

DOJ DOESN'T CARE WHAT THE TEXT OF THE LAW OR THE 2ND CIRCUIT SAYS, DRAGNET EDITION

Since USA F-ReDux passed JustSecurity has published two posts about how the lapse of Section 215 might create problems for the dragnet. Megan Graham argued that technically USA F-ReDux would have amended Section 215 as it existed in 2001, meaning the government couldn't obtain any records but those that were specifically authorized before the PATRIOT Act passed. And former SSCI staffer Michael Davidson argued that a technical fix would address any uncertainty on this point.

DOJ, however, doesn't much give a shit about what USA F-ReDux actually amends. In its memorandum of law accompanying a request to restart the dragnet submitted the night USA F-ReDux passed, DOJ asserted that of course Section 215 as it existed on May 31 remains in place.

Its brief lapse notwithstanding, the USA FREEDOM Act also expressly extends the sunset of Section 215 of the USA PATRIOT Act, as amended, until December 15, 2019, *id.* § 705(a), and provides that, until the effective date of the amendments made by Sections 101 through 103, it does not alter or eliminate the Government's authority to obtain an order under Section 1861 as in effect prior to the effective date of Sections 101 through 103 of the USA FREEDOM Act. *Id.* § 109(b). Because the USA FREEDOM Act extends the sunset for Section 215 and delays the ban on bulk production under Section 1861 until 180 days from its enactment, the Government

respectfully submits that it may seek and this Court may issue an order for the bulk production of tangible things under Section 1861 as amended by Section 215 of the USA PATRIOT Act as it did in docket number BR 15-24 and prior related dockets.

It cites comments Pat Leahy and Chuck Grassley made on May 22 (without, curiously, quoting either Rand Paul or legislative record from after Mitch McConnell caused the dragnet to lapse) showing that the intent of the bill was to extend the current dragnet.

While I think most members of Congress would prefer DOJ's argument to hold sway, I would expect a more robust argument from DOJ on this point.

Likewise their dismissal of the Second Circuit decision in *ACLU v. Clapper* (which they say they're still considering appealing). While it notes the Second Circuit did not immediately issue an injunction, DOJ's base argument is weaker: it likes FISC's ruling better and so it thinks FISC's District Court judges should consider but ultimately ignore what the Second Circuit said.

The Government believes that this Court's analysis of Section 215 reflects the better interpretation of the statute, see, e.g., *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, docket no. BR 13-109, Amended Mem. Op., 2013 WL 5741573 (FISA Ct. Aug. 29, 2013) (Eagan, J.) and *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, docket no. BR 13-158, Mem. (FISA Ct. Oct. 11, 2013) (McLaughlin, J.), disagrees with the Second Circuit panel's opinion, and submits that the request for renewal of the bulk production authority is authorized under the statute as noted

above.

[snip]

The Government submits that this Court's analysis continues to reflect the better reading of Section 1861.

This is where, incidentally, the flaccid report language attached to USA F-ReDux is so problematic. In a filing affirming the importance of legislative language, had the HJC report said something more than "Congress' decision to leave in place the "relevance" standard for Section 501 orders should not be construed as Congress' intent to ratify the FISA Court's interpretation of that term," DOJ might have to take notice of the language. But as it is, without affirmatively rejecting FISC's opinion, the government will pretend it doesn't matter.

I'm no more surprised with DOJ's argument about the Second Circuit decision than I am its insistence that lapsing a bill doesn't have legal ramifications.

But I would expect both arguments to make some effort to appear a bit less insolent. I guess DOJ is beyond that now.