NSA'S NEWFOUND CONCERN ABOUT DEFENDANTS' RIGHTS UNDER FISA

As WSJ reported it was going to do, NSA has requested that the FISA Court permit it to retain call data beyond the 5 year age-off date because of all the lawsuits it faces.

> [T]he Government requests that Section (3)E of the Court's Primary Order be amended to authorize the preservation and/or storage of certain call detail records or "telephony metadata" (hereinafter "BR metadata") beyond five years (60 months) after its initial collection under strict conditions and for the limited purpose of allowing the Government to comply with its preservation obligations, described below, arising as a result of the filing of several civil lawsuits challenging the legality of the National Security Agency (NSA) Section 215 bulk telephony metadata collection program.

It provides this introduction to a list of the suits in question.

> The following matters, currently pending either before a United States District Court, or United States Court of Appeals, are among those in which a challenge to the lawfulness of the Section 215 program have been raised:

And lists:

- ACLU v. Clapper
- Klayman v. Obama
- Smith v. Obama, an Idaho

case
- First Unitarian Church of LA, the EFF related case
- Paul v. Obama
- Perez v. Clapper, a Bivens suit out of West Texas I hadn't known about before

It goes on to say,

> The duty to preserve typically arises from the common-law duty to avoid spoilation of relevant evidence for use at trial;
>
> [snip]
>
> A party may be exposed to a range of sanctions not only for violating a preservation order,3 but also for failing to produce relevant evidence when ordered to do so because it destroyed information that it had a duty to preserve.
>
> 3 To date, no District Court or Court of Appeals has entered a specific preservation order in any of the civil lawsuits referenced in paragraph 4 but a party's duty to preserve arises apart from any specific court order.
>
> [snip]
>
> When preservation of information is required, the duty to preserve supersedes statutory or regulatory requirements or records-management policies that would otherwise result in the destruction of the information.
>
> [snip]
>
> Based upon the claims raised and the relief sought, a more limited retention of the BR metadata is not possible as there is no way for the Government to know in advance and then segregate and

> retain only that BR metadata specifically relevant to the identified lawsuits.
>
> [snip]
>
> Congress did not intend FISA or the minimization procedures adopted pursuant to section 1801(h) to abrogate the rights afforded to defendants in criminal proceedings.4 For example, in discussing section 1806, Congress stated,
>
> > [a]t the outset, the committee recognizes that nothing in these subsections abrogates the rights afforded a criminal defendant under *Brady v. Maryland*, and the Jencks Act. These legal principles inhere in any such proceeding and are wholly consistent with the procedures detailed here.
>
> [snip]
>
> Although the legislative history discussed above focuses on the use of evidence against a person in criminal proceedings, the Government respectfully submits that the preservation of evidence in civil proceedings is likewise consistent with FISA.
>
> 4 By extension, this should also apply to section 1861(g) which, with respect to retention is entirely consistent with section 1801(h).

Now, if you're not already peeing your pants in laughter, consider the following.

First, as EFF's Cindy Cohn pointed out to the WSJ, Judge Vaughn Walker issued a retention order in EFF's 2008 suit against the dragnet.

> Ms. Cohn also questioned why the

> government was only now considering this move, even though the EFF filed a lawsuit over NSA data collection in 2008.
>
> In that case, a judge ordered evidence preserved related to claims brought by AT&T customers. What the government is considering now is far broader.

So, at least in her interpretation, it should already be retaining it.

Then, consider DOJ's very serious citation of Congress' intention that FISA not impair any defendant's criminal rights. It basically says that that principle, laid out during debates about traditional FISA in 1978, should apply to other parts of FISA like the phone dragnet.

Of course, it was only 24 hours ago when DOJ was last caught violating that principle in Section 702, abrogating a defendant's right to know where the evidence against him came from. And there are a whole slew of criminal defendants — most now imprisoned — whose 702 notice DOJ is still sitting on, whose rights DOJ felt perfectly entitled to similarly abrogate (we know this because back in June FBI was bragging about how many of them there were). So I am … surprised to hear DOJ suggest it gives a goddamn about criminal defendants' rights, because for at least the last 7 years it has been shirking precisely that duty as it pertains to FISA.

Also, did you notice what pending case pertaining to the legality of the phone dragnet DOJ didn't mention? Basaaly Moalin's appeal of his conviction based off evidence collected pursuant to Section 215. What do you want to bet that NSA hasn't retained the original phone records that busted him, which would have aged off NSA's servers back in October 2012, well before DOJ told Moalin it had used Section 215 to nab him. That's relevant because, according to recent reporting, NSA should not have been able to find Moalin's call records given claims

about limits on collection; if they did, they probably only did because AT&T was turning over other providers phone records. Moreover, we know that NSA was in violation of the dragnet minimization requirements in a slew of different ways at the time. Notably, that includes queries using selectors that had not been RAS-approved, as required, and dissemination using EO 12333's weaker dissemination rules. Now that we know of these problems, a court might need that original data to determine whether the search that netted Moalin was proper (I presume NSA has the original query **results** and finished intelligence reports on it, but it's not clear that would explain precisely how NSA obtained that data). Significantly, it was not until after 2009 that NSA even marked incoming data to show where it had been obtained.

So show us (or rather, Moalin's lawyers) the data, NSA.

Ah well. If nothing else, this laughable motion should prove useful for defendants challenging their conviction because DOJ abrogated their rights!