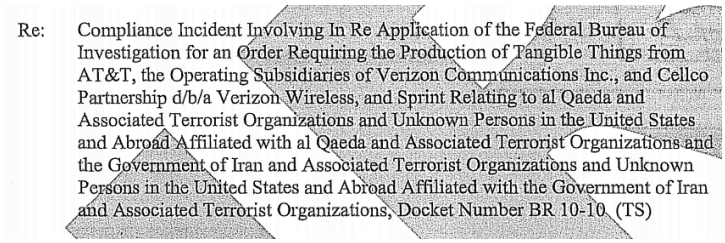
DOJ THREATENS TO INVOKE STATE SECRETS OVER SOMETHING RELEASED IN FOIA


Re: Compliance Incident Involving In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from AT&T, the Operating Subsidiaries of Verizon Communications Inc., and Cellco Partnership d/b/a Verizon Wireless, and Sprint Relating to al Qaeda and Associated Terrorist Organizations and Unknown Persons in the United States and Abroad Affiliated with al Qaeda and Associated Terrorist Organizations and the Government of Iran and Associated Terrorist Organizations and Unknown Persons in the United States and Abroad Affiliated with the Government of Iran and Associated Terrorist Organizations, Docket Number BR 10-10 (TS)

In a hearing today, Judge Richard Leon said that Larry Klayman could pursue his dragnet challenge by adding a plaintiff who did business with Verizon Business Services. But as part of Klayman's effort, he noted — weakly — that evidence got released showing Verizon Wireless was included in the dragnet. Klayman cited just the Charlie Savage article, not the document released under FOIA showing VZ Wireless on a FISC caption (though I presume his underlying 49 page exhibit includes the actual report — just not necessarily with the passage in question highlighted).

> It was disclosed on August 12, 2015 by Charlie Savage of The New York Times that Verizon Wireless, as this Court had already ruled in its Order of December 16, 2013, at all material times was conducting and continuing to conduct unconstitutional and illegal dragnet "almost Orwellian" surveillance on Plaintiffs and millions of other American citizens. See Exhibit 1, which is a Government document evidencing this, incorporated herein by reference, and see Exhibit 2, the New York Times article.

Moreover, Klayman surely overstated what the inclusion of VZ Wireless in a phone dragnet Primary Order caption from 2010 showed.

Which probably explains why DOJ said "The government has not admitted in any way, shape, or form that Verizon Wireless participated" in the Section 215 phone dragnet, according to Devlin Barrett.

The point is, they should have to explain why it is that, according to a document they've released, VZ Wireless was targeted under the program. Perhaps we'll get that in Northern California, where EFF very competently pointed to what evidence there was.

Which is why the government's threat to invoke state secrets was so interesting.

> The Court should avoid discovery or other proceedings that would unnecessarily implicate classified national-security information, and the potential need to assert and resolve a claim of the state secrets privilege: Plaintiffs' proposed amendments, in particular their new allegations regarding the asserted participation of Verizon Wireless in the Section 215 program, implicate matters of a classified nature. The Government has acknowledged that the program involves collection of data from multiple telecommunications service providers, and that VBNS (allegedly the Little Plaintiffs' provider) was the recipient of a now-expired April 25, 2013, FISC Secondary Order. But otherwise the identities of the carriers participating in the program, now, or at any other time, remain classified for reasons of national security. See Klayman, 2015 WL 5058403, at *6 (Williams, S.J.).
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> At this time the Government Defendants do not believe that it would be necessary to assert the state secrets privilege to respond to a motion by Plaintiffs for expedited injunctive relief that is based on the allegations of the Little Plaintiffs, or even the

> proposed new allegations (and exhibit) regarding Verizon Wireless. Nor should it be necessary to permit discovery into matters that would risk or require the disclosure of classified national-security information and thus precipitate the need to assert the state secrets privilege. Nevertheless, if Plaintiffs were permitted to seek discovery on the question of whether Verizon Wireless is now or ever has been a participating provider in the Section 215 program, the discovery sought could call for the disclosure of classified national-security information, in which case the Government would have to consider whether to assert the state secrets privilege over that information.
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> As the Supreme Court has advised, the state secrets privilege "is not to be lightly invoked." United States v. Reynolds, 345 U.S. 1, 7 (1953). "To invoke the . . . privilege, a formal claim of privilege must be lodged by the head of the department which has control over the matter after actual personal consideration by that officer." Id. at 7-8. To defend an assertion of the privilege in court also requires the personal approval of the Attorney General. Policies and Procedures Governing Invocation of the State Secrets Privilege at 1-3, http://www.justice.gov/opa/documents/state-secret-privileges.pdf. The Government should not be forced to make so important a decision as whether or not to assert the state secrets privilege in circumstances where the challenged program is winding down and will end in a matter of weeks. Moreover, discovery into national-security information should be unnecessary to the extent the standing of the newly added Little Plaintiffs, and the appropriateness of injunctive relief, may be litigated

> without resort to such information.
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> If, however, discovery into national-security information is permitted, the Government must be allowed sufficient time to give the decision whether to assert the state secrets privilege the serious consideration it requires. And if a decision to assert the privilege is made, the Government must also be given adequate time to prepare the senior-level declarations and other materials needed to support the claim of privilege, to ensure that the national security interests at stake are appropriately protected. See, e.g., Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077, 1090 (9th Cir. 2009).

I think it's quite possible that VZW was not turning over phone records under the Section 215 program in 2010 (which is quite another matter than suggesting NSA was not obtaining a great deal, if not most, of VZW phone records generally). I believe it quite likely NSA obtained some VZW records under Section 215 during the 2010 period.

But I also believe explaining the distinctions between those issues would be very illuminating.

Meanwhile, the threat of stalling, with all the attendant rigamarole, served to scare Leon — he wants this to move quickly as badly as Klayman does. After all, Leon will have much less ability to issue a ruling that will stand after November 28, when the current dragnet dies.

We shall see what happens in CA when DOJ attempts to make a similar argument.