THE LAST TIME NSA SUBMITTED SECRET AUTHORITIES, IT WAS ACTIVELY HIDING ILLEGAL WIRETAPPING

Via Mike Masnick, I see that in addition to submitting a new state secrets declaration and a filing claiming EFF's clients in *Jewel v. NSA* don't have standing, the government also submitted a secret supplemental brief on its statement of authorities, which EFF has challenged.

The secret supplemental brief is interesting given the government's outrageous state secrets claim in the lawsuit against United Against a Nuclear Iran, in which it refuses to explain why it must protect the intelligence sources and methods of an allegedly independent NGO. It seems the government's state secrets claims are getting even more outrageous than they already were.

That's particularly interesting given what appears to be the outlines of a claim that if the court recognizes Jewel's standing, then all hell will break loose.

> Due to the failings of Plaintiffs' evidence described above, the Court need not consider the impact of the state secrets privilege on the standing issue. However, if the Court were to find Plaintiffs' declarations admissible and sufficiently probative of Plaintiffs' standing to raise a genuine issue meriting further inquiry (which it should not), adjudication f the standing issue could not proceed without risking exceptionally grave damage to national security (a threshold issue on which the Court requested briefing). That is so

> because operational details of Upstream collection that are subject to the DNI's assertion of the state secrets privilege in this case are necessary to address Plaintiffs' theory of standing. The Government presented this evidence to the Court in the DNI's and NSA's classified declarations of December 20, 2013, and supplements it with the Classified Declaration of Miriam P., NSA, submitted *in camera, ex parte,* herewith. Disclosure of this evidence would risk informing our Nation's adversaries of the operational details of the NSA's Upstream collection, including the identities of electronic-communications-service providers assisting with Upstream collection.

Behind these claims of grave harm are the reality that if US persons started to get standing under the dragnet, then under John Bates' rules (in which illegal wiretapping is only illegal if the government knows US persons are targeted), the entire program would become illegal. So I suspect the government is ultimately arguing that Jewel can't have standing because it would make the entire program illegal (which is sort of the point!).

But the biggest reason I'm intrigued by the government's sneaky filing is because of what happened the last time it submitted such a sneaky filing.

I laid out in this post how a state secrets filing submitted in EFF's related Shubert lawsuit by Keith Alexander on October 30, 2009 demonstrably lied. Go back and read it—it's a good one. A lot of what I show involves Alexander downplaying the extent of the phone dragnet problems.

But we now know more about how much more Alexander was downplaying in that declaration.

As I show in this working thread, it

is virtually certain that on September 30, 2009, Reggie Walton signed this order, effectively shutting down the Internet dragnet (I'm just now noticing that ODNI did not — as it has with the other FISC dragnet orders — release a copy with the timestamp that goes on all of these orders, which means we can't determine what time of the day this was signed). Some time in the weeks before October 30, DOJ had submitted this notice, admitting that NSA had been violating the limits on "metadata" collection from the very start, effectively meaning it had been collecting content in the US for 5 years.

Precisely the kind of illegal dragnet Virginia Shubert was suing the government to prevent.

Mind you, there are hints of NSA's Internet dragnet violations in Alexander's declaration. In ¶59, Alexander says of the dragnet, "The FISC Telephone Business Records Order was most recently reauthorized on September 3, 2009, with authority continuing until October 30, 2009" (Walton signed the October 30, 2009 phone dragnet order around 2:30 ET, which would be 11:30 in NDCA where this declaration was filed). In ¶58, he says, "The FISC Pen Register Order was most recently reauthorized on [redacted], 2009, and requires continued assistance by the providers through [redacted] 2009" (this is a longer redaction than October 30 would take up, so it may reflect the 5PM shutdown Walton had imposed). So it may be that one of the redacted passages in Alexander's declaration admitted that FISC had ordered the Internet dragnet shut down.

In addition, footnote 24 is quite long (note it carries onto a second page); particularly given that the tense used to describe the dragnets in the referenced paragraph differ (the Internet dragnet is in the past tense, the phone dragnet is in the present tense), it is possible Alexander admitted to both the compliance violation and that NSA had "voluntarily" stopped querying the dragnet data.

Further, in his later discussions, he refers to this data as "non-content metadata" and "records about communication transactions," which may reflect a tacit (or prior) acknowledgment that the NSA had been collecting more than what, to the telecoms who were providing it, was legally metadata, or, if you will, was in fact "content as metadata."

> To the extent that the plaintiffs "dragnet" allegations also implicate other NSA activities, such as the bulk collection of *non-content* communications meta data or the collection of communications records, *see, e.g.*, Amended Compl ¶58, addressing their assertions would require disclosure of NSA sources and methods that would cause exceptionally grave harm to national security.
>
> [snip]
>
> Accordingly, adjudication of plaintiffs' allegations concerning the collection of non-content meta data and records about communication transactions would risk or require disclosure of critical NSA sources and methods for [redacted] contacts of terrorist communications as well as the existence of current NSA activities under FISC Orders. Despite media speculation about those activities, official confirmation and disclosure of the NSA's bulk collection and targeted analysis of telephony meta data would confirm to all of our foreign adversaries [redacted] the existence of these critical intelligence capabilities and thereby severely undermine NSA's ability to gather information concerning terrorist connections and cause exceptionally grave harm to national security.

So it seems that Alexander provided some glimpse to Vaughn Walker of the troubles with the

Internet dragnet program. So when after several long paragraphs describing the phone dragnet problems (making no mention even of the related Internet dragnet ones), Alexander promised to work with the FISC on the phone dragnet "and other compliance issues," he likely invoked an earlier reference to the far more egregious Internet dragnet ones.

> NSA is committed to working with the FISC on this and other compliance issues to ensure that this vital intelligence tool works appropriately and effectively. For purposes of this litigation, and the privilege assertions now made by the DNI and by the NSA, the intelligence sources and methods described herein remain highly classified and the disclosure that [redacted] would compromise vital NSA sources and methods and result in exceptionally grave harm to national security.

I find it tremendously telling how closely Alexander ties the violations themselves to the state secrets invocation.

The thing is, at this point in the litigation, the only honest thing to submit would have been a declaration stating, "Judge Walker? It turns out we've just alerted the FISC that we've been doing precisely what the plaintiffs in this case have accused of us — we've been doing it, in fact, for 5 years." An honest declaration would have amounted to concession of the suit.

But it didn't.

And that state secrets declaration, like the one the government submitted at the end of September, was accompanied by a secret statement of authorities, a document that (unless I'm mistaken) is among the very few that the government hasn't released to EFF.

Which is why I find it so interesting that the government is now, specifically with reference

to upstream collection, following the same approach.

Do these secret statements of authority basically say, “We admit it, judge, we’ve been violating the law in precisely the way the plaintiffs claim we have. But you have to bury that fact behind state secrets privilege, because our dragnets are more important than the Fourth Amendment”? Or do they claim they’re doing this illegal dragnettery under EO 12333 so the court can’t stop them?

If so, I can see why the government would want to keep them secret.

Update: I originally got the name of Shubert wrong. Virginia Shubert is the plaintiff.