THE GOVERNMENT'S BAD FAITH ARGUMENTS DEMANDING A DRAGNET STAY

As expected, the government requested an immediate stay of Richard Leon's decision yesterday to enjoin the dragnet from collecting JJ Little's phone records.

Their argument is noteworthy for its stubbornness — reasserting many of the same arguments Leon just ruled against — and logical inconsistency. The brief claims, for example, that termination of the dragnet would cause the government irreparable harm, even while suggesting that it's possible they've stopped collecting data from Verizon Business Network Services, which they've just claimed would cause irreparable harm.

But the brief also argues that the only way to comply with the injunction is to shut down the entire dragnet.

> As the Government Defendants have explained, however, the only practicable way for the NSA to comply with the Court's preliminary injunction is immediately to cease all collection and queries of telephony metadata under the Section 215 program—that is, to shut the program down. That is so because the technical steps required in order to prevent the further collection of and to segregate the metadata associated with particular persons' calls would take the NSA months to complete. Gov't Defs.' Opp. to Pls.' Renewed Mot. for a Prelim. Inj. (ECF No. 150) ("Gov't PI Opp.") at 41-44, citing Potter Decl. (Gov't PI Opp. Exh. 4) ¶¶ 20-27.

That's not actually what the Potter declaration

the discussion cites to says. Potter says there is a way to make Little's records inaccessible — though it claims implausibly that it would take two weeks to accomplish.

> With respect to a requirement that the NSA cease analytic access to any records about plaintiffs' calls that may already have been collected under the Program, NSA has developed a process that can be used to prevent analytic access to metadata containing specified identifiers. This capability prevents the use of particular identifiers to conduct queries, and prevents analysts from accessing records containing those identifiers even if responsive to queries using different identifiers. NSA technical personnel estimate that eliminating analytic access to metadata associated with plaintiffs' calls could be completed within approximately 2 weeks after receipt of the plaintiffs' telephone numbers and the time-frames during which they were used.

This is the defeat list process I've discussed repeatedly, by which high volume numbers (like Verizon's voice mail number and pizza joints) and other sensitive numbers (likely including Congress' official numbers as well as informants) are made inaccessible to querying.

Consider me skeptical that it really takes 2 weeks to put something on a defeat list, as not doing so makes queries unusable. If it took 2 weeks, then the dragnet would frequently return crap for 2 weeks as techs tried to stay ahead of the defeat list numbers.

There's one more thing that yesterday's brief and the underlying declaration make clear though: The government is collecting records off telecom backbones, not off any billing system (contrary to what some reports still claim).

That's true because the only way that the

government wouldn’t be sure that Little’s records were collected under an order to VBNS is if they weren’t getting actual subscribers information. Moreover, Little’s records still show up on AT&T’s compliance, too (anytime his calls transit their backbone, not to mention any time he calls someone who uses AT&T).

That, of course, means that Larry Klayman and everyone else in the United States has standing if the Fourth Amendment injury comes with collection — because everyone’s records transit the major telecom backbones of the country. But the government has been claiming all this time they can’t be sure that’s the case.

The government will get their stay, and they will moot this decision (if not overturn it) at the end of the month. But not before engaging in some serious bad faith in claims to the court.