenomenal for that sort of thing. **Especially if you're talking about mass volumes, if you're talking about hundreds of thousands of, say, telephone**

communications or something like that, calls of people just like you and me, like we're talking now.

Then you have things like, and this is where language specialists come in, linguists who specialize in things like accents and inflections and speech patterns and all those things that come into play. Or looking for key phrases or combinations of key words within a block of speech. It becomes, when you add in all the variables, astronomical. [my emphasis]

He then later says he's talking about a program no one knows anything about.

REASON: You're referring to what James Risen calls "The Program," the NSA wiretaps that have been reported on?

Tice: No, I'm referring to what I need to tell Congress that no one knows yet, which is only tertiarily connected to what you know about now.

By the time this interview was published, both the Risen and Lichtblau article providing more details on the large-scale collection of data and the Harris and Naftali article had already appeared. They provide pretty specific details of intercepting switches, so it's unlikely that Tice's secret has to do with the AT&T intercept program.

In the same interview, Tice twice says he doesn't think the details of the program he's talking about **should** become public.

First of all, I don't want this stuff to leak out. I'm not going to tell you or anyone in the press anything that's classified, especially about these programs.

[snip]

In my case, there's no way the programs I want to talk to Congress about should be public ever, unless maybe in 200 years they want to declassify them. You should never learn about it; no one at the *Times* should ever learn about these things.

Which suggests that Tice's comments on any hypothetical telecom intercept case do not relate to the program he's concerned about, and that his comments are not classified. Tice may be telling reporters there's something big there they still haven't found; he may be providing guidance to understand the programs they've already discovered. Indeed, if you look at how the ABC News story reports he was a source for Risen and Lichtblau,

But Tice disagrees. He says the number of Americans subject to eavesdropping by the NSA could be in the millions if the full range of secret NSA programs is used.

It appears likely he may have just been one of the people telling Risen and Lichtblau the NSA programs were bigger than they initially reported.

The National Security Agency has traced and analyzed large volumes of telephone and Internet communications flowing into and out of the United States as part of the eavesdropping program that President Bush approved after the Sept. 11, 2001, attacks to hunt for evidence of terrorist activity, according to current and former government officials.

The volume of information harvested from telecommunication data and voice networks, without court-approved warrants, is much larger than the White House has acknowledged, the officials said. It was collected by tapping

directly into some of the American telecommunication system's main arteries, they said.

(Though admittedly, if Tice is one of these sources, it suggests he may have given Risen and Lichtblau the general idea of direct intercept from the switches. Though it still seems that that's not the program he's whistleblowing.)

So why Tice, then? FWIW, Tice says he was subpoenaed to cow others into silence.

This latest action by the government is designed only for one purpose: to ensure that people who witness criminal action being committed by the government are intimidated into remaining silent.

Which might mean this is just harrassment—that Tice hasn't broken any laws, but the government will go after him nevertheless because it will prevent others from coming forward. They'll tar him as a paranoid former employee fired for cause. They'll suggest that anyone questioning the domestic spying programs is just equally crazy.

But I also wonder whether the government isn't trying to scare him from leaking details of the program he says he doesn't want to leak. Or whether it isn't trying to scare other whistleblowers and journalists from reporting on the as-yet unreported programs, the ones that seem to be bubbling just beneath the surface.

The AT&T cases are important because, as class action suits targeting the vacuuming of data, they involve everyone. They defy excuses that, "you only need to worry if you've been doing something you shouldn't be," because the programs target all data going through selected switches. And by targeting publicly traded corporations, they threaten to bring real financial consequences, if not legal ones. (Though TNH's resident realist Kagro X predicts all of them will still get dismissed on State

Secrets grounds, whether at the appellate level or somewhere else.)

But I've got a nagging feeling that we're getting close—close to either the details that prove the known programs have been abused, or to the programs that entail a surveillance so oppressive that even Joe Sixpack will get up in arms over it.