

Q: WHOSE SECRETS ARE MORE SENSITIVE THAN THE DC MADAM'S? A: NSA'S.

On September 17, FISC Judge Michael Mosman appointed the first known amicus under the terms laid out in USA F-ReDux; notice of which got posted yesterday (Mosman could have done so before USA F-ReDux, of course, but he did cite the statute in making the appointment). The question this amicus will help him determine is whether FISC should permit the government to retain bulk collected data past November 28, when the six month extension of the program ends. The government wants to retain the data it is collecting today for three months to make sure the new dragnet program collects the same data as the last one. But the data in question also includes data being held under an old protection order renewed last year as part of EFF's suits against government dragnets; I suspect that data would show the extent to which one of the plaintiffs in EFF's *First Unitarian Church* suit was dragnetted, and as such is critical to showing injury in that suit.

Mosman had deferred the decision on whether or not to let the government keep that data when he signed the August 28 dragnet order.

So who is the lawyer who will represent the interests of civil liberties and privacy in this question? [Update: In this post, I note Mosman may not have appointed Burton to represent privacy at all.]

White collar defense attorney Preston Burton. In addition to Russian moles Aldrich Ames and Robert Hanssen, Burton represented Monica Lewinsky and the DC Madam, Deborah Jeane Palfrey.

Burton is, undoubtedly, an excellent lawyer. And his experience representing the biggest spies of

the last several decades surely qualifies him to work with the phone dragnet data, including data that probably shows NSA mapped out an entire civil liberties' organization's structure using the phone dragnet 5 years ago. Though given this description, it's not clear Burton would learn of that information from the government's application, which is what he'll get.

Pursuant to 50 U.S.C. § 1803(i)(6)(A)(i), the Court has detennined that the government's application (including exhibits and attachments) and the full, unredacted Primary Order in this docket are relevant to the duties of the amicus. By September 22, 2015, or after receiving confirmation from SEPS that the amicus has received the appropriate clearances and access approvals for such materials, whichever is later, the Clerk of the Court shall make these materials available to the amicus.

Moreover, remember the government can claim privilege over this data and not share it with Burton. Mosman even invited the government to tell the Court sharing information with Burton was not consistent with national security (though he set a deadline for doing so for September 21, so I assume they did not complain).

But it's entirely unclear to me why Burton would be picked to represent the privacy interests of Americans, including those whose First Amendment rights had been violated under this program, in deciding whether to keep or destroy this data. Mosman made no mention of those interests when he explained his choice.

Mr. Burton is well qualified to assist the Court in considering the issue specified herein. The Security and Emergency Planning Staff (SEPS) of the Department of Justice has advised that he is eligible for access to classified

information.

Which is why I take this to be one more in the series of Burton's famous clients, in which discretion about DC's secrets is the most important factor.