

THE AWKWARD TIMING OF THE 2ND CIRCUIT DENIAL OF ACLU'S REQUEST FOR A PHONE DRAGNET INJUNCTION

The 2nd circuit just denied the ACLU's request for an injunction in the phone dragnet, finding that Congress intended to let the dragnet continue for 6 months after passage of USA F-ReDux.

That's not all that surprising, but it also means the 2nd circuit is dodging constitutional issues for now (in part by claiming Congress had adopted their reasoning on the meaning of "relevant to," which it did not; I will return to this).

But the court remanded the case on one main issue: what happens on November 29, when the 6 month transition period ends.

Appellants and the government disagree, however, regarding the mootness of the final relief requested after November 29: an injunction that would require the government to end the telephone metadata program and purge records collected unlawfully. Appellants argue that the government intends to retain the records "indefinitely," and are under no outside obligation to purge them, and thus that their claims for relief will not become moot on November 29. The government argues that the claims will be moot on November 29, because the telephone metadata program will cease at that time, and an order enjoining the telephone metadata program will have no effect.

Further, the government notes that the Office of the Director of National

Intelligence has announced that the government will not use § 215 data for law enforcement or investigatory purposes after November 29. See Statement by the ODNI on Retention of Data Collected Under Section 215 of the USA PATRIOT Act (July 27, 2015). Additionally, the government states that it will destroy all records as soon as possible after the government's litigation-preservation obligations end, *id.*, and thus Appellants' requests that their information no longer be queried and that their records be purged will also be moot.

[snip]

We do not address whether Appellants' claims will become moot on November 29, and leave this, and all other remaining questions, to the district court in the first instance.

While I don't expect much to come of this question either, it is rather awkward that the court has chosen to remand that decision *today*, of all days.

As it is, the 2nd circuit misses one development in this case, which is that after declaring on July 27 that they were going to keep the data but not use it for law enforcement purposes, the FISC then refused the government's request to just rubber stamp that decision. So the question of what will happen with the data is still being review at the FISC.

Not only that, but today is also the deadline Michael Mosman set for FISC-appointed amicus Preston Burton to submit his first brief on this question.

So Burton will submit something – there's no reason to think we'll get to see all of his brief – without the benefit of knowing that ACLU may still contest whatever he argues for

regarding the use of the data past November 29.
And of course, one reason the government may
need to keep that data past November 29 is
because EFF has a protection order that requires
they keep it for their lawsuit(s).

That still doesn't mean anything all that
interesting will come of this, but we do have
two courts addressing the same question at the
same time, without full notice of the other.