

# THE GOVERNMENT TRIES TO QUICKLY FORCE FEED ITS DOG ITS PHONE DRAGNET HOMEWORK

I have been following the government's claims that it needs to ~~make the phone dragnet~~ ~~plaintiffs look bad~~ preserve evidence in the phone dragnet cases. I noted:

1. NSA's claim, on February 20, that it might need to preserve the phone dragnet information
2. EFF Legal Director Cindy Cohn's observation that NSA already should have been preserving phone dragnet data because of earlier orders in EFF cases
3. NSA's own claim, in 2009, that it was under a preservation order that might prevent it from destroying illegal alert information
4. NSA's own quickness to destroy 3,000 violative files in 2012 when caught retaining data in ways it shouldn't have been
5. NSA's rather bizarre claim – given their abysmal track record on this point – that a great concern about defendants' rights meant

- they had to keep the data
6. The likelihood that, that claim of concern about defendants' rights notwithstanding, NSA had probably already destroyed highly relevant data pertaining to Basaaly Moalin
  7. FISC's equally bizarre – given their own destruction of any normal meaning of the word, “relevant” – order to force the government to continue destroying the dragnet data

That last bit – FISC's order that the government go on destroying data in spite of existing protection orders to retain it – happened Friday.

Since Friday, the EFF has been busy.

First, it filed a motion for a Temporary Restraining Order to retain the records, pointing out that there have been two preservation order in effect for at least 5 years that should govern the phone dragnet.

There has been litigation challenging the lawfulness of the government's telephone metadata collection activity, Internet metadata collection activity, and upstream collection activity pending in the Northern District of California continuously since 2006. The government has been under evidence preservation orders in those lawsuits continuously since 2007.

The first-filed case was Hepting v. AT&T, No. 06-cv-0672 (N.D. Cal). It became the lead case in the MDL proceeding in this district, In Re:

National Security Agency  
Telecommunications Records Litigation,  
MDL No. 06-cv-1791-VRW (N.D. Cal). On  
November 6, 2007, this Court entered an  
evidence preservation order in the MDL  
proceeding. ECF No. 393 in MDL No. 06-  
cv- 1791-VRW. One of the MDL cases,  
Virginia Shubert, et al., v. Barack  
Obama, et al. No. 07-cv- 0603-JSW (N.D.  
Cal.), remains in litigation today  
before this Court, and the MDL  
preservation order remains in effect  
today as to that case.

In 2008, movants filed this action—Jewel  
v. NSA—and this Court related it to the  
Hepting action. This Court entered an  
evidence preservation order in Jewel.  
ECF No. 51. The Jewel evidence  
preservation order remains in effect as  
of today.

EFF also filed a similar motion with the FISA  
Court.

And it provided all the emailed reminders it  
sent the government, starting on February 26  
after the government filed a motion with FISC to  
destroy the data, that it was already under a  
preservation order. On February 28, DOJ asked  
EFF to hold off until roughly March 5. But DOJ  
did nothing at that time, and EFF followed up  
again on March 7, after the order, asking how it  
was that the FISC didn't know that existing  
preservation orders covered the phone dragnet.  
In response, DOJ's Marcia (Marcy) Berman got  
dragged back into the case to give this  
convincing response.

[T]he Government's motion fo the FISC,  
and the FISC's decision today [March 7],  
addressed the recent litigation  
challenging the FISC-authorized  
telephony metadata collection under  
Section 215-litigation as to which there  
are no preservation orders. As we  
indicated last week, the Government's

motion did not address the pending Jewel (and Shubert) litigation because the district court had previously entered preservation orders applicable to those cases. As we also indicated, since the entry of those orders the Government has complied with our preservation obligations in those cases. At the time the preservation issue was first litigated in the MDL proceedings in 2007, the Government submitted a classified ex parte, in camera declaration addressing in detail the steps taken to meet our preservation obligations. Because the activities undertaken in connection with the President's Surveillance Program (PSP) were not declassified until December 2013, we were not able to consult with you previously about the specific preservation steps that have been taken with respect to the Jewel litigation. However, the Government described for the district court in 2007 how it was meeting its preservation obligations, including with respect to the information concerning the PSP activities declassified last December. We have been working with our clients to prepare an unclassified summary of the preservation steps described to the court in 2007 so that we can address your questions in an orderly fashion with Judge White, if you continue to believe that is necessary.

After San Francisco Judge Jeffrey White ordered the government to explain itself, the government changed the timeline, suppressing the fact that they told EFF to hold off on making any filings. It also said it would just have to keep destroying data.

Therefore, in light of the FISC's March 7 order, the Government currently remains subject to orders of the

FISC—the Article II Court established by Congress with authority to issue orders pursuant to FISA and to impose specific minimization requirements—which orders require the destruction of call-details records collected by the NSA pursuant to Section 215 that are more than five years old.

In light of the obligations created by those orders, on March 7, 2014, upon receipt of the FISC's decision, the Government filed a notice in First Unitarian and other cases challenging the legality of the Section 215 telephony metadata program of the Government's intention, as of the morning of Tuesday, March 11, 2014, to comply with applicable FISC orders requiring the destruction of call-detail records at this time, absent a court order to the contrary.

Judge White was not impressed – he issued an order requiring the government to retain the data.

There are two things, even at first glance, that don't make sense about all this.

First, there's still one case that hasn't been officially mentioned in any court discussion of retaining data I know of: Basaaly Moalin's challenge to his dragnet identification, based off 2007 data that has probably already been destroyed but which almost certainly would reflect the many violations characteristic of the program at the time.

Then there's the likelihood that one or both of the EFF cases was the case mentioned on February 17, 2009 – just over the 5 year age-off period at this point – regarding age-off requirements. If it was relevant then, why isn't it now? Note, Reggie Walton is still presiding over the same decisions, so if that earlier case were an EFF one, Walton should know about it.

I would normally think this charade was just two sides lobbying for good press. Except that the phone dragnet data from just over 5 years ago – the stuff that would age off if the government followed FISC's order – would show a great deal of violations, almost certainly constitutionally so.

So who is the entity in such a rush to destroy that data? DOJ? Or the FISC?