GARR KING'S SPECULATIVE FISA RULING

Garr King, the judge in Mohamed Osman Mohamud's case, has refused Mohamud's demand for broad discovery into the government's failure to notice him about the Section 702 surveillance they used to bust him.

Before I get into the substance of King's ruling, take a look at how King dismisses the reporting—almost exclusively from NYT's Charlie Savage—about how, upon having lied to SCOTUS, Solicitor General Don Verrilli pushed to change DOJ's policy on notice about Section 702. Here's King:

> Defendant bases his argument, in part, on events concerning Clapper, 133 S. Ct. 1138. The Solicitor General argued to the Court that the government provided notice to defendants when evidence was derived from § 1881a surveillance. Plaintiffs had not received such notice, so the Court ruled plaintiffs had no standing to challenge the constitutionality of the FAA. Id. at 1143, 1148. **Newspapers began to speculate about an internal Justice Department debate** on providing notice in these circumstances. Defendant received his Supplemental Notification thereafter. [my emphasis]

That is, King dismisses clear evidence of DOJ misconduct by claiming the reporter — Savage — was just speculating.

Here's the reporting King bases that "speculate" claim on:

> Prosecutors plan to inform the defendant about the monitoring in the next two weeks, **a law enforcement official said**.

> The move comes after an internal Justice Department debate in which Solicitor General Donald B. Verrilli Jr. argued that there was no legal basis for a previous practice of not disclosing links to such surveillance, **several Obama administration officials familiar with the deliberations said**.
>
> [snip]
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> In February, the Supreme Court dismissed a case challenging its constitutionality because the plaintiffs, led by Amnesty International, could not prove they had been wiretapped. Mr. Verrilli had told the justices that someone else would have legal standing to trigger review of the program because prosecutors would notify people facing evidence derived from surveillance under the 2008 law.
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> But it turned out that Mr. Verrilli's assurances clashed with the practices of national security prosecutors, who had not been alerting such defendants that evidence in their cases had stemmed from wiretapping their conversations without a warrant.
>
> [snip]
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> Mr. Verrilli sought an explanation from national security lawyers about why they had not flagged the issue when vetting his Supreme Court briefs and helping him practice for the arguments, according to officials.
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> The national security lawyers explained that it was a misunderstanding, **the officials said**. Because the rules on wiretapping warrants in foreign intelligence cases are different from the rules in ordinary criminal investigations, they said, the division has long used a narrow understanding of what "derived from" means in terms of when it must disclose specifics to

> defendants.
>
> [snip]
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> Division officials believed it would have to disclose the use of that program only if it introduced a recorded phone call or intercepted e-mail gathered directly from the program — and for five years, they avoided doing so.
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> For Mr. Verrilli, that raised a more fundamental question: was there any persuasive legal basis for failing to clearly notify defendants that they faced evidence linked to the 2008 warrantless surveillance law, thereby preventing them from knowing that they had an opportunity to argue that it derived from an unconstitutional search?
>
> [snip]
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> Verrilli argued that withholding disclosure from defendants could not be justified legally, officials said. Lawyers with several agencies — including the Federal Bureau of Investigation, the N.S.A. and the office of the director of national intelligence — concurred, officials said, and the division changed the practice going forward.

Even aside from the fact that Savage provides reasonably clear descriptions of his sources — a law enforcement official, Obama administration officials, and those same described officials — the thing that should validate Savage's reporting is his description of what happened mirrors not only King's, but DOJ's.

> Likewise, the Department has always recognized that notice pursuant to those provisions must be provided when the government intends to use evidence obtained through ordinary criminal process (such as a Rule 41 search

> warrant) that was itself based directly on information obtained pursuant to Title I, III, or VII. Such evidence would be evidence that was "derived from" such FISA collection.
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> Prior to recent months, however, the Department had not considered the particular question of whether and under what circumstances information obtained through electronic surveillance under Title I or physical search under Title III could also be considered to be derived from prior collection under Title VII. After conducting a review of the issue, the Department has determined that information obtained or derived from Title I or Title III FISA collection may, in particular cases, also be derived from prior Title VII collection, such that notice concerning both Title I/III and Title VII collections should be given in appropriate cases with respect to the same information.

In other words, Savage described, in October, a decision process that (in its awkward wrestling with the "derived from" concept and its timing) closely resembles the decision process DOJ laid out to Carr in their official filings. He did so relying on obviously official figures, including one law enforcement source.

And yet King made the ruling he made in significant part by dismissing Savage's reporting as speculation.

Which brings us to King's ruling. He depends on a submission from "Obama Administration officials familiar with the deliberations" and a number of "law enforcement officials." That is, he relies on substantially the same kind of sources that Savage did (though his ruling doesn't yet have the validation of laying out, 4 months beforehand, what DOJ would claim in its official filings).

And his ruling substantially capitulates to the same "speculative" sources that Savage used in his prescient reporting, even while repeating several of the findings Savage laid out.

> The government insists there was no deliberate government misconduct because the government had never considered whether information obtained under Title I/III could also be considered to be derived from prior collection under Title VII. **After deciding this could be the case, the government reviewed these proceedings, determined the situation arose in this case, and provided the Supplemental Notification**. The government argues this is indicative of good faith, not bad faith, but concedes it is solely responsible for the untimely notice.
>
> My goal is to resolve the criminal prosecution against defendant, whether that means I proceed to sentencing, I grant a new trial, or I dismiss the indictment. I have carefully considered defendant's arguments for broad discovery, and **I understand and acknowledge defendant's arguments explaining how broad discovery relates to this prosecution and the entrapment defense**. Defendant has argued numerous times during this prosecution, and does so again in this motion, that I should discard the FISA ex parte procedures in favor of adversarial proceedings. **Defendant raises strong policy reasons to support this request**. But I am not persuaded there is a need to go beyond the procedures outlined in FISA's § 1806, or that I have the authority to do so. **Thus, I conclude that I will not order disclosure to the defense team of any materials relating to the surveillance unless, after reviewing the upcoming motion to suppress, I decide the disclosure "is necessary to make an**

> **accurate determination of the legality of the surveillance." § 1806(f)**. For this reason, I deny defendant's motion for full discovery., [my emphasis]

Now I'll grant you ~~sworn declarations~~ motions from lawyers carry—and ought to carry—more legal weight than newspaper reporting, especially that based on anonymous sources. But Savage is no schlub: he's reporting what his sources, sufficiently identified as actual officials, have told him.

So essentially King is placing all the weight on the defensive submissions he got after the fact, and dismissing—as speculation—the prescient and more detailed reporting from several months before.

That may or may not be the proper legal result. But, especially given how closely the DOJ filing and Savage's reporting match on key underlying issues, it's a hack result.

King, while accusing Savage of speculating, is effectively doing the same based on less complete evidence.

Update: My use of "sworn declarations," particularly appearing in my effort to set up a parallelism between DOJ and Savage's reporting, caused confusion. So I've changed that. I don't mean to say DOJ submitted declarations; they didn't (hmmm). Sorry for the confusion.