JUDGE REGGIE WALTON IS PISSED THAT GOVERNMENT IS MAKING MATERIAL MISSTATEMENTS TO FISC, AGAIN

FISA Court Chief Judge Reggie Walton just issued a rather unhappy order requiring the government to explain why it materially misstated the facts about whether any plaintiffs had protection orders that governed the phone dragnet.

Generally, he wants to know why the government didn't tell him that EFF had protection orders in the Jewel and Shubert cases. More specifically, he wants to know why they didn't tell him that — as I reported here — the EFF had asked the government how they could claim there was no protection order when they had one in their suits of the larger dragnet.

> 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.
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> 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.

In a number of places, Walton provides an out for the government, suggesting they might just be stupid and not obstructing (those are my words, obviously). He even goes so far as to suggest that DOJ might have an internal communication problem between the Civil Division, which is litigating the EFF suits, and the National Security Division, which works with FISC.

But then he notes that both Civil AAG Stuart Delery and Acting NSD AAG John Carlin submitted the filings to him.

> The government's failure to inform the FISC of the plaintiffs' understanding that the prior preservation orders require retention of Section 591 telephony metadata may have resulted from imperfect communication or coordination within the Department of Justice rather than from deliberate decision-making.4 Nonetheless, the Court expects the government to be far more attentive to its obligations in its practice before this Court.
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> 4 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.

Frankly, I hope Walton ultimately tries to learn why he wasn't told about these protection orders in more detail years ago, when the government was deciding whether or not to destroy evidence of lawbreaking that Walton first identified in 2009. I also hope he gets to the bottom of why Deputy Attorney General James Cole had to intervene in this issue. But for now, I'm happy to see DOJ taken to the woodshed for misinforming the Court.

Update: Meanwhile, on the other coast, Judge Jeffrey White issued a protection order that is far broader than the government would prefer it to be. The government had implied that the First Unitarian Church suit only covered Section 215; earlier this week (I've got a post half written on it), EFF argued they're challenging the dragnet, irrespective of what authorization the government used to collect it. Nothing in White's order limits the protection order to Section 215 and this passage seems to encompass the larger dragnet.

> Defendants' searching of the telephone communications information of Plaintiffs is done without lawful authorization, probable cause, and/or individualized suspicion. It is done in violation of statutory and constitutional limitations and in excess of statutory and constitutional authority. Any judicial, administrative, or executive authorization (including any business records order issued pursuant to 50 U.S.C. § 1861) of the Associational Tracking Program or of the searching of the communications information of Plaintiffs is unlawful and invalid.

Update: fixed a typo in which I inadvertently said Walton caused rather than found the lawbreaking in 2009.