

MICHAEL MOSMAN'S DEADLINES RAISE (MORE) QUESTIONS ABOUT THE FISC ADVOCATE

In the series of letters purporting to speak for “the judiciary,” Director of the Administrative Office of US Courts John Bates and (after Duff replaced him) James Duff expressed concern about how a FISC amicus would affect the timeliness of proceedings before the court. Bates worried that any involvement of an amicus would require even more lead time than the current one week requirement in FISC applications. He also worried that the presumption an amicus (and potentially tech experts) would have access to information might set off disputes with the Executive over whether they could really have it. Duff apparently worried that the perception that an amicus would oppose the government would lead the government to delay in handing over materials to the FISC.

Which is why I’m interesting in the briefing order Chief FISC Judge Thomas Hogan, signing for Michael Mosman, issued on Wednesday (see below for a timeline).

Back on September 17, Mosman appointed spook lawyer Preston Burton amicus. As part of that order, he gave the government 4 days to refuse to share information with Burton, but otherwise required Burton receive the application and primary order in this docket.

(Pursuant to 50 U.S.C. § 1803(i)(6)(A)(i), the Court has determined 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.

Yet even after the almost month long delay in deciding to appoint someone and deciding that someone would be Burton, it still took Mosman two weeks after the date when Burton was supposed to have received the relevant information on this issue before setting deadlines. And in setting his deadlines, Mosman has basically left himself only 2 weeks during which time he will have to decide the issue and the government will have to prepare to keep or destroy the data in question (in past data destruction efforts it has taken a fairly long time). That could be particularly problematic if Mosman ends up requiring the government to pull the data from EFF's clients from the data retained under their protection order.

On November 28, the order authorizing the retention of this data expires.

To be fair, Mosman is definitely making a more concerted effort to comply with the appearance if not the intent of USA F-ReDux's amicus provision than, say, Dennis Saylor (who blew it off entirely). And there may be aspects of this process – and FISC's presumed effort to start coming up with a panel of amici by November 29 – that will take more time than future instances down the road.

Still, it's hard to understand the almost 3 week delay in setting a briefing schedule.

Unless the government slow-walked giving even a spook lawyer not explicitly ordered to represent the interests of privacy approval to receive and then a packet of documents to review.

I suspect this represents a stall by the government, not FISC (though again, the month

long delay in deciding to appoint an amicus didn't help things, and FISC's thus far 4 month delay in picking amici likely doesn't help either). But whatever the cause of the delay, it may indicate a reluctance on someone's part to use the amicus as intended.

Timeline

July 27: ODNI declares that "NSA has determined" that "NSA will allow technical personnel to continue to have access to the historical metadata for an additional three months"

By August 20: Government asks for permission to retain data past November 28 (the government must submit major FISA orders at least a week in advance)

August 27: Mosman approves dragnet order, defers decision on data retention

September 17: Mosman appoints Burton and orders the government to cough up its application and the full order

September 21: Last date by which government can complain about sharing information with Burton

September 22: Date by which Burton must receive application and order

October 7: Mosman sets deadlines

October 29: Deadline for Burton's first brief

November 6: Deadline for Government response

November 10: Deadline for Burton reply, if any

November 28: Expiration of authorization to retain data