DID THE SECOND CIRCUIT DECISION ALSO BLOW UP SPCMA?

In a post on last week's Second Circuit opinion finding NSA's Section 215 phone dragnet unlawful, Faiza Patel observed that the government may have problems with the court's ruling that a seizure of metadata can constitute an injury. She points to DOD directive 5240.1-R as a rule that may be impacted.

> Second, as Jennifer Daskal explained last Friday, "collection matters." The Second Circuit rejected the government's contention that there was no cognizable injury until plaintiffs' phone records were actually analyzed and reviewed. It ruled that collection is properly analyzed as "seizure," which if unlawful constitutes a separate injury from the "search" that takes place when records are analyzed either by a human being or a computer.
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> As the Supreme Court has recognized, in Fourth Amendment cases the analysis of standing is intertwined with the merits question of whether there has been an invasion of a protected privacy interest. Thus, the Second Circuit's position on collection could have serious implications for other government programs beyond the standing question.
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> [snip]
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> Another set of programs for which "collection matters" are those conducted under Executive Order 12,333. Department of Defense directive 5240.1-R, which sets out procedures for intelligence activities that affect U.S. persons, states:

> > Information shall be considered as "collected" only when it has been received for use by an employee of a DoD intelligence component in the course of his official duties … Data acquired by electronic means is "collected" *only when it has been processed into intelligible form*. (Emphasis added.)
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> Although the directive does not explain what constitutes an "intelligible form" of electronic data, another regulation (USSID 18) states that information becomes "intelligible" and is therefore "collected" when a NSA analyst "intentional[ly] task[s] or select[s]" a communication of interest for "inclusion in a report or retention as a file record." This is a critical distinction because protections for US persons under Executive Order 12,333, Presidential Policy Directive 28, and subsidiary regulations are triggered when information is "collected" per the government's definition.

All the caveats about not being a lawyer, I think there's a subset of practices under 5240.1-R that may be particularly acutely affected: SPCMA, the authority that the NSA uses to contact (and, presumably, connection) chain on US person metadata collected overseas.

As I pointed out here, OIPR (during a period when it was headed by current FBI General Counsel James Baker) originally informally advised that NSA had to stop chaining when it hit a US person. But then, a rather suspiciously short period after Baker left in 2007, Steven Bradbury and Ken Wainstein came up with a theory whereby such data did not count as an acquisition — because it had already been collected — and therefore could be chained through.

> The fourth definition of electronic surveillance involves "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication …. " 50 U.S.C. § 1802(f)(2). "Wire communication" is, in turn, defined as "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier …. " !d. § 1801 (1). The data that the NSA wishes to analyze already resides in its databases. The proposed analysis thus does not involve the acquisition of a communication "while it is being carried" by a connection furnished or operated by a common carrier. (S//SI)
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> [snip]
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> The current DOD procedures and their Classified Annex may be read to restrict NSA's ability to conduct the desired communications metadata analysis, at least with respect to metadata associated with United States persons. In particular, this analysis may fall within the procedures' definitions of, and thus restrictions on, the "interception" and "selection" of communications.
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> Accordingly, the Supplemental Procedures that would govern NSA's analysis of communications metadata expressly state that the DOD Procedures and the Classified Annex do not apply to the analysis of communications metadata. Specifically, the Supplemental Procedures would clarify that "contact chaining and other metadata analysis do not qualify as the 'interception' or 'selection' of communications, nor do they qualify as 'us[ing] a selection term,' including using a selection term 'intended to intercept a communication

> on the basis of. .. [some] aspect of the content of the communication." Once approved, the Supplemental Procedures will clarify that the communications metadata analysis the NSA wishes to conduct is not restricted by the DOD procedures and their Classified Annex. (S//SI)

As I've previously explained, it works out to a kind of virgin birth, all to avoid the actual seizure moment that would implicate EO 12333.

That virgin birth theory led to this paragraph in supplemental procedures that amend 5240.1-R to treat metadata analysis (it doesn't say it here, but it means, of US persons) as something other than an interception.

> S//SI) For purposes of Procedure 5 of DoD Regulation 5240.1-R and the Classified Annex thereto contact chaining and other metadata analysis don't qualify as the "interception" or "selection" of communications, nor do they qualify as "us[ing] a selection term," including using a selection term "intended to intercept a communication on the basis of … [some] aspect of the content of the communication."

I'm not sure, but Gerard Lynch's opinion may pose real problems for this virgin birth theory. And oh, by the way, a lot of this data leads to data ending up in FBI's hands which would be overseen by … James Baker, who may have had a problem with this argument in the past, even without the Second Circuit decision.

All of which is one way of saying that, in addition to creating some pressure on Congress to pass USA F-ReDux, this bill may have (though I await actual lawyers to consider this question) created far, far larger problems for SPCMA, which is understood to have been one of the places where the old domestic Internet

dragnet went to (which might explain why Richard Burr was talking about Internet dragnets on the floor of the Senate the other day).

If so, the government has a far bigger headache than just the one created for the domestic phone metadata program.