

EMERGENCY DRAGNET CHAINING, NOW WITH FIRST AMENDMENT PROTECTIONS!

Thursday, I Con the Record quietly released the most recent phone dragnet order, BR-125, dated September 11, 2014 (curiously, I Con the Record went back to correct its original release to indicate the order had been reauthorized on 9/11, not 9/12; I think FISC has been setting deadlines such that they are a Friday, but this one was approved on a Thursday).

Congratulations, Raymond Dearie! The government will point to your approval of this order as yet more proof of the soundness of the program.

There is one intriguing new addition to the order (the change shows up in two places). Both footnote 6 and footnote 7 add a requirement to the emergency provision for a First Amendment review. Footnote 7, which is more extensive, reads:

Before an emergency query is performed under this authority, NSA's Office of General Counsel (OGC), in consultation with the Director or Acting Director shall confirm that any selection term reasonably believed to be used by a United States (U.S.) person is not regarded as associated with [redacted—description of terrorist groups acceptably included in this program] solely on the basis of activities that are protected by the First Amendment of the Constitution.

Such a requirement was not in the emergency procedures as originally proposed by the government nor in the orders issued since. (Update: Though of course, First Amendment review is *required by the law*; ultimately, the

order for NSA to do a First Amendment review is tantamount to a reminder that it has to follow the law even when doing emergency queries.)

While we can't know whether this got added because NSA used the emergency provisions to chain on someone for their speech, most changes to dragnet orders have historically been a response to some kind of problem.

And whether or not this language arose out of some issue or just intelligent caution, it provides yet another reason why the emergency provision of USA Freedom Act should not be passed as written.

As I have laid out, one of the ways in which Leahy's emergency provision is notably worse than this emergency provision is because it puts the Attorney General in charge of compliance. It does not – as the current emergency provisions do – give broad authority to the FISC to remedy any collection conducted under the emergency provision that should not have been. As adopted, the current provisions even permit the FISC to order “destroying the results of the emergency query and recalling any reports or other disseminations based on those results”).

Under USA Freedom, if the FISC caught the government using an emergency authorization to identify the communications network of someone who engaged in protected speech, it would not have the explicit authority to demand the Attorney General destroy the records collected as a result. It has that authority right now.

And the latest dragnet order at least raises questions about whether it has already had to exercise that authority.