THE SECOND CIRCUIT ATTEMPTS TO REASSERT ITS NON-DEFINITION OF RELEVANT

Orin Kerr and Steve Vladeck got in a bit of a squabble last week over the Second Circuit's decision not to reach the constitutionality of the phone dragnet. Vladeck called it wrong-headed, because even if the constitutional injury of the dragnet is temporary (that is, only until November 29), it's the kind of injury that can recur. Kerr reads both this — and the Second Circuit's original opinion — to be nothing more than a pragmatic nudge to Congress. "If you liked that opinion, it's a little hard to object to the Second Circuit's pragmatic, politically savvy, we-got-Congress-to-act-on-this-so-we're-done moves in the second opinion."

But I think both are misreading what the Second Circuit tried to do with this.

Take Kerr's suggestion that the initial ruling from the Second Circuit got Congress to act. He doesn't say what he means by that (or which civil libertarians he had in mind when asserting that). The earlier decision certainly added pressure to get the bill through Congress.

But look at how Gerard Lynch, in his opinion, describes the relationship: Congress not just passed a bill to prohibit bulk telephone collection, but it "endorsed our understanding of the key term 'relevance.'"

> Congress passed the Freedom Act in part to prohibit bulk telephone metadata collection, and in doing so endorsed our understanding of the key term "relevance." See H.R. Rep. No. 114-109, at 19.

Lynch goes on to cite the House report on the

bill to support this claim.

> Section 103 of the Freedom Act, titled "Prohibition on Bulk Collection of Tangible Things," states that "[n]o order issued under this subsection may authorize the collection of tangible things without the use of a specific selection term" that meets certain requirements. Id. The purpose of § 103 is to "make[] clear that the government may not engage in indiscriminate bulk collection of any tangible thing or any type of record." H.R. Rep. No. 114-109, pt. 1, at 18 (2015). Section 103 is also intended to "restore meaningful limits to the 'relevance' requirement of Section 501, consistent with the opinion of the U.S. Court of Appeals for the Second Circuit in ACLU v. Clapper." Id. at 19.

He cites language point to an entire section that the House says will restore limits to the relevance requirement of a section of a law "consistent" with his own earlier opinion.

All that said, it's not clear that USA F-ReDux, as written, does do that. That's true, first of all, because while the House report specifically states, "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" (Lynch cites this language in his opinion), it also doesn't state that Congress intended to override that definition. What the bill did instead was leave the word "relevant" (still potentially meaning "all" as FISC defined it) in place, but place additional limits for its application under FISA.

Moreover, I'm not convinced the limits as written in USA F-ReDux accomplish all that the Second Circuit's earlier opinion envisioned, which is perhaps best described in the ways the dragnets didn't resemble warrants or subpoenas.

> Moreover, the distinction is not merely one of quantity — however vast the quantitative difference — but also of quality. Search warrants and document subpoenas typically seek the records of a particular individual or corporation under investigation, and cover particular time periods when the events under investigation occurred. The orders at issue here contain no such limits. The metadata concerning every telephone call made or received in the United States using the services of the recipient service provider are demanded, for an indefinite period extending into the future. The records demanded are not those of suspects under investigation, or of people or businesses that have contact with such subjects, or of people or businesses that have contact with others who are in contact with the subjects — they extend to every record that exists, and indeed to records that do not yet exist, as they impose a continuing obligation on the recipient of the subpoena to provide such records on an ongoing basis as they are created.

Even setting aside my concern that USA F-ReDux only explicitly prohibits the use of communications company names like Verizon and AT&T as a specific selection term — thus leaving open the possibility FISC will continue to let the government use financial company names as specific selection terms — USA F-ReDux certainly envisions the government imposing "a continuing obligation on the recipient of the subpoena to provide such records on an ongoing basis." It also permits the collection of records that "are not those of suspects under investigation."

In other words, Lynch used this second opinion to do more than say the Second Circuit was "done with it." He used it to interpret USA F-ReDux — and the word "relevant" generally, outside of

FISA, and to do so in ways that go beyond the clear language of the bill.

Vladeck is wrong when he suggested the Second Circuit would assess "whether and to what extent the Fourth Amendment applies to information we voluntarily provide to third parties" — that is, the Third Party Doctrine generally. The Second Circuit made it quite clear throughout that they were interested in the application of "relevant," not whether the Third Party Doctrine still applied generally, which is probably why Lynch isn't that worried about the injury recurring.

And I think Lynch used this opinion — one the government can't really appeal — to suggest the application of USA F-ReDux is broader than it necessarily is, and to suggest the narrowing of "relevant to" is more general than it would be under USA F-ReDux (which applies just to certain sections of FISA, but not to the definition of "relevant" generally).

It's not clear how useful the opinion will be in restricting other over-broad uses of the word "relevant" (especially given DEA claims it has eliminated its dragnet). But I do suspect, having interpreted the law as having narrowed the meaning of the law, Lynch felt like he had limited the egregious constitutional injury.