WHY DID 3 TOP DOJ OFFICIALS FEED THEIR DOG DOJ'S HOMEWORK?

DOJ has submitted what it claims is an explanation for why it materially misstated facts to Reggie Walton in discussions about destroying phone dragnet data. (See this post and this post for background.)

As you recall, Walton had read EFF's emails closely enough to realize that EFF had asked Civil Division lawyers why they had claimed there was no protection order when they believed they had one.

> A review of the E-mail Correspondence indicates that as early as February 26, 2014, the day after the government filed its February 25 Motion, the plaintiffs in *Jewel* and *First Unitarian* indeed sought to clarify why the preservation orders in *Jewel* and *Shubert* were not referenced in that motion. E-mail Correspondence at 6-7. The Court's review of the E-mail Correspondence suggests that the DOJ attorneys may have perceived the preservation orders in *Jewel* and *Shubert* to be immaterial to the February 25 Motion because the metadata at issue in those cases was collected under what DOJ referred to as the "President's Surveillance Program" (i.e., collection pursuant to executive authority), as opposed to having been collected under Section 215 pursuant to FISC orders — a proposition with which plaintiffs' counsel disagreed. Id at 4. As this Court noted in the March 12 Order and Opinion, it is ultimately up to the Northern District of California, rather than the FISC, to determine what BR metadata is relevant to the litigation pending before the court.

> As the government is well aware, it has a heightened duty of candor to the Court in *ex parte* procedings. See MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (2013). Regardless of the government's perception of the materiality of the preservation orders in *Jewel* and*Shubert* to its February 25 Motion, **the government was on notice, as of February 26, 2014, that the plaintiffs in *Jewel* and *First Unitarian* believed that orders issued by the District Court for the Northern District of California required the preservation of the FISA telephony metadata** at issue in the government's February 25 Motion. E-mail Correspondence at 6-7. **The fact that the plaintiffs had this understanding of the preservation orders—even if the government had a contrary understanding—was material to the FISC's consideration of the February 25 Motion**. The materiality of that fact is evidenced by the Court's statement, based on the information provided by the government in the February 25 Motion, that "there is no indication that nay of the plaintiffs have sought discovery of this information or made any effort to have it preserved." March 7 Opinion and Order at 8-9.
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> The government, upon learning this information, should have made the FISC aware of the preservation orders and of the plaintiffs' understanding of their scopre, regardless of whether the plaintiffs had made a "specific request" that the FISC be so advised. Not only did the government fail to do so, but the E-mail Correspondence suggests that on February 28, 2014, the government sought to dissuade plaintiffs' counsel from immediately raising this issue with the FISC or the Northern District of California. E-mail Correspondence at 5.

DOJ's excuse for not telling Walton EFF believed they had a protection order is roughly as follows:

1. 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.

2. It explains that it never provided EFF with its own 2007 preservation plan (which did not meet the terms of Walker's order) until March 17, 2014 because Stellar Wind — but not the FISC-authorized programs that the preservation plan excluded — was classified until December 2013.

> A classified submission was necessary at that time [in 2007] because the existence of the presidentially-authorized program was classified and

> remained so until December 2013.

Note, it doesn't mention that 19 days passed between the time EFF formally raised concerns about the protection order and the date DOJ actually provided the declassified protection plan to them, during which time, it appears, NSA destroyed one of the most damning half year's worth of data in the program's history (which I'll return to in a later post).

3. In spite of EFF telling DOJ their earlier suits were relevant (and not having received the preservation plan which could have been declassified in December), DOJ claims they didn't think they were relevant so it didn't tell FISC about EFF's beliefs.

> Because the Government's Motion for Second Amendment already had sought relief from this Court based on a list of BR metadata pursuant to FISC authorization, *see* Motion for Second Amendment at 3-5, counsel did not appreciate – even after receiving the email from plaintiffs' counsel in *Jewel* – that it would be be important to notify this Court about *Jewel* and *Shubert* or the email from counsel for the *Jewel* plaintiffs about those cases with which the Government disagreed. Rather, counsel viewed any potential dispute about the scope of *Jewel* and *Shubert* preservation orders as a mater to be resolved, if possible, by the parties to those cases (though a potential unclassified explanation to plaintiffs' counsel) or, failing that, by the district court.

Note what DOJ is not mentioning here? That EFF has a Section 215 lawsuit too, and that its understanding of the impact on that suit may have been influenced by the Shubert and Jewel protection orders.

4. DOJ's Civil Division lawyers did not forward EFF's email to DOJ's National Security Division lawyers, they claim, because the Civil Division lawyers did not agree with EFF's interpretation of the protection order.

> For these reasons, counsel did not think to forward the email from *Jewel* Plaintiffs' counsel to the attorneys with primary responsibility for interaction with this Court before the Court ruled on the Motion for Second Amendment. The Department wishes to assure the Court that it has always endeavored to maintain close coordination within the Department regarding civil litigation matters that involve proceedings before this Court, and will take even greater care to do so in the future.

5. DOJ told EFF to hold off formally alerting any Court in the belief that it could tell EFF about the preservation plan which could have been declassified in December but did not get declassified until 10 days after FISC issued its initial order requiring DOJ to destroy data, and that would solve everything.

> In particular, the request in its February 28 email that counsel for the *Jewel* plaintiffs "forbear from filing anything with the FISC, or [the district court], until we have further opportunity to confer" was a good faith attempt to avoid unnecessary motions practice in the event that the issue could be worked out among the parties through the Government's provision of an unclassified explanation concerning its preservation in *Jewel* and *Shubert*.

6. Bizarrely, DOJ also claims that this — its attempt to avoid any motions on this issue which of course would avoid creating an official paper trail — is the reason (or another reason?) why

they didn't tell the Court about EFF's email.

> Accordingly, the Government did not bring the *Jewel* plaintiffs' February 25 email to this Court's attention.

Now this is so many different flavors of hogwash I barely know where to start.

First, there's the detail that DOJ withholds the documents that would reveal that EFF had a very reasonable expectation — especially given that the PATRIOT-authorized dragnets were still secret — that the preservation order covered their suit; DOJ doesn't want to let Walton assess their claims for himself.

Moreover, the entire claim ignores that EFF represents the plaintiff in both *Jewel* and *First Unitarian Church*, meaning its understanding about the former may impact the latter.

Also, it is premised on the claim DOJ was going to give EFF notice of its preservation plan that they had already had 2 months to provide after the declassification of Stellar Wind on December 21 by the time EFF first raised concerns, and that DOJ took a full month (for a total of 3 after Stellar Wind got declassified) to actually provide. And all that's if you ignore that DOJ went on to insist later that week that it did not have to provide EFF anything beyond the earlier declarations; by all appearances, DOJ would never have given EFF notice of the preservation plan if EFF had not gotten a Restraining Order.

Thus far, it's just a load of bullshit.

But it gets worse!

Throughout this filing, signed only by National Security Division AAG John Carlin and Civil Division AAG Stuart Delery, the subject is "counsel." Presumably that includes the two AAGs.

And yet the AAG in charge of the people litigating against EFF and the AAG in charge of

the people who work with FISC claim that "counsel did not think to forward the email from *Jewel* Plaintiffs' counsel to the attorneys with primary responsibility for interaction with this Court before the Court ruled on the Motion for Second Amendment." Carlin was, in this matter, one of the attorneys interacting with the FISC, and the claim would have you believe in the 10 days between the time DOJ filed for this motion and Walton decided it, that email never got shared.

Now, Judge Walton has already seen the problem with this claim. As he noted in his order,

> Attorneys from the Civil Division of the Department of Justice participated in the E-Mail Correspondence with plaintiffs' counsel. As a general matter, attorneys from the National Security Division represent the government before the FISC. The February 25 Motion, as well as the March 13 Response, were submitted by the Assistant Attorney General for the Civil Division and the Acting Attorney General for the National Security Division.

That is, Stuart Delery — the boss of the people sitting on EFF's email — was on the initial motion to the Court. (Note, here, that DOJ doesn't tell Walton precisely when Civil Division purportedly handed over this email to their boss.)

Oh — and Delery and Carlin just blew off Walton's earlier mention of this detail, making no mention of the fact that Walton has already called bullshit on this claim.

And then there's one more issue. Back before March 14 (that is, before it became clear DOJ would not get away with this unnoticed), someone close to DOJ was telling Shane Harris about how Deputy Attorney General James Cole intervened — apparently well before this started — to make sure Civil and NSD were working closely on this

issue (or, from the looks of things, working closely to avoid preservation obligations).

> The official noted that the department's National Security Division, which represents the government before the surveillance court, and the Civil Division, which is handling the lawsuits, had to coordinate with each other, and that the back-and-forth has at times been a cumbersome process.
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> [Deputy Attorney General James] Cole has been acting as a referee between the two sides, and he has made the final decisions on how to proceed with regards to the legal issues presented by the phone records program, the Justice Department official said. The involvement of such a senior official in managing the program underscores the degree to which it has become a particularly nettlesome challenge for the Obama administration to resolve.

That is, according to Harris' story (which appears to conflict with the court record on at least one crucial issue), not only were the AAGs of Civil and NSD working closely on this together, but so was the DAG, all to smooth the cumbersome process of communicating between the two sides.

And yet, those two AAGs want Walton to believe, even with their boss riding herd, the Civil Division lawyers didn't manage to pass on a crucial email to the NSD lawyers, even though the bosses for both those Divisions would have to put their name on the process.

Voila! This is what DOJ offers as its excuse for materially misleading the presiding FISC Judge.