

“INFORMATION IS NO LONGER BEING COLLECTED IN BULK [PURSUANT TO 21 U.S.C. § 876]”

Given the details in yesterday’s USAT story on DEA’s dragnet, I wanted to re-examine the DEA declaration revealing details of the phone dragnet in the Shantia Hassanshahi case which I wrote about here. As I noted then, there’s a footnote modifying the claim that the database in question “was suspended in September 2013” that is entirely redacted. And the declaration only states that “information is no longer being collected in bulk pursuant to 21 U.S.C. §876,” not that it is no longer being collected.

According to the USAT, DEA moved this collection to more targeted subpoenas that may number in the thousands.

The DEA asked the Justice Department to restart the surveillance program in December 2013. It withdrew that request when agents came up with a new solution. Every day, the agency assembles a list of the telephone numbers its agents suspect may be tied to drug trafficking. Each day, it sends electronic subpoenas – sometimes listing more than a thousand numbers – to telephone companies seeking logs of international telephone calls linked to those numbers, two official familiar with the program said.

The data collection that results is more targeted but slower and more expensive. Agents said it takes a day or more to pull together communication profiles that used to take minutes.

We should expect this move occurred either in

the second half of 2013 (after the dragnet first got shut down) or the first half of 2014 (after DEA backed off its request to restart the dragnet). And we should expect these numbers to show in the telecoms transparency reports.

But they don't – or don't appear to.

Both AT&T and Verizon reported their 2013 numbers for the entire year. They both broke out their 2014 numbers semiannually. (Verizon; AT&T 2013; AT&T 2014; h/t Matt Cagle, who first got me looking at these numbers)

Here are the numbers for all subpoenas (see correction below):

	Verizon	AT&T
Total 2013	164,184	248,343
First Half 2014	72,342	86,943
Second Half 2014	65,816	114,811
Total 2014	138,158	201,754

Both companies show a decrease in overall criminal subpoenas from 2013 to 2014. And while Verizon shows a continued decline, AT&T's subpoena numbers went back up in the second half of 2014, but still lower than half of 2013's numbers.

In any case, both companies report at least 15% fewer subpoenas in 2014, at a time when – according to what USAT got told – they should have been getting thousands of extra subpoenas a day.

It is possible what we're seeing is just the decreased utility of phone records. As the USAT notes, criminals are increasingly using messaging platforms that use the Internet rather than telecoms.

But it's possible the DEA's dragnet went somewhere else entirely.

Though USAT doesn't mention it (comparing instead with the Section 215 dragnet, which is

not a comparable program because it, like Hemisphere as far as we know, focuses solely on domestic records), the NSA has an even bigger phone and Internet dragnet that collects on drug targets. Indeed, President Obama included "transnational criminal threats" among the uses permitted for data collected in bulk under PPD-28, which he issued January 17, 2014. So literally weeks after DEA supposedly moved to subpoena-based collection in December 2013, the President reiterated support for using NSA (or, indeed, any part of the Intelligence Community) bulk collections to pursue transnational crime, of which drug cartels are the most threatening.

There is no technical reason to need to collect this data in the US. Indeed, given the value of location data, the government is better off collecting it overseas to avoid coverage under *US v. Jones*. Moreover, as absolutely crummy as DOJ is about disclosing these kinds of subpoenas, it has disclosed them, whereas it continues to refuse to disclose any collection under EO 12333.

Perhaps it is the case that DEA really replaced its dragnet with targeted collection. Or perhaps it simply moved it under a new shell, EO 12333 collection, where it will remain better hidden.

Update: I realized I had used criminal subpoenas for AT&T, but not for Verizon (which doesn't break out criminal and civil). Moreover, it's not clear whether the telecoms would consider these criminal or civil subpoenas.

I also realized one other possible explanation why these don't show up in the numbers. USAT reports that DEA uses subpoenas including thousands of numbers, whereas they used to use a subpoena to get all the records. That is, the telecoms may count each of these subpoenas as just one subpoena, regardless of whether it obtains 200 million or 1,000 numbers. Which would have truly horrifying implications for "Transparency."

Update: There would be limitations to relying on

the NSA's database (though DEA could create its own for countries of particular interest). First, DEA could not search for US person identifiers without Attorney General approval (though under SPMCA, it could conduct chaining it knew to include US persons). Also, as of August 2014, at least, NSA wasn't sharing raw EO 12333 data with other agencies, per this Charlie Savage story.

The N.S.A. is also permitted to search the 12333 storehouse using keywords likely to bring up Americans' messages. Such searches must have "foreign intelligence" purposes, so analysts cannot hunt for ordinary criminal activity.

For now, the N.S.A. does not share raw 12333 intercepts with other agencies, like the F.B.I. or the C.I.A., to search for their own purposes. But the administration is drafting new internal guidelines that could permit such sharing, officials said.

That said, it's clear that NSA shares metadata under ICREACH with other agencies, explicitly including DEA.