

GARR KING'S MOHAMUD DECISION: CLASSIFYING THE UNCLASSIFIED DETAILS OF SECTION 215

There are a lot of appalling things Garr King did in his opinion denying Mohamed Osman Mohamud any of a number of remedies for the government not having revealed he was caught using Section 702.

King gives far too much credence to the government's farcical claims about why they didn't disclose the 702 surveillance back when they disclosed the traditional FISA surveillance. I think King's portrayal of the FISA Court contradicts itself – and the public record – from paragraph to paragraph (see the last paragraph on 18 and the first on 19, especially). The Third Party argument used for content (see page 40) is pretty crazy, and the minimization procedures discussion (page 41) is ripe for challenge under Chief Justice John Roberts' insistence that "protocols" are not the protection from General Warrants our Founders fought a Revolution for (and even King seems unpersuaded by the Government's arguments about back door searches on page 43).

But King's craziest move is to hide his argument for rejecting Mohamud's challenge to Section 215 collection.

Defendant raises concerns about the collection of telephone metadata under § 215 of the Patriot Act, codified at 50 U.S.C. § 1861, and any other still-secret warrantless surveillance programs. He assumes there is a strong possibility that his telephone metadata has been collected, and he asks the court to

address the lawfulness of these programs, conclude they violate the First and Fourth Amendments, and suppress all fruits of these other surveillance activities.

I deny defendant's arguments concerning § 215 for the reasons stated in the classified opinion.

It seems to me the proper responses to this question should have been a standing argument (he has no proof he was surveilled, even though we all were) or an unclassified discussion, as Jeffery Miller managed in the Basaaly Moalin case. But to put this discussion of a program that the government claims it has substantially declassified in a classified opinion seems to confirm 215 was used, but deprives Mohamud of challenging the new details about its use the government likely provided.

I suspect it is likely that the government has used Moalin's call records just like James Clapper admitted they do from the start, as a kind of index to find the content of interest. If I'm right, King's discussion of it would pertain directly to his wobbly support for back door searches. And it would show just how outrageous the phone dragnet is – because it basically amounts to content "collection" without a warrant (which brings us back to King's crazypants treatment of content as if it fell under the Third Party doctrine).

We have now had at least 4 cases assessing the constitutionality of the phone dragnet decided in largely unclassified fashion, including another criminal defendant.

And yet the first defendant who might challenge the way Section 215 is likely yoked to Section 702 somehow loses the right to have an adversarial discussion about it.

That seems to betray just how damaging such a discussion might be to the government's claims.