IN REAUTHORIZING THE DRAGNET, FISC MAKES A MOCKERY OF THE AMICUS PROVISION

Between a [ruling by Dennis Saylor issued on June 17](), while I was away, and a [ruling by Michael Mosman issued and released today](), the FISA Court has done the predictable: ruled both that the lapse of the PATRIOT Act on June 1 did not mean the law reverted to its pre-PATRIOT status (meaning that it permitted collection of records beyond hotel and rental car records), and ruled that the dragnet can continue for 6 more months.

In other words, the government is back in the business of conducting a domestic dragnet of phone records. Huzzah!

As I said, the FISC's ultimate rulings — that it will treat USA F-ReDux as if it passed before the lapse (a fair but contestable opinion) and that it will permit the dragnet to resume for 6 months — are unsurprising. It's how they get there, and how they deal with the passage of USA F-ReDux and the rebuke from the 2nd Circuit finding the dragnet unlawful, that I find interesting.

Reading both together, in my opinion, shows how increasingly illegitimate the FISC is making itself. It did so in two ways, which I'll address in two posts. In this one, I'll treat the FISC's differing approaches to the amicus provision.

USA F-ReDux was a deeply flawed bill (and some of my predictions about its weaknesses are already being fulfilled). But it was also intended as a somewhat flaccid critique of the FISC, particularly with its weak requirement for an amicus and its stated intent, if not an effective implementation, to rein in bulk collection.

Congress at least claimed to be telling the FISC it had overstepped both its general role by authorizing programmatic collection orders and its specific interpretation of Section 215. One of its solutions was a demand that FISC stop winging it.

The Court's response to that was rather surly.

A timeline may help to show why.

> June 1: Section 215 lapses
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> June 2: USA F-ReDux passes and government applies to restart the dragnet
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> June 5: Ken Cuccinelli and FreedomWorks challenge the dragnet but not resumption of post-PATRIOT Section 215 (Section 109)
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> June 5: Michael Mosman orders government response by June 12, a supplemental brief from FreedomWorks on Section 109 by June 12, immediate release of government's June 2 memorandum of law
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> June 12: Government submits its response and FreedomWorks submits its Section 109 briefing, followed by short response to government submission
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> June 17: In response to two non-bulk applications, Dennis Saylor rules he doesn't need amicus briefing to decide Section 109 question then rules in favor of restoration of post-PATRIOT Section 215
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> June 29: Michael Mosman decides to waive the 7-day application rule, decides to treat FreedomWorks as the amicus in this case while denying all other request for relief, and issues order restarting dragnet for until November 29 (the longest dragnet order ever)

After having been told by Congress FISC needs to

start consulting with an amicus on novel issues, two judges dealt with that instruction differently.

In part, what happened here (as has happened in the past, notably when Colleen Kollar-Kotelly was reviewing the first Protect America Act certifications while Reggie Walton was presiding over Yahoo's challenge to their orders) is that one FISC judge, Saylor, was ruling whether two new orders (BR 15-77 and 15-78) could be approved giving the lapse in Section 215 (which became a ruling on how to interpret Section 109) while another FISC judge, Mosman, was reviewing what to do with the FreedomWorks challenge. That meant both judges were reviewing what to do with Section 109 at the same time. On June 5, Mosman ordered up the briefing that would make FreedomWorks an amicus *without telling them they were serving as such* until today. FreedomWorks did offer up this possibility when they said they were "amenable to [designation as an amicus curiae] by this Court, as an alternative to proceeding under this Motion in Opposition," but they also repeatedly requested an oral hearing, most recently a full 17 days ago.

> The Court now turns to the Movants' alternative request to participate as amici curiae. Congress, through the enactment of the USA FREEDOM Act, has expressed a clear preference for greater amicus curiae involvement in certain types of FISC proceedings.
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> [Mosman reviews of the amicus language of the law]
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> The Court finds that the government's application "presents a novel or significant interpretation of the law" within the meaning of section 103(i)(2)(A). Because, understandably, no one has yet been designated as eligible to be appointed as an amicus curiae under section 103(i)(2)(A), appointment under that provision is not

> appropriate. Instead, the Court has chosen to appoint the Movants as amici curiae under section 103(i)(2)(B) for the limited purpose of presenting their legal arguments as stated in the Motion in Opposition and subsequent submissions to date.7
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> 7 [footnote talking about courts' broad discretion on how they use amicus]

That is, on June 29, Mosman found this circumstance requires an amicus under the law, and relied on briefing ordered way back on June 5 and delivered on June 12, while denying any hearing in the interim.

Meanwhile, in a June 17 ruling addressing what I consider the more controversial of the two questions Mosman treated — whether the lapse reverted Section 215 to its pre-PATRIOT status — Saylor used this logic to decide he didn't need to use an amicus.

> [3 paragraphs laying out how 103(i)(2)(A) requires an amicus unless the court finds it is not appropriate, while section 103(i)(2)(B) permits the appointment of an amicus]
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> The question presented here is a legal question: in essence, whether the "business records" provision of FISA has reverted to the form it took before the adoption of the USA PATRIOT Act in October 2001. That question is solely a matter of statutory interpretation; it presents no issues of fact, or application of facts to law, and requires no particular knowledge or expertise in technological or scientific issues to resolve. The issue is thus whether an amicus curiae should be appointed to assist the court in resolving that specific legal issue.
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> The legal question here is undoubtedly "significant" within the meaning of

> Section 1803(i)(2)(A). If Section 501 no longer provides that the government can apply for or obtain orders requiring the production of a broad range of business records and other tangible things under the statute, that will have a substantial effect on the intelligence-gathering capabilities of the government. It is likely “novel,” as well, as the issue has not been addressed by any court (indeed, the USA FREEDOM Act, is only two weeks old). The appointment of an amicus curiae would therefore appear to be presumptively required, unless the court specifically finds that such an appointment is “not appropriate.”
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> Because the the statute is new, the court is faced for the first time with the question of when it is “not appropriate” to appoint an amicus curiae. There is no obvious precedent on which to draw. Moreover, the court as a whole has not had an opportunity to consider or adopt any rules addressing the designation of amicus curiae.
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> The statute provides some limited guidance, in that it clearly contemplates that there will be circumstances where an amicus curiae is unnecessary (that is, “not appropriate”) even though an application presents a “novel or significant interpretation of the law.” At a minimum, it seems likely that those circumstances would include situations where the court concludes that it does not need the assistance or advice of amicus curiae because the legal question is relatively simple, or is capable of only a single reasonable or rational outcome. In other words, Congress must have intended the court need not appoint amicus curiae to point out obvious legal issues or obvious legal conclusions, even if the issue

> presented was "novel or significant." Accordingly, the court believes that if the appropriate outcome is sufficiently clear, such that no reasonable jurist would reach a different decision, the appointment of an amicus curiae is not required under the statute.
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> This is such an instance. Although the statutory framework is somewhat tangled, the choice before the court is actually clear and stark: as described below, it can apply well established principles of statutory construction and interpret the USA FREEDOM Act in a manner that gives meaning to all its provisions, or it can ignore those principles and conclude that Congress passed an irrational statute with multiple superfluous parts.

That is, 5 days after FreedomWorks submitted briefing on the particular issue in question — Section 109 — Saylor decided he did not need an amicus even though this was obviously a novel issue. While FreedomWorks only addressed one of its responses to the question of the lapse, it did argue that, "Congress was fully aware ofthe problems associated with passing the expiration date and they chose to do nothing to fix those problems."

And Saylor did not do what Mosman did, recognize that even though there wasn't an amicus position set up, the court could easily find one, even if it asked the amicus to brief under 103(i)(2)(B). Indeed, by June 17, former SSCI Counsel Michael Davidson — literally the expert on FISA sunset provisions — had written a JustSecurity post describing the lapse as a "huge problem." So by the time Saylor had suggested that "no reasonable jurist" could disagree with him, the author of the sunset provision in question had already disagreed with him. Why not invite Davidson to submit a brief?

It seems Mosman either disagrees with Saylor's conclusion about the seriousness of Congress'

“preference for greater amicus curiae involvement” (though, having read Saylor’s opinion, he does say appointment under 103(i)(2)(A) “is not appropriate,” though without adopting his logic for that language in the least), or has been swayed by the criticism of people like [Liza Goitein] and [Steve Vladeck] responding to Saylor’s earlier opinion.

All that said, having found a way to incorporate an amicus — even one not knowingly acting as such during briefing — Mosman than goes on to completely ignore what the government and JudicialWatch said about the lapse — instead just declaring that “the government has the better end of the dispute” — and to justify that judgment, simply quoting from Saylor.

> On June 1, 2015, the language of section 501 reverted to how it read on October 25, 2001. See page 2 supra. The government contends that the USA FREEDOM Act, enacted on June 2, 2015, restored the version of section 501 that had been in effect immediately before the June 1 reversion, subject to amendments made by that Act. Response at 4. Movants contend that the USA FREEDOM Act had no such effect. Supplemental Brief at 1-2. The Court concludes that the government has the better of this dispute.
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> Another judge of this Court recently held that the USA FREEDOM Act effectively restored the version of section 501 that had been in effect immediately before the June 1 sunset. See In reApplication of the FBI for Orders Requiring the Production ofTangible Things, Docket Nos. BR 15-77, 15-78, Mem. Op. (June 17, 2015). In reaching that conclusion, the Court noted that, after June 1, Congress had the power to reinstate the lapsed language and could exercise that power “by enacting any form of words” making clear “its intention to do so.” Id. at 9

> (internal quotation marks omitted). The Court found that Congress indicated such an intention through section 705(a) of the USA FREEDOM Act, which amended the pertinent sunset clause8 by striking the date "June 1, 2015," and replacing it with "December 15, 2019." Id. at 7-9. Applying fundamental canons of statutory interpretation, the Court determined that understanding section 705(a) to have reinstated the recently-lapsed language of section 501 of FISA was necessary to give effect to the language of the amended sunset clause, as well as to amendments to section 501 of FISA made by sections 101 through 107 of the USA FREEDOM Act, and to fit the affected provisions into a coherent and harmonious whole. Id. at 10-12. The Court adopts the same reasoning and reaches the same result in this case.

JudicialWatch's argument was the mirror image of Saylor's — that "Congress was fully aware of the problems associated with passing the expiration date and they chose to do nothing to fix those problems" — and yet Mosman doesn't deal with it in the least. His colleague had ruled, and so the government must have the better side of the argument.

That's basically the logic Mosman uses on the underlying question, which I hope to return to. Even in making a symbolic nod to the amicus, Mosman is still engaging in the legally suspect navel gazing that has become the signature of the FISC.

Mind you, I'm not surprised by all this. That was very clearly what was going to happen to the amicus, and one reason why [I said it'd be likely a 9-year process]() until we had an advocate that would make the FISC a legitimate court.

But this little exhibition of navel gazing has only reinforced my belief that we should not wait that long. There is no reason to have a

FISC anymore, not now that virtually every District court has the ability to conduct the kind of classified reviews that FISC judges do. And as we're about to see (Jameel Jaffer promised he's going to ask the 2nd Circuit for an injunction today), the competing jurisdictions that in this case let District Court judges dismiss Appellate judges as less preferable than the government are going to create legal confusion for the foreseeable future (though one the government and FISC are likely going to negate by using the new fast track review process I warned about).

The FISC is beyond saving. We should stop trying.