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The Surveillance State. NSA Telephony Metadata Collection: Fourth Amendment Violation

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Edward Snowden, who worked for the National Security Agency (NSA), revealed a secret order of the Foreign Intelligence Surveillance Court (FISC), that requires Verizon to produce on an "ongoing daily basis ... all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."

The government has admitted it collects metadata for all of our telephone communications, but says the data collected does not include the content of the calls.

In response to lawsuits challenging the constitutionality of the program, two federal judges issued dueling opinions about whether it violates the Fourth Amendment's prohibition on unreasonable searches and seizures.

Judge Richard J. Leon, of the US District Court for the District of Columbia, held that the metadata program probably constitutes an unconstitutional search and seizure. Judge William H. Pauley III, of the US District Court for the Southern District of New York, determined that it does not violate the Fourth Amendment.

Leon's opinion

Leon wrote, "Because the Government can use daily metadata collection to engage in 'repetitive surreptitious surveillance of a citizen's private goings on,' the 'program implicates the Fourth Amendment each time a government official monitors it.'" The issue is "whether plaintiffs have a reasonable expectation of privacy that is violated when the Government indiscriminately collects their telephony metadata along with the metadata of hundreds of millions of other citizens without any particularized suspicion of wrongdoing, retains all of that metadata for five years, and then queries, analyzes, and investigates that data without prior judicial approval of the investigative targets. If they do—and a Fourth Amendment search has thus occurred—then the next step of the analysis will be to determine whether such a search is 'reasonable.'" The first determination is whether a Fourth Amendment "search" has occurred. If so, the second question is whether that search was "reasonable."

The judicial analyses of both Leon and Pauley turn on their differing interpretations of the 1979 U.S. Supreme Court decision, Smith v. Maryland. In Smith, a robbery victim reported she had received threatening and obscene phone calls from someone who claimed to be the robber. Without obtaining a warrant, the police installed a pen register, which revealed a telephone in the defendant's home had been used to call the victim. The Supreme Court held that a person has no reasonable expectation of privacy in the numbers dialed from his

telephone because he voluntarily transmits them to his phone company.

Leon distinguished Smith from the NSA program, saying that whether a pen register constitutes a "search" is "a far cry from the issue in [the NSA] case." Leon wrote, "When do present-day circumstances—the evolution of the Government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and telecom companies—become so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like Smith simply does not apply? The answer, unfortunately for the Government, is now."

Then Leon cited the 2012 Supreme Court case of United States v. Jones, in which five justices found that law enforcement's use of a GPS device to track the movements of a vehicle for nearly a month violated a reasonable expectation of privacy. "Significantly," Leon wrote, "the justices did so without questioning the validity of the Court's 1983 decision in United States v. Knotts, that the use of a tracking beeper does not constitute a search because '[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'" Leon contrasted the short-range, short-term tracking device used in Knotts with the constant month-long surveillance achieved with the GPS device attached to Jones's car.

Unlike the "highly-limited data collection" in Smith, Leon noted, "[t]he NSA telephony metadata program, on the other hand, involves the creation and maintenance of a historical database containing five years' worth of data. And I might add, there is the very real prospect that the program will go on for as long as America is combating terrorism, which realistically could be forever!" He called the NSA program "effectively a joint intelligence-gathering operation [between telecom companies and] the Government."

"[T]he almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979," Leon exclaimed, calling it "the stuff of science fiction." He cited Justice Scalia's opinion in Kyllo v. United States, which held the use of a thermal imaging device, that measures heat waste emanating from a house, constitutes a "search." Justice Scalia was concerned about increasing invasions of privacy occasioned by developing technology.

Leon wrote, "I cannot imagine a more 'indiscriminate' and 'arbitrary invasion' than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval."

Quoting Justice Sotomayor's concurrence in Jones, Leon noted the breadth of information our cell phone records reveal, including "familial, political, professional, religious, and sexual associations."

Having determined that people have a subjective expectation of privacy in their historical record of telephony metadata, Leon turned to whether that subjective expectation is one that society considers "reasonable." A "search" must ordinarily be based on individualized suspicion of wrongdoing in order to be "reasonable." One exception is when there are "special needs," beyond the need for ordinary law enforcement (such as the need to protect children from drugs).

"To my knowledge, however, no court has ever recognized a special need sufficient to justify

continuous, daily searches of virtually every American citizen without any particularized suspicion," Leon wrote. "In effect," he continued, "the Government urges me to be the first non-FISC judge to sanction such a dragnet."

Leon stated that fifteen different FISC judges have issued 35 orders authorizing the metadata collection program. But, Leon wrote, FISC Judge Reggie Walton determined the NSA has engaged in "systematic noncompliance" and repeatedly made misrepresentations and inaccurate statements about the program to the FISC judges. And Presiding FISC Judge John Bates noted "a substantial misrepresentation [by the government] regarding the scope of a major collection program."

Significantly, Leon noted that "the Government does not cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature."

Pauley's opinion

Pauley's analysis of the Fourth Amendment issue was brief. He explained that prior to the September 11th terrorist attacks, the NSA intercepted seven calls made by hijacker Khalid al-Mihdhar to an al-Qaeda safe house in Yemen. But the overseas signal intelligence capabilities the NSA used could not capture al-Mihdhar's telephone number identifier; thus, the NSA mistakenly concluded that al-Mihdhar was not in the United States. Pauley wrote: "Telephony metadata would have furnished the missing information and might have permitted the NSA to notify the Federal Bureau of Investigation (FBI) of the fact that al-Mihdhar was calling the Yemeni safe house from inside the United States."

> "If plumbed," Pauley noted, the telephony metadata program "can reveal a rich profile of every individual as well as a comprehensive record of people's association with one another." He noted, "the Government acknowledged that since May 2006, it has collected [telephony metadata] for substantially every telephone call in the United States, including calls between the United States and a foreign country and calls entirely within the United States."

But, unlike Leon, Pauley found Smith v. Maryland controls the NSA case. He quoted Smith: "Telephone users … typically know that they must convey numerical information to the telephone company; that the telephone company has facilities for recording this information; and that the telephone company does in fact record this information for a variety of legitimate business purposes." Thus, Pauley wrote, when a person voluntarily gives information to a third party, "he forfeits his right to privacy in the information."

While Leon's distinction between Smith and the NSA program turned on the breadth of information collected by the NSA, Pauley opined, "The collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search." And whereas Leon's detailed analysis demonstrated how Jones leads to the result that the NSA program probably violates the Fourth Amendment, Pauley failed to meaningfully distinguish Jones from the NSA case, merely noting that the Jones court did not overrule Smith.

Leon's decision is the better-reasoned opinion.

Looking ahead

This issue is headed to the Court of Appeals. From there, it will likely go the Supreme Court. The high court checked and balanced President George W. Bush when he overstepped his legal authority by establishing military commissions that violated due process, and attempted to deny constitutional habeas corpus to Guantanamo detainees. It remains to be seen whether the court will likewise refuse to cower before President Barack Obama's claim of unfettered executive authority to conduct dragnet surveillance. If the court allows the NSA to continue its metadata collection, we will reside in what can only be characterized as a police state.

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