BASAALY MOALIN WINS HIS APPEAL — BUT GETS NOTHING

Basaaly Moalin is a Somali-American prosecuted for funding Al-Shabaab in 2010 who, years later, was used by FBI to justify the phone dragnet. After Edward Snowden revealed the Section 215 dragnet, the FBI pointed to his case, claiming they would not have found him were it not for the dragnet.

He just won an appeal of his case in the 9th Circuit, which found that the Section 215 dragnet may violate the Fourth Amendment. But it doesn't do him any good, because the 9th Circuit panel determined that the government had been lying about how central the dragnet was in identifying him in the first place. The ruling is important, however, because it affirms that if the government is going to use evidence obtained from surveillance in court — or derived from surveillance — they need to notify the defendant.

The opinion argued that the Third Party doctrine probably doesn't apply here, because current metadata collection obtains so much more than old-style pen registers.

> There are strong reasons to doubt that Smith applies here.
> Advances in technology since 1979 have enabled the
> government to collect and analyze information about its
> citizens on an unprecedented scale. Confronting these
> changes, and recognizing that a "central aim" of the Fourth
> Amendment was "to place obstacles in the way of a too
> permeating police surveillance," the Supreme Court recently
> declined to "extend" the third-party

> doctrine to information
> whose collection was enabled by new
> technology. Carpenter
> v. United States, 138 S. Ct. 2206, 2214,
> 2217 (2018) (quoting
> United States v. Di Re, 332 U.S. 581,
> 595 (1948)).
>
> Carpenter did not apply the third-party
> doctrine to the
> government's acquisition of historical
> cell phone records
> from the petitioner's wireless carriers.
> The records revealed
> the geographic areas in which the
> petitioner used his cell
> phone over a period of time. Id. at
> 2220. Citing the "unique
> nature of cell phone location
> information," the Court
> concluded in Carpenter that "the fact
> that the Government
> obtained the information from a third
> party does not
> overcome [the petitioner's] claim to
> Fourth Amendment
> protection," because there is "a world
> of difference between
> the limited types of personal
> information addressed in Smith
> . . . and the exhaustive chronicle of
> location information
> casually collected by wireless carriers
> today." Id. at 2219–
> 20.
>
> There is a similar gulf between the
> facts of Smith and the
> NSA's long-term collection of telephony
> metadata from
> Moalin and millions of other Americans.
>
> [snip]
>
> The distinctions between Smith and this
> case are legion
> and most probably constitutionally
> significant. To begin

> with, the type of information recorded in Smith was "limited" and of a less "revealing nature" than the telephony metadata at issue here. Carpenter, 138 S. Ct. at 2219. The pen register did not disclose the "identities" of the caller or of the recipient of a call, "nor whether the call was even completed." Smith, 442 U.S. at 741 (quoting United States v. New York Tel. Co., 434 U.S. 159, 167 (1977)). In contrast, the metadata in this case included "comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile station Equipment Identity (IMEI) number, International Mobile Subscriber Identity (IMSI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call." In re Application II, 2013 WL 5741573, at *1 n.2. "IMSI and IMEI numbers are unique numbers associated with a particular telephone user or communications device." Br. of Amici Curiae Brennan Center for Justice 11. "A 'trunk identifier' provides information about where a phone connected to the network, revealing data that can locate the parties within approximately a square kilometer." Id. at 11–12.
>
> Although the Smith Court perceived a significant distinction between the "contents" of a conversation and the phone number dialed, see 442 U.S. at 743, in recent years the distinction between content and metadata "has become increasingly untenable," as Amici point out. Br. of Amici Curiae Brennan Center for Justice 6. The amount of metadata created and collected has increased

> exponentially, along with the government's ability to analyze it. "Records that once would have revealed a few scattered tiles of information about a person now reveal an entire mosaic—a vibrant and constantly updating picture of the person's life." Klayman v. Obama, 957 F. Supp. 2d 1, 36 (D.D.C. 2013), vacated and remanded, 800 F.3d 559 (D.C. Cir. 2015). According to the NSA's former general counsel Stewart Baker, "[m]etadata absolutely tells you everything about somebody's life. . . . If you have enough metadata you don't really need content . . . ." Laura K. Donohue, The Future of Foreign Intelligence 39 (2016). The information collected here was thus substantially more revealing than the telephone numbers recorded in Smith.

Importantly, it pointed to how much more revealing Moalin's metadata was collected in conjunction with that of millions of other people (a point I made shortly after the District Court rejected Moalin's original challenge).

> Also problematic is the extremely large number of people from whom the NSA collected telephony metadata, enabling the data to be aggregated and analyzed in bulk. The government asserts that "the fact that the NSA program also involved call records relating to other people . . . is irrelevant because Fourth Amendment rights . . . cannot be raised vicariously." Br. of United States 58. The government quotes the FISA Court, which reasoned similarly that "where one individual does not have a Fourth Amendment interest, grouping together a large number of similarly-situated individuals cannot result in a Fourth Amendment interest springing into existence ex nihilo." In re Application

> II, 2013 WL 5741573, at *2. But these observations fail to recognize that the collection of millions of other people's telephony metadata, and the ability to aggregate and analyze it, makes the collection of Moalin's own metadata considerably more revealing.

After suggesting that Carpenter would apply to this dragnet, the panel then concluded that it doesn't matter, because the dragnet wasn't all that central to obtaining a warrant against Moalin.

> Having carefully reviewed the classified FISA applications and all related classified information, we are convinced that under established Fourth Amendment standards, the metadata collection, even if unconstitutional, did not taint the evidence introduced by the government at trial. See Wong Sun v. United States, 371 U.S. 471, 488 (1963). To the extent the public statements of government officials created a contrary impression, that impression is inconsistent with the contents of the classified record

This will be a working thread.