

THE SCANDAL OF LYING ABOUT “THWARTED” “PLOTS” STARTED 4 YEARS AGO

As predicted, one big takeaway from yesterday’s NSA hearing (the other being the obviously partial disclosure about location tracking) is Keith Alexander’s admission that rather than 54 “plots” “thwarted” in the US thanks to the dragnet, only one or maybe two were. Here are some examples.

But they’re missing this real scandal about the government’s lies about the central importance of Section 215.

That scandal started 4 years ago, when an example the FBI now admits had limited import played a critical role in the reauthorization of Section 215 without limits on the dragnet authority.

First, note that even while Leahy got Alexander to back off his “54 plots” claim, the General still tried to insist Section 215 had been critical in two plots, not just one.

SEN. LEAHY: Let’s go into that discussion, because both of you have raised concerns that the media reports about the government surveillance programs have been incomplete, inaccurate, misleading or some combination of that. But I’m worried that we’re still getting inaccurate and incomplete statements from the administration.

For example, we have heard over and over again the assertion that 54 terrorist plots were thwarted by the use of Section 215 and/or Section 702 authorities. That’s plainly wrong, but we still get it in letters to members of

Congress; we get it in statements. These weren't all plots, and they weren't all thwarted. The American people are getting left with an inaccurate impression of the effectiveness of NSA programs.

Would you agree that the 54 cases that keep getting cited by the administration were not all plots, and out of the 54, only 13 had some nexus to the U.S. Would you agree with that, yes or no?

DIR. ALEXANDER: Yes.

SEN. LEAHY: OK. In our last hearing, Deputy Director Inglis' testimony stated that there's only really one example of a case where, but for the use of Section 215, bulk phone records collection, terrorist activity was stopped. Is Mr. Inglis right?

DIR. ALEXANDER: He's right. I believe he said two, Chairman; I may have that wrong, but I think he said two, and I would like to point out that it could only have applied in 13 cases because of the 54 terrorist plots or events, only 13 occurred in the U.S. Business Record FISA was only used in (12 of them ?).

SEN. LEAHY: I understand that, but what I worry about is that some of these statements that all is – all is well, and we have these overstatements of what's going on – we're talking about massive, massive, massive collection. We're told we have to do that to protect us, and then statistics are rolled out that are not accurate. It doesn't help with the credibility here in the Congress; doesn't help with the credibility with us, Chairman, and it doesn't help with the credibility with the – with the country. [my emphasis]

the previous hearing, where Inglis in fact testified that Section 215 was only critical in the Basaaly Moalin case (which was not a plot against the US but rather funding to defeat a US backed invasion of Somalia).

MR. INGLIS: There is an example amongst those 13 that comes close to a but-for example and that's the case of Basaaly Moalin.

That is, in fact, Inglis said it had been critical in just one "plot."

After he did, FBI Deputy Director Sean Joyce piped in to note the phone dragnet also "played a role" by identifying a new phone number of a suspect we already knew about in the Najibullah Zazi case.

MR. JOYCE: I just want to relate to the homeland plots. So in Najibullah Zazi and the plot to bomb the New York subway system, Business Record 215 played a role; it identified specifically a number we did not previously know of a –

SEN. LEAHY: It was a – it was a critical role?

MR. JOYCE: What I'm saying – what it plays a –

SEN. LEAHY: (And was there ?) some undercover work that was – took place in there?

MR. JOYCE: Yes, there was some undercover work.

SEN. LEAHY: Yeah –

MR. JOYCE: What I'm saying is each tool plays a different role, Mr. Chairman. I'm not saying that it is the most important tool –

SEN. LEAHY: Wasn't the FBI – wasn't the

FBI already aware of the individual in contact with Zazi?

MR. JOYCE: Yes, we were, but we were not aware of that specific telephone number, which NSA provided us. [my emphasis]

So, when pressed, Joyce admitted that Section 215 wasn't critical to finding Adis Medunjanin, one of Zazi's conspirators. (And if you read Matt Apuzzo and Adam Goldman's *Enemies Within*, you see just how minor a role it played.)

That's important, because the Administration's use of Section 215 in the Zazi case was crucially important to the defeat of two efforts to rein in the dragnet in 2009.

As I noted at the time, Pat Leahy tried to require a Section 215 order have some tie to a suspect. Dianne Feinstein got Leahy to agree to a substitute, to which Dick Durbin tried to add specificity back in with an amendment. DiFi defeated it by pointing to the Zazi investigation.

My concern was that nothing we do here interfere adversely with an investigation that's going ongoing. I happen to believe that the biggest investigation we've had since 9/11 is currently ongoing and do not want to do anything to disturb it. Second, I believe that finally, the intelligence in the transformation or transfiguration of the FBI is now taking hold and that we are developing an intelligence mechanism within the country that is now able to ferret out some of these proposed attacks before they might happen. And I think the arrest of Mr. Zazi is demonstration of that. It is not ended and the investigation continues on.

Later in the hearing, she went further, claiming that adding specificity would "end several

classified and critical investigations.”

Secondly, the FBI does not support this amendment. And thirdly, in putting forward this higher standard, it would end several classified and critical investigations.

In context, it seemed that DiFi implied imposing specificity would end the still-ongoing Zazi investigation, though Sheldon Whitehouse would later refer to “ongoing programs,” suggesting perhaps she was thinking of the phone and the Internet dragnet (though the latter was authorized by Pen Register, not Section 215, at least as far as we know).

In any case, though, DiFi clearly and repeatedly left the impression that if Section 215 were made more specific, it would end the Zazi investigation, and might have prevented the FBI from thwarting that plot.

Now we find out that, when pressed, FBI admits Section 215 helped but really wasn’t critical at all to the investigation.

It’s possible FBI’s use of Zazi to sustain the dragnet is not as cynical as it seems. It’s possible that they were still investigating other people who had been in phone contact with Zazi, and every single one of them turned out to be innocent. Keep in mind, if Zazi had 40 phone contacts, and they had 30 separate unique contacts, and those contacts had 30 unique contacts, it would mean the FBI proceeded to investigate 36,000 people to make sure they weren’t terrorists – and that’s assuming they didn’t do the same chaining for Zazi’s family members, some of whom were better integrated into their community.

It’s possible FBI also used it (as I first suspected), to find out who had bought beauty supplies that happened to be precursors to TATP, so they could (at a minimum) cross reference it with Zazi’s contact list to find suspects to submit on his detention motion. Apuzzo and

Goldman suggest the FBI didn't do so, but their sources for a very FBI-friendly book might not now want to admit they investigated a bunch of people for buying hydrogen peroxide.

And FBI might be forgiven for the propaganda they were feeding DiFi in 2009 because they did not yet know those 36,000 people and those hydrogen peroxide buyers were innocent. But it would still mean we didn't make a common sense change to this law because we were busy ruling out 36,000 apparently completely innocent people as terrorists.

But in recent days (including yesterday), Intelligence Community people now call the use of the dragnet to rule out people as terror associates the "peace of mind" metric.

DIR. CLAPPER: (Off mic) – let me comment first on the value of Section 215, where I think, unfortunately – and we may be part – guilty of this – it's – the only metric used is plots foiled. I think there's another metric here that's very important use for Section 215. I would call it the peace of mind metric. In the case of the Boston Marathon bomber, where using these tools, we're able to check out whether there was or was not a subsequent plot involving New York City. In the case of the AQAP threat this summer that occasioned the closure of several diplomatic facilities in the Mideast, there were a number of selectors that emerged from our collectors overseas that pointed to the United States. Each one of them were checked out and were found not to be relevant to a domestic aspect of a terrorist plot.

It has taken 4 years and 3 debates about Section 215 for the IC to finally admit Section 215 has not actually proven crucial for thwarting any single plot (except one guy sending money to defeat a US backed invasion). (And note, Sean

Joyce, who has been one of the people who has briefed Congress along the way, may have a real incentive to claim he didn't oversell the value of it in the past.)

Rather, it serves to allow the IC to assure themselves that tens of thousands of people are innocent after every plot and near-plot (given how much more wired in the Tsarnaevs were, that number might now be higher).

Now perhaps that really is a worthy reason to develop a phone-based relationship map of all the people in America, so they can be swept up as one of those 36,000 the next time there's a plot. But that's what we're really talking about here – and were talking about, back when those read into this program tried to rein it in.

That's not what DiFi implied when people first tried to fix it. And we're only now learning the truth.