“WHAT ELSE HAVEN’T YOU LET US KNOW?” 2ND CIRCUIT ASKS DOJ

Well into today’s argument over ACLU v. Clapper, the ACLU’s challenge to the government’s phone dragnet, one of the judges — Robert Sack — pointed out the discussion we’re having all stems from documents the government was forced to release after the Edward Snowden leaks.

It was itself telling — not least because DOJ Civil Division AAG Stuart Delery at times proclaimed not to know the answers to the questions the judges posed, questions I know the answer to. For example, Delery claimed, at first, not to know of instances when the FISA Court ruled more harshly than the government; and when he ultimately did admit to those instances, he didn’t admit that some of them involved systematic abuses. He also dodged questions about whether the government could get financial records, which we know they do (and James Cole has testified they could).

It was all the more telling, however, given that two of the judges on the panel — Gerard Lynch and Sack — had ruled against the government in Amnesty v. Clapper, ACLU’s challenge to the Section 702 program. As you’ll recall, to get SCOTUS to overturn that ruling, DOJ lied to the Supreme Court about what kind of notice it gave to defendants under Section 702. Snowden’s leaks led to a change in DOJ’s notice policy to actually come closer — but not actually match —what DOJ had claimed before SCOTUS (they’re still not giving notice to all defendants). At one point, Lynch said something like, “We weren’t as familiar [with 702] as the Supreme Court thought we should have been.”

These judges have reason to be skeptical about DOJ’s claims about their own surveillance programs. Which is probably why Sack asked (after 1:36), “That’s what you’ve let us know.

What else haven't you let us know?"

Much of the hearing went like I expected. ACLU's Alex Abdo argued both that the court has the authority to overturn the dragnet based on statutory grounds, but also that it's not reasonable and therefore constitutional. He used Obama's decision to change the program to argue that the Administration recognizes that the program, as currently constituted, is not reasonable. To support an argument the program is reasonable, DOJ's Delery claimed Congress had ratified it by reauthorizing it twice. On rebuttal, Abdo noted that Congress had never seen the legal basis (because there was none, until 2013) before they allegedly "ratified" the program.

Delery's arguments were even weaker than I had expected. He argued that the courts can't intrude here because the political branches had worked out reasonable limits for this program, pointing to the minimization procedures required by the statute. Except that — as he admitted later — the FISA Court had largely influenced the minimization procedures for the program. If a Court set the minimization procedures that make it reasonable, then can't a court rule on whether that's a proper balance?

Not to mention, the statute only requires FBI have minimization procedures, not NSA, so the minimization procedures in the statute are proof the government is actually using the statute with an agency Congress did not envision using it.

Abdo returned to the centrality of minimization procedures in his closing words. He noted that if, as the government claims, Section 215 is authorized by Smith v. Maryland, then, minimization procedures are constitutionally superfluous.

> The minimization procedures that the government relies on would be constitutionally superfluous if Smith governed this case. They could collect

> the records without any of those protections in place. They could store all of them indefinitely. They could query them for any reason or no reason at all. And they could build the dossiers that they disclaim building in this case with no constitutional restrictions. A final point is that the government tries to explain why it's only asking for a narrow ruling from this court. But the legal theories that it advances are a roadmap to a world in which the government routinely collects vast quantities of information about Americans who have done absolutely nothing wrong. I don't think that's the world that Congress envisioned when it enacted Section 215. And it's certainly not the world that the framers envisioned when they crafted the Fourth Amendment.

But that would bring us to the scenario laid out by Judge Lynch (see from 59:00 to 1:06:50), in which the government could get anything held by a third party about everyone just because it could. The same argument applies to bank records and credit card records, Lynch walked Delery through the implications patiently.

> … You can collect everything there is to know about everybody and have it all in one big government cloud.
>
> [snip]
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> I just don't understand an argument as to what's so special about telephone records that makes them so valuable, so uniquely interactive or whatever, that the same arguments you're making don't apply to every record in the hands of a third party business entity of every American's everything.

As far as we know, the government has already

done this with financial records, in part under Section 215, which is one of the reasons Obama won't back off this challenge; even under USA Freedom, the government can continue to obtain Western Union's records. Add in the EO 12333 collections, and the government is well on its way to the nightmarish scenario both Lynch and Abdo laid out.

In any case, Judge Lynch (more likely his clerks) seems to have done his homework. He seems to have a sense not only where this could go, but where it already has. And while he repeatedly talked about narrow rulings — if I had to guess, I think he might prefer to rule the "relevant" interpretation Bates-stamped by the FISA Court unconstitutional than ruling the entire program so — he gets that this program is a constitutional atrocity.

The question is whether he can write a ruling that will withstand SCOTUS review, this time.