RICHARD LEON: A PHONE DRAGNET IS NOT A SPECIAL NEED

As I noted briefly in this post, Judge RIchard Leon ruled that Judicial Watch's Larry Klayman is very likely to succeed in his suit challenging the phone dragnet on Constitutional grounds. He issued an injunction requiring NSA to take out Klayman's data, but stayed that decision pending appeal.

While many civil liberties lawyers are hailing the decision, the its strength might be measured by the fact that Mark Udall and Jim Sensenbrenner both used it as a call to pass Leahy-Sensenbrenner; they did not celebrate the demise of the dragnet itself. That is, it is almost certain that this decision will not, by itself, end the dragnet.

I suspect this ruling will serve to break the ice for other judges (there are several other suits, a number of them launched by entities — like the ACLU — that I expect to have better command of the details of the dragnet and the reasons it is unconstitutional, which may lead to a stronger opinion). And to the extent it stands (don't hold your breath) it will begin to chip away at NSA's claims that searches don't happen on collection, but on database access.

And on one point, I think Leon's ruling provides a really important baseline on the matter of special needs.

As Orin Kerr sketches out roughly here (and I agree with much of what he says about Leon's ruling), Leon basically held that Smith v. Maryland didn't apply in the era of smart phones. From there, he moved onto Fourth Amendment analysis, which involves an analysis of whether the special need of hunting terrorists merits the huge privacy infringement of collecting all phone records in the US. After reviewing the precedents on special needs, Leon

writes,

> 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. In effect, the Government urges me to be the first non-FISC judge to sanction such a dragnet.

Then Leon goes on to challenge the government's claims about the need involved.

> The Government asserts that the Bulk Telephony Metadata Program serves the "programmatic purpose" of "identifying unknown terrorist operatives and preventing terrorist attacks."
>
> [snip]
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> A closer examination of the record, however, reveals the Government's interest is a bit more nuanced—it is not merely to investigate potential terrorists, but rather, to do so *faster* than other investigative methods might allow.

Which brings him to the same issue Ron Wyden and Mark Udall keep pointing to: the NSA simply doesn't have evidence of this actually having worked.

> Yet, turning to the efficacy prong, 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. In fact, none of the three "recent episodes" cited by the Government that supposedly "illustrate the role that telephony metadata analysis can play in preventing and

> protecting against terrorist attack" involved any urgency.

Now, I actually think the NSA and FBI declarants in this case begin to hint at the real purpose of the dragnet — I'll come back to that once PACER recovers from what everyone jokes is NSA retaliation for this ruling.

But with regards to accomplishing the purpose the NSA claims the dragnet serves, there's no evidence to show. Leon finds that absent real proof that the dragnet works, Klayman's privacy interests outweigh the Government's need.

> Given the limited record before me at this point in the litigation—most notably, the utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other investigative tactics—I have serious doubts about the efficacy of the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism.
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> [snip]
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> Thus, plaintiffs have a substantial likelihood of showing that their privacy interests outweigh the Government's interest in collecting and analyzing build telephony metadata and therefore the NSA's bulk collection program is indeed an unreasonable search under the Fourth Amendment.

Now, to be clear, before Leon gets here, he has to get by Smith v. Maryland, and I agree with Kerr that his argument there isn't all that strong (though I disagree with Kerr that it couldn't be).

But one big takeaway from this ruling —whether the DC Circuit overturns it or not — is that it

will be very hard for the government to make the case that the need the dragnet serves outweighs the privacy cost.

Probably not with this ruling, but it may not be long before the government has to face up to the fact that its dragnet really hasn't shown any results.

Update: New Yorker's Amy Davidson writes, "But what his ruling does is deprive the N.S.A. of the argument of obviousness: the idea that what it is doing is plainly legal, plainly necessary, and nothing for decent people to worry about." That's about what I mean by Leon breaking the ice.