# DOJ SAYS YOU CAN'T KNOW IF THEY'VE USED THE DRAGNET AGAINST YOU … BUT FISC SAYS THEY'RE WRONG

As I noted the other day in yet another post showing why investigations into intelligence failures leading up to the Boston Marathon attack must include NSA, the government outright refuses to tell Dzhokhar Tsarnaev whether it will introduce evidence obtained using Section 215 at trial.

> Tsarnaev's further request that this Court order the government to provide notice of its intent to use information regarding the ". . . collection and examination of telephone and computer records pursuant to Section 215 . . ." that he speculates was obtained pursuant to FISA should also be rejected. Section 215 of Pub. L. 107-56, conventionally known as the USA PATRIOT Act of 2001, is codified in 50 U.S.C. § 1861, and controls the acquisition of certain business records by the government for foreign intelligence and international terrorism investigations. It does not contain a provision that requires notice to a defendant of the use of information obtained pursuant to that section or derived therefrom. Nor do the notice provisions of 50 U.S.C. §§ 1806(c), 1825(d), and 1881e apply to 50 U.S.C § 1861. Therefore, even assuming for the sake of argument that the government possesses such evidence and intends to use it at trial, Tsarnaev is not entitled to receive the notice he requests.

This should concern every American whose call records are likely to be in that database, because the government can derive prosecutions — which may not even directly relate to terrorism — using the digital stop-and-frisk standard used in the dragnet, and never tell you they did so.

Note, too, Dzhokhar's lawyers are not just asking for phone records, but also computer records collected using Section 215, something Zoe Lofgren has made clear can be obtained under the provision.

And in the case in which Dzhokhar's college buddies are accused of trying to hide his computer and some firecracker explosives, prosecutors profess to be unable to provide any of the text messages Dzhokhar sent after his last text to them. That stance seems to pretend they couldn't get at least the metadata from those texts from the phone dragnet.

The government, then, claims that defendants can't have access to data collected using Section 215. They base that claim on the absence of any language in the Section 215 statute, akin to that found in FISA content collection statutes, providing for formal notice to defendants.

But at least in the case of the phone dragnet, that stance appears to put them in violation of the dragnet minimization procedures. That's because since at least September 3, 2009 and continuing through the last dragnet order released (note, ODNI seems to be taking their time on releasing the March 28 order), the minimization procedures have explicitly provided a way to make the query results available for discovery. Here's the language from 2009.

> Notwithstanding the above requirements, NSA may share information derived from the BR metadata, including U.S. person identifying information, with Executive Branch personnel in order to enable them to determine whether the information contains exculpatory or impeachment

> information or is otherwise discoverable in legal proceedings.

The government routinely points to these very same minimization procedures to explain why it can't provide information to Congress or other entities. But if the minimization procedures trump other statutes to justify withholding information, surely they must have the weight of law for disclosure to criminal defendants. And all that's before you consider the Brady and Constitutional reasons that should trump the government's interpretation as well.

Using the formulation the government always uses when making claims about the dragnet's legality, on at least 21 occasions, FISC judges have envisioned discovery to be part of the minimization procedures with which the government must comply. At least 7 judges have premised their approval of the dragnet, in part, on the possibility exculpatory information may be shared in discovery.

Now, there is a limit to the discovery envisioned by these 21 FISA orders; this discovery language, in the most recently published order, reads:

> Notwithstanding the above requirements, NSA may share results from intelligence analysis queries of the BR metadata, including U.S. person identifying information, with Executive Branch personnel (1) in order to enable them to determine whether the information contains exculpatory or impeachment information or is otherwise discoverable in legal proceedings …

That is, this discovery language only includes the "results from intelligence analysis queries." It doesn't permit new queries of the entire database, a point the government makes over and over. But in the case of the Marathon bombing, we know the queries have been run,

because Executive Branch officials have been bragging about the queries they did after the bombing that gave them “peace of mind.”

Those query results are there, and the FISC judges explicitly envisioned the queries to be discoverable. And yet the government, in defiance of the minimization procedures they claim are sacred, refuse to comply.