THE PHONE DRAGNET WHITE PAPER, REVISITED

I made the mistake of referring to the Administration's White Paper on the phone dragnet, which led me to do another close read of the document. Given what we know now there are several passages I find to be quite telling.

Still hiding the how and why of the first authorization

As I've traced, the government seems to be hiding the first authorization of the phone dragnet and may have withheld it from Congress for six months past the 2010 reauthorization of the phone dragnet.

Which is why I find it interesting the White Paper specifically admits to withholding "facts underlying its legal authorization."

> Because aspects of this program remain classified, there are limits to what can be said publicly about the facts underlying its legal authorization. This paper is an effort to provide as much information as possible to the public concerning the legal authority for this program, consistent with the need to protect national security, including intelligence sources and methods.

One fact underlying its legal authorization may well be what David Kris suggested it was: that the program was initially approved only to make Bush's illegal program illegal.

The White Paper references the requirement — included as part of the FISA Amendments Act passed in 2008 — that the Administration provide all significant legal interpretations to Congress.

> Although the proceedings before the FISC are classified, Congress has enacted legislation to ensure that its members are aware of significant interpretations of law by the FISC. FISA requires "the Attorney General [to] submit to the [Senate and House Intelligence and Judiciary Committees] . . . a summary of significant legal interpretations of this chapter involving matters before the [FISC or Foreign Intelligence Surveillance Court of Review (FISCR)], including interpretations presented in applications or pleadings filed with the [FISC or FISCR] by the Department of Justice and . . . copies of all decisions, orders, or opinions of the [FISC or FISCR] that include significant construction or interpretation of the provisions of this chapter." 50 U.S.C. § 1871(a). The Executive Branch not only complied with this requirement with respect to the telephony metadata collection program, it also worked to ensure that all Members of Congress had access to information about this program and the legal authority for it. Congress was thus on notice of the FISC's interpretation of Section 215, and with that notice, twice extended Section 215 without change.

But the Administration provide all the past decisions until August 16, 2010, two years after the law was passed. So their claim to have complied with that requirement sure seems like an attempt to cover up its failure to comply in good faith.

Just as interestingly, the White Paper separates the paragraph on complying with a requirement to provide all opinions from this one by a paragraph.

> Moreover, in early 2007, the Department of Justice began providing all significant FISC pleadings and orders

> related to this program to the Senate and House Intelligence and Judiciary committees. By December 2008, all four committees had received the initial application and primary order authorizing the telephony metadata collection. Thereafter, all pleadings and orders reflecting significant legal developments regarding the program were produced to all four committees.

This is particularly bizarre given that they address the same topic: providing FISC orders to Congress. This makes the "thereafter"—withholding the date—comment all the more suspicious.

The non-substantive queries conducted by the techs

As I've reviewed repeatedly, NSA needs techs to massage the data before the analysts can use the database to lay out alleged terror networks. They also seem to work on algorithms with the data.

Which is why I find the modification of query here so interesting.

> The Government cannot conduct substantive queries of the bulk records for any purpose other than counterterrorism.

It seems to be an admission that the Government can conduct non-substantive queries of the bulk records for non-CT purposes. Is that just the tech massaging or is that something else the court hasn't authorized?

Rewriting the Guidelines to require investigative overkill

As I wrote in this post, some time after September 2008, the FISC started using the Attorney General Guidelines on Domestic Operations as FBI's minimization procedures for Section 215.

So I found it interesting to see how the White Paper used the AGG. It starts by laying out that FBI protects the US from threats to national security and collects foreign intelligence.

> Authorized Investigation. The telephony metadata records are sought for properly predicated FBI investigations into specific international terrorist organizations and suspected terrorists. The FBI conducts the investigations consistent with the Attorney General's Guidelines for Domestic FBI Operations, U.S. Dep't of Justice (2008), which direct the FBI "to protect the United States and its people from . . . threats to the national security" and to "further the foreign intelligence objectives of the United States," a mandate that extends beyond traditional criminal law enforcement. See id. at 12.

Then it uses the language describing Enterprise Investigations to describe its mandate to investigate terrorism.

> The guidelines authorize a full investigation into an international terrorist organization if there is an "articulable factual basis for the investigation that reasonably indicates that the group or organization may have engaged . . . in . . . international terrorism or other threat to the national security," or may be planning or supporting such conduct. See id. at 23. FBI investigations into the international terrorist organizations identified to the Court readily meet that standard, and there have been numerous FBI investigations in the last several years to which the telephony metadata records are relevant.

It then includes more language on Enterprise Investigations to lay out the authorization to

map out the networks of such groups.

> The guidelines provide that investigations of a terrorist organization "may include a general examination of the structure, scope, and nature of the group or organization including: its relationship, if any, to a foreign power; [and] the identity and relationship of its members, employees, or other persons who may be acting in furtherance of its objectives." Id.

Then it takes language from page 12 and page 31 to argue FBI can use all authorized tools.

> And in investigating international terrorism, the FBI is *required* to "fully utilize the authorities and the methods authorized" in the guidelines, which include "[a]ll lawful . . . methods," including the use of intelligence tools such as Section 215. Id. at 12 and 31. [emphasis original]

The authorized tools on page 31 do include transactional records and pen registers (though criminal ones), so it does sort of authorize the use of phone records.

But note it just invents that language about FBI being required to fully utilize all authorities. Which is especially odd given that page 12, where it gets part of that quote, also says this:

> The conduct of investigations and other activities authorized by these Guidelines may present choices between the use of different investigative methods that are each operationally sound and effective, but that are more or less intrusive, considering such factors as the effect on the privacy and civil liberties of individuals and potential damage to reputation. The least intrusive method feasible is to be

> used in such situations.[my empahsis]

That is, not only has the government invented this need to use all methods, but in doing so, has ignored the mandate to use the least intrusive method, which Section 215 clearly does not do.

Pinpointing informants in the dragnet

In 2009, the government admitted it might use the phone dragnet to identify people to recruit as informants.

> Specifically, using contact chaining [redacted] NSA may be able to discover previously unknown terrorist operatives, to identify hubs or common contacts between targets of interest who were previously thought to be unconnected, and potentially to discover individuals willing to become U.S. Government assets.

With that in mind, I find this language on "information relevant to the investigative process" to be interesting.

> Second, unlike, for example, civil discovery rules, which limit discovery to those matters "relevant to the subject matter involved in the action," Fed. R. Civ. P. 26(b)(1), Section 215 requires only that the documents be relevant to an "authorized investigation." 50 U.S.C. § 1861(b)(2)(A) (emphasis added). This includes not only information directly relevant to the authorized object of the investigation–i.e., "foreign intelligence information" or "international terrorism or clandestine intelligence activities"–but also information relevant to the investigative process or methods employed in reasonable furtherance of such national security investigations.

> In the particular circumstance in which the collection of communications metadata in bulk is necessary to enable discovery of otherwise hidden connections between individuals suspected of engaging in terrorist activity, the metadata records are relevant to the FBI's "investigation[s]" to which those connections relate. Notably, Congress specifically rejected proposals to limit the relevance standard so that it would encompass only records pertaining to individuals suspected of terrorist activity.

So they get to relevance because they use it to find non-terrorist informants to throw at terrorists as an investigative method? Is that it?