THE PHONE DRAGNET ADOPTED "SELECTION TERM" BY 2013

As I laid out last week, I'm not convinced the term "specific selection term" is sufficiently narrowly defined to impose adequate limits to the "reformed" Section 215 (and NSL and PRTT) programs. Here's how the House defined it:

> SPECIFIC SELECTION TERM.—The term 'specific selection term' means a term used to uniquely describe a person, entity, or account.

That said, as I also noted, the motion to amend January's primary order used the term to refer to the query term, which may suggest my concerns are unfounded.

I've looked further, and the amendment's use of the term was not new in the phone dragnet.

In fact, the phrase used to refer to the query subject changed over the course of the dragnet. The first Primary Order authorized the search on "particular known phone numbers." That usage continued until 2008, when Primary Order BR 08-08 introduced the term "particular known identifier." A completely redacted footnote seems to have defined the term (and always has). Significantly, that was the first Primary Order after an August 20, 2008 opinion authorized some "specific intelligence method in the conduct of queries (term "searches") of telephony metadata or call detail records obtained pursuant to the FISC's orders under the BR FISA program." I think it highly likely that opinion authorized the use of correlations between different identifiers believed to be associated with the same person.

The September 3, 2009 Primary Order — the first one resuming some normality after the problems identified in 2009 — references a description of

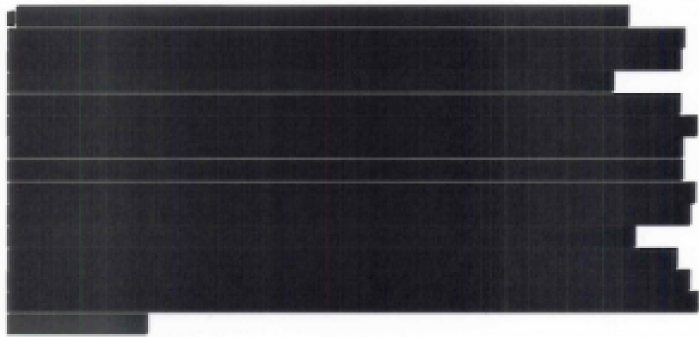
identifier in a declaration. And the redaction provides hints that the footnote describing the term lists several things that are included (though the footnote appears to be roughly the same size as others describing identifier).

C. Subject to the restrictions and procedures below, the BR metadata may be accessed for purposes of obtaining foreign intelligence information through contact chaining ("queries") using telephone identifiers,[3] as described in the Declaration at paragraphs 8-13.

(i) Except as provided in subparagraph (ii) below, all telephone identifiers to be used for queries shall be approved by one of the following designated approving

The Primary Orders revert back to the same footnote in all the orders that have been released (the government is still withholding 3 known Primary Orders from 2009). And that continued until at least June 22, 2011, the last Primary Order covered by the ACLU and EFF FOIAs.

But then in the first Primary Order after the 2011-2012 break (and all Primary Orders since), the language changes to “selection term,” which like its predecessor has a footnote apparently explaining the term – though the footnote is twice as long. Here’s what it looks like in the April 25, 2013 Primary Order:


to perform those processes needed to make it usable for intelligence analysis. Technical personnel may query the BR metadata using selection terms[4] that have not been RAS-approved (described below) for those purposes described above, and may share the results of those queries with other authorized personnel responsible for these purposes,

or use of the BR metadata in the event of any natural disaster, man-made emergency, attack, or other unforeseen event is in compliance with the Court's Order.

[3] The Court understands that the technical personnel responsible for NSA's underlying corporate infrastructure and the transmission of the BR metadata from the specified persons to NSA, will not receive special training regarding the authority granted herein.

The change in language is made not just to the subject of queries. There's a paragraph in Primary Orders approving the use of individual FISA warrant targets for querying (see this post for an explanation) that reads,

> [Identifiers/selection terms] that are currently the subject of electronic surveillance authorized by the Foreign Intelligence Surveillance Court (FISC) based on the FISC's finding of probable cause to believe that they are used by agents of [redacted] including those used by U.S. persons, may be deemed approved for querying for the period of FISC-authorized electronic surveillance without review and approval by a designated approving official.

The change appears there too. That's significant because it suggests a use that would be tied to targets about whom much more would be known, and in usages that would be primarily email addresses or other Internet identifiers, rather than just phone-based ones. I think that reflects a broader notion of correlation (and undermines the claim that a selection term is

"unique," as it would tie the use of an identity authorized for Internet surveillance to a telephone metadata identifier used to query the dragnet).

Finally, the timing. While the big gap in released Primary Orders prevents us from figuring out when the NSA changed from "identifier" to "selection term," it happened during the same time period when the automated query process was approved.

This may all seem like a really minor nit to pick.

But even after the language was changed to "selection term" on Primary Orders, top intelligence officials continued to use the term "identifier" to describe the process (see the PCLOB hearing on Section 215, for example). The common usage, it seems, remains "identifier," though there must be some legal reason the NSA and DOJ use "selection term" with the FISC.

It also means there's some meaning for selection term the FISA Court has already bought off on. It's a description that takes 15 lines to explain, one the government maintains is still classified.

And we're building an entire bill off a vague 17-word definition without first learning what that 15-line description entails.