

IN FEBRUARY, THE GOVERNMENT TURNED IN ITS DRAGNET HOMEWORK LATE

Last Wednesday, I Con the Record released the latest dragnet order, signed on February 26.

This order actually has several changes of note.

As I predicted, yet another new FISC judge signed the order, James Boasberg, who only joined the court last May. I suspect they've been ensuring that every new approval is approved by a different FISC judge, so they can boast to other courts about how many judges have approved the dragnet.

In what may be related detail, the application for this was late, having been submitted just 3 days before the renewal request was due (and therefore 4 days late). FISC judges have one week terms, so they may have stalled until Boasberg, as a new judge, was presiding.

Whatever the reason, Boasberg scolded DOJ for turning in their homework late, and warned them not to do it again for the next renewal, if there is one.

With two exceptions, neither of which applies here, Rule 9 of this Court's Rules of Procedure requires the government to submit a proposed application no later than seven days before it seeks to have a matter entertained by the Court. The Court notes that the government filed its proposed application in this matter four days late. If the government seeks to renew the authorities approved herein prior to their expiration on June 1, 2015, the government is directed to file the proposed renewal application no later than Friday, May 22, 2015.

Curiously, Boasberg doesn't discuss the five-day longer period of collection under this order, he just sets it.

Boasberg also laid out how the government must proceed under each of three scenarios.

First, if any of the 3 Appellate Courts reviewing the dragnet issue an opinion, "the government is directed to inform the Court promptly if the government's implementation of this Order has changed as a result."

Equally important, if Congress does pass some kind of new law, it must tell the court about anything the Court hasn't already considered.

If Congress has enacted legislation amending 50 U.S.C. § 1861 prior to a request for renewed authorities, the government is directed to provide, along with its request, a legal memorandum pursuant to Rule 11(d) of this Court's Rules of Procedure addressing any issues of law raised by the legislation and not previously considered by the Court.

This last bit is important. Some things – connection rather than contact chaining – would be codified if USA Freedom Act were to pass. But the Court has already considered it; it has been part of dragnet orders for over a year. Some USAF supporters had assumed new definitions in the bill would elicit new opinions that would be treated under the bill's transparency provisions, but that's only if the government believes the FISC has never reviewed it. So (for example) we might never know how the FISC has permitted the government to interpret selection term if it deems that the same as selection term it is using.

Finally, in language that might address the possibility Charlie Savage raised in November – that the government would continue doing what it is doing, because the underlying "investigation" remains the same, and therefore no extension is required – if nothing happens, the Court

requires a memo of law explaining that.

If Congress, conversely, has not enacted legislation amending § 1861 or extending its sunset date, established by Section 102(b) of Public Law 109-177, 120 Stat. 195, as most recently amended by Section 2(a) of Public Law 112-14, 125 Stat. 216, the government is directed to provide a legal memorandum pursuant to Rule 11(d) addressing the power of the Court to grant such authority beyond June 1, 2015.

Section 102(b) of Public Law 109-177 is the section Savage pointed to that might permit the dragnet to continue.

(2) Exception.—With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in paragraph (1) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.

That basically says the Court is aware of this discussion, either because it reads the NYT or because the government has mentioned it. This order doesn't tip a hand on how FISC would regard this claim, but it does make clear it considers it a distinct possibility.

Note, unless I'm missing something, no language like this appears in any of the unredacted sections of previous dragnet orders, not even when Congress was giving the government straight renewals. We can't be sure, but that certainly seems to suggest the Court has been having conversations — either by itself or with the government — about alternatives in a way Bob Litt and others are not having publicly.

Which brings me back to the government's late

homework again. There are other possibilities to explain the delayed submission. For example, it's possible they delayed to make the extension of the 90-day period less odd (though I'm not sure why). It's possible they honestly considered not renewing the order, already putting into place whatever they're going to unilaterally do once Congress does nothing. Or perhaps they were still debating how to proceed with the Court.

When I used to turn in homework late (okay – it probably only happened once), I had to have a good excuse. What was the government's?

There's one more tiny change of note. This order moves its definition for connection chaining to footnote 7 (and the order consolidated some other footnotes). That's likely just cosmetic, unless the FISC had some concern that the government was using a flexible definition of "connection chaining" for its emergency approvals.