IN SWORN DECLARATION ABOUT DRAGNET, NSA CHANGES ITS TUNE ABOUT SCOPE OF "THIS PROGRAM"

I've been tracking the sudden effort on the part of NSA to minimize how much of the call data in the US it collects (under "this program," Section 215).

That effort has, unsurprisingly, carried over to its sworn declarations in lawsuits.

Along with the response in the First Unitarian Church of Los Angeles v. NSA suit the government filed last Friday (this is the EFF-backed suit that challenges the phone dragnet on Freedom of Association as well as other grounds), NSA's Signals Intelligence Director Theresa Shea submitted a new declaration about the scope of the program.

Ostensibly, Shea's declaration serves to explain the "new" "changes" Obama announced last month, which the FISA Court approved on February 4. As I have noted, in one case the "change" simply formalized NSA"s existing practice and in the other it's probably not a big change either.

In addition to her explanation of those "changes," Shea included this language about the scope of the dragnet.

> Although there has been speculation that the NSA, **under this program**, acquires metadata relating to all telephone calls to, from, or within the United States, that is not the case. The Government has acknowledged that the program is broad in scope and involves the collection and aggregation of a large volume of data

> from **multiple telecommunications service providers**, but as the FISC observed in a decision last year, it has never captured information **on all (or virtually all)** calls made and/or received in the U.S. *See In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, Dkt. No. BR13-109 Amended Mem. Op. at 4 n.5 (F.I.S.C. Aug. 29, 2013) (publicly released, unclassified version) ("**The production of all call detail records of all persons in the States has never occurred under under this program.**") And while the Government has also acknowledged that one provider was the recipient of a now-expired April 23, 2013, Secondary Order from the FISC (Exhibit B to my earlier declaration), the identities of the carriers participating **in the program** (**either now, or at any time in the past**) otherwise remain classified. [my emphasis]

Shea appears to be presenting as partial a picture of the dragnet as she did in her prior declaration, where she used expansive language that — if you looked closely — actually referred to the entire dragnet, not just the Section 215 part of it.

Here, she's selectively citing the declassified August 29, 2013 version of Claire Eagan's July 19, 2013 opinion. The latter date is significant, given that the day the government submitted the application tied to that order, NSA General Counsel Raj De made it clear there were 3 providers in the program (see after 18:00 in the third video). These are understood to be AT&T, Sprint, and Verizon.

Shea selectively focuses on language that describes some limits on the dragnet. She could also note that Eagan's opinion quoted language suggesting the dragnet (at least in 2011)

collected “substantially all” of the phone records from the providers in question, but she doesn’t, perhaps because it would present problems for her “virtually all” claim.

Moreover, Shea’s reference to “production of all call detail records” appears to have a different meaning than she suggests it has when read in context. Here’s what the actual language of the opinion says.

> Specifically, the government requested Orders from this Court to obtain certain business records of specified telephone service providers. Those telephone company business records consist of a very large volume of each company’s call detail records or telephony metadata, but expressly exclude the contents of any communication; the name, address, or financial information of any subscriber or customer; or any cell site location information (CSLI). Primary Ord. at 3 n.l.5
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> 5 In the event that the government seeks the production of CSLI as part of the bulk production of call detail records in the future, the government would be required to provide notice and briefing to this Court pursuant to FISC Rule 11. The production of all call detail records of all persons in the United States has never occurred **under this program**. For example, the government [redacted][my emphasis]

In context, the reference discusses not just whether the records of all the calls from all US telecom providers (AT&T, Sprint, and Verizon, which participated in this program on the date Eagan wrote the opinion, but also T-Mobile and Cricket, plus VOIP providers like Microsoft, owner of Skype, which did not) are turned over, but also whether each provider that does participate (AT&T, Sprint, and Verizon) turns over all the records on each call. The passage

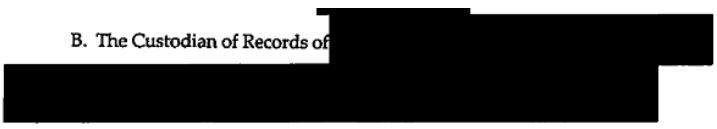
makes clear they don't do the latter; AT&T, Sprint, and Verizon don't turn over financial data, name, or cell location, for example! And since we know that at the time Eagan wrote this opinion, there were just those 3 providers participating, clearly the records of providers that didn't use the backbone of those 3 providers or, in the case of Skype, would be inaccessible, would be missed. So not all call detail records from the providers that do provide records, nor records covering all the people in the US. But still a "very large volume" from AT&T, Sprint, and Verizon, the providers that happen to be covered by the suit.

And in this declaration, instead of using the number De used last July, Shea instead refers to "multiple telecommunications service providers," which could be 50, 4, 3, or 2, or anywhere in between. Particularly given her "either now, or at any time in the past" language, this suggests the number of providers participating may have changed since July.

Which brings me to the two other implicit caveats in her statement.

First, she suggests (ignoring the time ODNI revealed Verizon's name a second time) that the only thing we can be sure of is that Verizon provided all its domestic data for the 3 months following April 23, 2013.

Actually, we can be fairly sure that at least until January 3, Verizon still participated. That's because the Primary Order approved on that date still includes a paragraph that — thanks to ODNI's earlier redaction fail — we know was written to ensure that Verizon didn't start handing over its foreign call records along with its domestic ones.



Though curiously, the way in which DOJ implemented the Obama-directed changes — the

ones that Shea's declaration supposedly serves to explain — involved providing substitute language affecting a huge section of the Primary Order, without providing a new Primary Order itself. So we don't know whether ¶1(B) — what I think of as the Verizon paragraph — still exists, or even whether it still existed on February 4, when Reggie Walton approved the change.

Which is particularly interesting given that Shea's declaration just happened to be submitted on the date, February 21, when a significant change in Verizon's structure may have affected how NSA gets its data. (That date was set in December by a joint scheduling change.)

One way or another, Shea's claim that the dragnet doesn't collect all or even virtually all phone records is very time delimited, certainly allowing the possibility that the scope of the dragnet has changed since the plaintiffs filed this suit on July 16, 3 days before Eagan explicitly excluded cell location data from the dragnet collection, which is the reason NSA's leak recipients now give for limits on the scope of the program.

The claim is also — as claims about the Section 215 always are — very program delimited. In her statement claiming limits on how much data the NSA collects, Shea makes 2 references to "this program" and quotes Eagan making a third. She's not saying the NSA doesn't collect all the phone data in the US (I don't think they quite do that either, but I think they collect more US phone data than they collect under this program). She's saying only that it doesn't collect "virtually all" the phone data in the US "under this program."

Given her previously expansive declaration (which implicitly included all the other dragnet collection methods), I take this declaration as a rather interesting indicator of the limits to the claims about limits to the dragnet.