

BEHOLD, BR 15-24, THE LONGEST-SERVING PHONE DRAGNET ORDER EVER

By my calculation today marks the 91st day of the life of phone dragnet order BR 15-24, making it the longest running dragnet order ever. Though the order offered no explanation, FISC judge James Boasberg approved a 95-day expiration for this order back on February 26 so the dragnet order expiration would coincide with PATRIOT Act's sunset.

It probably seemed wise at the time, but it definitely exacerbates the impact of Mitch McConnell's miscalculation last week, as it means there's is no grace period after the current order expires.

The 90-day renewals appear to arise out of both the Stellar Wind practice and the FISA Pen Register practice. Under the former, the Bush Administration reviewed the dragnet every 45 days to make sure it was still necessary and give it the appearance of oversight. (The renewal dates appear on this timeline.) When FISC approved the use of the Pen Register statute to collect the Internet dragnet, it adhered to that statute's renewal process, which requires 90-day renewals. I assume the phone dragnet adopted the same, even though Section 215 has no renewal requirement, because the phone dragnet collected even more data than the Internet dragnet did.

So already, we're a day longer than the spirit of the law should permit, four days before Sunday's scheduled resolution (or lack thereof) of the current impasse.

Given Charlie Savage's account, it appears the Administration did not – as ordered by Boasberg – brief the FISC on the impact of the 2nd Circuit decision if it would change the program.

Rather, they're just hiding out, hoping they don't need to raise this or any other issue with regards to the dragnet with the FISC.

The Foreign Intelligence Surveillance Court had given the government a deadline of last Friday to file a new application to extend the bulk phone records program for 90 days. Given the disarray in the Senate and the looming deadline, the Justice Department did not file, the official said, speaking on condition of anonymity to discuss intelligence-related matters.

[snip]

The administration is holding to its decision not to invoke the grandfather clause to keep collecting bulk phone records past next Monday, the official said. But the government has not ruled out invoking such a clause for using the business records provision – as well as the other two powers that are expiring – to gather specific records for more routine investigations.

“We will not use the grandfather clause in the Patriot Act to continue the bulk metadata collection program; it would not be tenable for us to do so,” the senior official said.

“Thus, because of the pending sunset of the current authority, we have not filed an application with the FISA court to continue collection,” the official said, referring to the Foreign Intelligence Surveillance Act court, also known as FISC.

The official added, “We will consider, in light of our national security needs and the status of our authorities, whether to make an appropriate filing with the FISC about accessing previously collected metadata.”

[snip]

The administration is hoping to avoid any need to go to the court for permission to query already-acquired bulk phone data, which would raise additional legal complications.

But one plan being floated – Dianne Feinstein’s non-compromise compromise – would simply permit the FISC to extend the current order until a year after whenever her bill might be passed into law (which couldn’t be Sunday night), as if nothing had ever happened.

CONTINUED APPLICABILITY.—Notwithstanding any other provision of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) or this Act or any amendment made by this Act, the order entered by the court established under section 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)) on February 26, 2015, in Docket No. BR 15–24, may be extended by order of that court until the effective date established in subsection (a) [that is, one year after the passage of this bill]

In other words, Feinstein proposes to take a dragnet collecting the phone records of all Americans, and extend it for an entire year, when even a Pen Register targeting an individual would need to be formally renewed.