2ND CIRCUIT RULES PHONE DRAGNET EXCEEDS SECTION 215

Here's the opinion. This will be a working thread.

(27) LOL! I love this line, which was surely written for Sam Alito.

> Appellants here need not speculate that the government has collected, or may in the future collect, their call records.

(28) And they directly address Amnesty v. Clapper on the next page.

> Amnesty International does not hold otherwise. There, the Supreme Court, reversing our decision, held that respondents had not established standing because they could not show that the government was surveilling them, or thatsuch surveillance was "certainly impending." 131 S. Ct. at 1148-1150. Instead, the Supreme Court stated that respondents' standing arguments were based on a "speculative chain of possibilities" that required that: respondents' foreign contacts be targeted for surveillance; the surveillance be conducted pursuant to the statute challenged, rather than under some other authority; the FISC approve the surveillance; the government actually intercept the communications of the foreign contacts; and among those intercepted communications be those involving respondents. Id. Because respondents' injury relied on that chain of events actually transpiring, the Court held that the alleged injury was not "fairly traceable" to the statute being challenged. Id. at 1150. As to costs incurred by respondents to avoid

> surveillance, the Court characterized those costs as "a product of their fear of surveillance" insufficient to confer standing. Id. at 1152.
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> Here, appellants' alleged injury requires no speculation whatsoever as to how events will unfold under § 215 — appellants' records (among those of numerous others) have been targeted for seizure by the government; the government has used the challenged statute to effect that seizure; the orders have been approved by the FISC; and the records have been collected. Amnesty International's "speculative chain of possibilities" is, in this context, a reality.That case in no way suggested that such data would need to be reviewed or analyzed in order for respondents to suffer injury.

(38) Really interesting argument about whether secrecy can preclude standing.

> These secrecy measures, the government argues, are evidence that Congress did not intend that § 215 orders be reviewable in federal court upon suit by an individual whose metadata are collected.
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> Upon closer analysis, however, that argument fails. The government has pointed to no affirmative evidence, whether "clear and convincing" or "fairly discernible," that suggests that Congress intended to preclude judicial review. Indeed, the government's argument from secrecy suggests that Congress did not contemplate a situation in which targets of § 215 orders would become aware of those orders on anything resembling the scale that they now have. That revelation, of course, came to pass only because of an unprecedented leak of classified information. That

> Congress may not have anticipated that individuals like appellants, whose communications were targeted by § 215 orders, would become aware of the orders, and thus be in a position to seek judicial review, is not evidence that Congress affirmatively decided to revoke the right to judicial review otherwise provided by the APA in the event the orders were publicly revealed.
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> The government's argument also ignores the fact that, in certain (albeit limited) instances, the statute does indeed contemplate disclosure. If a judge finds that "there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person," he may grant a petition to modify or set aside a nondisclosure order. 50 U.S.C. § 1861(f)(2)(C)(i). Such a petition could presumably only be brought by a § 215 order recipient, because only the recipient, not the target, would know of the order before such disclosure. But this provision indicates that Congress did not expect that all § 215 orders would remain secret indefinitely and that, by providing for such secrecy, Congress did not intend to preclude targets of § 215 orders, should they happen to learn of them, from bringing suit

(42) Court argues that because telecoms get immunity their interests are not coincident with their customers'.

> As appellants point out, telecommunications companies have little incentive to challenge § 215 orders — first, because they are unlikely to want

> to antagonize the government, and second, because the statute shields them from any liability arising from their compliance with a § 215 order. See 50 U.S.C. § 1861(e). Any interests that they do have are distinct from those of their customers. The telephone service providers' primary interest would be the expense or burden of complying with the orders; only the customers have a direct interest in the privacy of information revealed in their telephone records.

(47) Court rebuts govt worry that millions of people would challenge this by pointing out that that's only because millions of people had been collected on.

> That argument, however, depends on the government's argument on the merits that bulk metadata collection was contemplated by Congress and authorized by § 215. The risk of massive numbers of lawsuits challenging the same orders, and thus risking inconsistent outcomes and confusion about the legality of the program, occurs only in connection with the existence of orders authorizing the collection of data from millions of people.

(48) Some of this is LOL funny.

> While constitutional avoidance is a judicial doctrine, the principle should have considerable appeal to Congress: it would seem odd that Congress would preclude challenges to executive actions that allegedly violate Congress's own commands, and thereby channel the complaints of those aggrieved by such actions into constitutional challenges that threaten Congress's own authority. There may be arguments in favor of such an unlikely scheme, but it cannot be said that any

> such reasons are so patent and indisputable that Congress can be assumed, in the face of the strong presumption in favor of APA review, to have adopted them without having said a word about them.

(52) Court's final kick at the claim that Congress has prohibited review.

> In short, the government relies on bits and shards of inapplicable statutes, inconclusive legislative history, and inferences from silence in an effort to find an implied revocation of the APA's authorization of challenges to government actions. That is not enough to overcome the strong presumption of the general command of the APA against such implied preclusion. Congress, of course, has the ability to limit the remedies available under the APA; it has only to say so. But it has said no such thing here. We should be cautious in inferring legislative action from legislative inaction, or inferring a Congressional command from Congressional silence. At most, the evidence cited by the government suggests that Congress assumed, in light of the expectation of secrecy, that persons whose information was targeted by a § 215 order would rarely even know of such orders, and therefore that judicial review at the behest of such persons was a non-issue. But such an assumption is a far cry from an unexpressed intention to withdraw rights granted in a generally applicable, explicit statute such as the APA.

(59) This is the key passage.

> Thus, the government takes the position that the metadata collected — a vast amount of which does not contain

> directly “relevant” information, as the government concedes — are nevertheless “relevant” because they may allow the NSA, at some unknown time in the future, utilizing its ability to sift through the trove of irrelevant data it has collected up to that point, to identify information that is relevant.5 We agree with appellants that such an expansive concept of “relevance” is unprecedented and unwarranted.
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> The statutes to which the government points have never been interpreted to authorize anything approaching the breadth of the sweeping surveillance at issue here.6 The government admitted below that the case law in analogous contexts “d[id] not involve data acquisition on the scale of the telephony metadata collection.” ACLU v. Clapper, No. 13 Civ. 3994 (S.D.N.Y. Aug. 26, 2013), ECF No. 33 (Mem. of Law of Defs. in Supp. of Mot. to Dismiss) at 24. That concession is well taken. As noted above, if the orders challenged by appellants do not require the collection of metadata regarding every telephone call made or received in the United States (a point asserted by appellants and at least nominally contested by the government), they appear to come very close to doing so. The sheer volume of information sought is staggering; while search warrants and subpoenas for business records may encompass large volumes of paper documents or electronic data, the most expansive of such evidentiary demands are dwarfed by the volume of records obtained pursuant to the orders in question here.
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> Moreover, the distinction is not merely one of quantity — however vast the quantitative difference — but also of quality. Search warrants and document subpoenas typically seek the records of

> a particular individual or corporation under investigation, and cover particular time periods when the events under investigation occurred. The orders at issue here contain no such limits. The metadata concerning every telephone call made or received in the United States using the services of the recipient service provider are demanded, for an indefinite period extending into the future. The records demanded are not those of suspects under investigation, or of people or businesses that have contact with such subjects, or of people or businesses that have contact with others who are in contact with the subjects — they extend to every record that exists, and indeed to records that do not yet exist, as they impose a continuing obligation on the recipient of the subpoena to provide such records on an ongoing basis as they are created. The government can point to no grand jury subpoena that is remotely comparable to the real-time data collection undertaken under this program.

(66) And more.

> The government's emphasis on the potential breadth of the term "relevant," moreover, ignores other portions of the text of § 215. "Relevance" does not exist in the abstract; something is "relevant" or not in relation to a particular subject. Thus, an item relevant to a grand jury investigation may not be relevant at trial. In keeping with this usage, § 215 does not permit an investigative demand for any information relevant to fighting the war on terror, or anything relevant to whatever the government might want to know. It permits demands for documents "relevant

> to an authorized investigation." The government has not attempted to identify to what particular "authorized investigation" the bulk metadata of virtually all Americans' phone calls are relevant. Throughout its briefing, the government refers to the records collected under the telephone metadata program as relevant to "counterterrorism investigations," without identifying any specific investigations to which such bulk collection is relevant. See, e.g., Appellees' Br. 32, 33, 34.8 The FISC orders, too, refer only to "authorized investigations (other than threat assessments) being conducted by the FBI . . . to protect against international terrorism," see, e.g., 2006 Primary Order at 2; Joint App'x 127, 317, merely echoing the language of the statute. The PCLOB report explains that the government's practice is to list in § 215 applications multiple terrorist organizations, and to declare that the records being sought are relevant to the investigations of all of those groups. PCLOB Report 59. As the report puts it, that practice is "little different, in practical terms, from simply declaring that they are relevant to counterterrorism in general. . . . At its core, the approach boils down to the proposition that essentially all telephone records are relevant to essentially all international terrorism investigations." Id. at 59-60. Put another way, the government effectively argues that there is only one enormous "anti-terrorism" investigation, and that any records that might ever be of use in developing any aspect of that investigation are relevant to the overall counterterrorism effort.

(70) I'll come back to this but this language on assessments could actually pose a problem for

USAF.

> The government's approach also reads out of the statute another important textual limitation on its power under § 215. Section 215 permits an order to produce records to issue when the government shows that the records are "relevant to an authorized investigation (other than a threat assessment)." 50 U.S.C. § 1861(b)(2)(A) (emphasis added). The legislative history tells us little or nothing about the meaning of "threat assessment." The Attorney General's Guidelines for Domestic FBI Operations, however, tell us somewhat more. The Guidelines divide the category of "investigations and intelligence gathering" into three subclasses: assessments, predicated investigations (both preliminary and full), and enterprise investigations. See Attorney General's Guidelines for Domestic FBI Operations 16-18 (2008), https://www.ignet.gov/sites/default/files/files/invprg1211appg1.pdf. Assessments are distinguished from investigations in that they may be initiated without any factual predication.
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> [snip]
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> In limiting the use of § 215 to "investigations" rather than "threat assessments," then, Congress clearly meant to prevent § 215 orders from being issued where the FBI, without any particular, defined information that would permit the initiation of even a preliminary investigation, sought to conduct an inquiry in order to identify a potential threat in advance. The telephone metadata program, however, and the orders sought in furtherance of it, are even more remote from a concrete investigation than the threat

> assessments that — however important they undoubtedly are in maintaining an alertness to possible threats to national security — Congress found not to warrant the use of § 215 orders. After all, when conducting a threat assessment, FBI agents must have both a reason to conduct the inquiry and an articulable connection between the particular inquiry being made and the information being sought. The telephone metadata program, by contrast, seeks to compile data in advance of the need to conduct any inquiry (or even to examine the data), and is based on no evidence of any current connection between the data being sought and any existing inquiry.

(74) As I pointed out here, this is what really concerned Lynch during the argument.

> The interpretation urged by the government would require a drastic expansion of the term "relevance," not only with respect to § 215, but also as that term is construed for purposes of subpoenas, and of a number of national security-related statutes, to sweep further than those statutes have ever been thought to reach. For example, the same language is used in 18 U.S.C. § 2709(b)(1) and 20 U.S.C. § 1232g(j)(1)(A), which authorize, respectively, the compelled production of telephone toll-billing and educational records relevant to authorized investigations related to terrorism. There is no evidence that Congress intended for those statutes to authorize the bulk collection of every American's toll-billing or educational records and to aggregate them into a database — yet it used nearly identical language in drafting them to that used in § 215. The interpretation that the

> government asks us to adopt defies any limiting principle. The same rationale that it proffers for the "relevance" of telephone metadata cannot be cabined to such data, and applies equally well to other sets of records. If the government is correct, it could use § 215 to collect and store in bulk any other existing metadata available anywhere in the private sector, including metadata associated with financial records, medical records, and electronic communications (including e-mail and social media information) relating to all Americans.
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> Such expansive development of government repositories of formerly private records would be an unprecedented contraction of the privacy expectations of all Americans. Perhaps such a contraction is required by national security needs in the face of the dangers of contemporary domestic and international terrorism. But we would expect such a momentous decision to be preceded by substantial debate, and expressed in unmistakable language. There is no evidence of such a debate in the legislative history of § 215, and the language of the statute, on its face, is not naturally read as permitting investigative agencies, on the approval of the FISC, to do any more than obtain the sorts of information routinely acquired in the course of criminal investigations of "money laundering [and] drug dealing."

(78) This language on ratification may be as important as the language on "relevant to."

> Third, as the above precedents suggest, the public nature of an interpretation plays an important role in applying the doctrine of legislative ratification. The Supreme Court has

> stated that "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982) (internal quotation marks omitted); see also United States v. Chestman, 947 F.2d 551, 560 (2d Cir. 1991). Congressional inaction is already a tenuous basis upon which to infer much at all, even where a court's or agency's interpretation is fully accessible to the public and to all members of Congress, who can discuss and debate the matter among themselves and with their constituents. But here, far from the ordinarily publicly accessible judicial or administrative opinions that the presumption contemplates, no FISC opinions authorizing the program were made public prior to 2013 – well after the two occasions of reauthorization upon which the government relies, and despite the fact that the FISC first authorized the program in 2006.

Sack concurrence (11)

> It may be worth considering that the participation of an adversary to the government at some point in the FISC's proceedings could similarly provide a significant benefit to that court. The FISC otherwise may be subject to the understandable suspicion that, hearing only from the government, it is likely to be strongly inclined to rule for the government. And at least in some cases it may be that its decision-making would be improved by the presence of counsel opposing the government's assertions

> before the court. Members of each branch of government have encouraged some such development.