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SECOND CIRCUIT REVIEW

Expert Analysis

Government Collection of Telephone Metadata Exceeds Statute's Authority

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This month, we discuss *American Civil Liberties Union v. Clapper*,[1] in which the U.S. Court of Appeals for the Second Circuit, in an opinion by Judge Gerard E. Lynch and joined by Circuit Judge Robert D. Sack and Vernon S. Broderick (Southern District of New York, sitting by designation), with Sack issuing a concurring opinion, found that the collection of telephone metadata by the National Security Agency (NSA) exceeded the authority granted to it by the Foreign Intelligence Surveillance Act (FISA),[2] as amended by Section 215 of the USA PATRIOT Act.[3] Specifically, the court ruled that the government's interpretation of Section 215 was overly broad and that Section 215 did not permit the collection of telephone metadata undertaken by the NSA. The court, however, found that its finding was insufficient to merit the court granting a preliminary injunction. In so ruling, the court reversed the district court's dismissal of the complaint and remanded the case to the district court.

Background

Congress enacted FISA in the 1970s against a backdrop of warrantless surveillance programs being conducted by the NSA, the FBI, and the CIA. These early surveillance programs were struck down by the Supreme Court in *United States v. U.S. District Court for the Eastern District of Michigan (Keith)*.[4] In response to these surveillance programs and the Supreme Court's decision in *Keith*, the Senate created the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "church committee"), to investigate the surveillance programs and to determine whether legislation was needed. FISA resulted from these efforts.

FISA created a statutory scheme whereby the government makes applications to a special court, the Foreign Intelligence Surveillance Court (FISC), which conducts its proceedings ex parte and in secret. Following the terrorist attacks of Sept. 11, 2001, Congress enacted the USA PATRIOT Act of 2001, which amended various surveillance laws, including FISA. Section 215 of this act substantially revised FISA to authorize the director of the FBI or his designee to request from the FISC orders for the production of "any tangible things…for an investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities."[5]

> The court ruled that the government's interpretation of Section 215 was overly broad and that Section 215 did not permit the collection of telephone metadata undertaken by the NSA.

An order under Section 215 is limited to the production of anything that "can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation" or any other court order.[6] This provision contained a sunset provision and has required subsequent renewals by Congress, with the most recent renewal expiring on June 1, 2015.[7]

Since at least May 2006, the FBI and NSA have been involved in a program of bulk collection of telephone metadata pursuant to a Section 215 order obtained from the FISC. This order became public as a result of the leaked classified material from former government contractor Edward Snowden in June 2013, when Snowden revealed a FISC order directed at Verizon to produce call detail records of all telephone calls made using Verizon's systems or services where one or both ends of the call were located within the United States. Since FISC orders must be renewed every 90 days, the program has been renewed 41 times since May 2006, with the most recent reauthorization occurring on Feb. 26, 2015, which lasted until June 1, 2015.

The government collects the telephone metadata on a network operated by the NSA and queries it based on a particular phone number, known as a "seed" the NSA believes to be associated with a foreign terrorist organization based on reasonable articulable suspicion. That initial search is known as a "hop." A second "hop" is then conducted to search for the numbers and associated metadata in connection with the numbers resulting from the first "hop." A third "hop" also could be

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conducted, producing the contacts of the initial "seed."

Under Section 215's specific minimization procedures requirement,[8] the NSA was required to store the metadata in secure networks, only permit access for what was allowed under the FISC order, only disseminate results within the NSA, and provide periodic reports to the FISC. In the event of any failures of compliance, reports were required to be made to the FISC and, if severe enough, to the Intelligence and Judiciary Committees of both houses of Congress.

Following the leaks by Snowden, President Barack Obama ordered changes to the telephone metadata program, specifically limiting the searches to two "hops" and requiring that a FISC judge find reasonable articulable suspicion for searching the metadata based on a "seed" rather than permitting the NSA to determine the "seed" number on its own. At the time the case was pending in the Second Circuit, Congress was debating the passage of the USA FREEDOM Act of 2015,[9] which incorporates additional limits on the telephone metadata program, including that the bulk metadata collected remains with the telecommunications providers and can be accessed by the government only with FISC authorization.

Prior Proceedings

Four current and former Verizon customers, the American Civil Liberties Union, the American Civil Liberties Union Foundation, the New York Civil Liberties Union, and the New York Civil Liberties Union Foundation (collectively, "plaintiffs"), filed suit on June 11, 2013 in the Southern District of New York against James R. Clapper, Director of National Intelligence, and the other government officials responsible for administering the telephone metadata program (collectively, the "government").

Plaintiffs sought to enjoin the government from continuing the telephone metadata program, to have their data purged from the database, and to have the program declared as exceeding the authority granted by Section 215 and as violating the First and Fourth Amendments to the U.S. Constitution. Plaintiffs moved for a preliminary injunction on Aug. 26, 2013, and the government moved to dismiss the complaint on the same date, under Rules 12(b)(1) and 12(b)(6).

On Dec. 27, 2013, the district court (Judge William H. Pauley, III) granted the government's motion to dismiss and denied plaintiffs' motion for a preliminary injunction.[10] After determining that plaintiffs had standing, the district court found that (i) Section 215 of the PATRIOT Act impliedly precluded judicial review of the telephone metadata program for plaintiffs' statutory claims, (ii) even if the court could review the program, plaintiffs' statutory claims would fail, and (iii) plaintiffs' constitutional claims failed.

The district court relied on the overall statutory scheme of FISA and the ways in which the PATRIOT Act revised FISA as well as the Wiretap Act and the Stored Communications Act. The PATRIOT Act created an exclusive monetary remedy against the United States for violations of the Wiretap Act and the Stored Communications Act,[11] removing the prior provisions of those acts that permitted private actions against the United States.

> The court agreed with plaintiffs that 'relevance' could not encompass collecting vast amounts of data that contain a large amount of irrelevant information that may become relevant in the future. The court remarked that "[t]he sheer volume of information sought is staggering."

This same remedy also applied for violations of wiretap surveillance, physical searches, and pen registers or trap and trace devices authorized under FISA. In contrast, Section 215 did not authorize any action for misuse of information. Section 215 only authorizes recipients of a Section 215 order to petition the FISC for review of the order, which the district court found evinced Congress' intent that targets of Section 215 orders could not bring suit; only recipients could. Plaintiffs appealed these rulings.

Second Circuit's Decision

The Second Circuit reviewed de novo the district court's grant of the motion to dismiss and reviewed the denial of the preliminary injunction for abuse of discretion.

Standing. The Second Circuit began its discussion by analyzing plaintiffs' standing. The court noted that the Supreme Court recently decided a similar case, *Clapper v. Amnesty International*,[12] in which plaintiffs did not have standing because their injury was too speculative. The court distinguished this case from *Amnesty International*, explaining that this injury is in no way speculative, because the record is clear that the government did collect telephone metadata from Verizon customers, which all four plaintiffs were or have been since the bulk metadata collection began.

In so ruling, the court rejected the government's argument that an injury only existed if plaintiffs' data were used as a "seed" or a result of a query, finding that if a court were to find that the telephone metadata program is unlawful, then the collection of telephone metadata would constitute a cognizable injury under the Fourth Amendment's prohibition against unreasonable seizures. The court went on to determine that even the act of querying the bulk metadata constituted a search under the Fourth Amendment and thus would confer standing.

Additionally, the court analyzed plaintiffs' standing under the First Amendment, based on plaintiffs' additional contention that their right to free association under the First Amendment was being violated both directly by the program and by the chilling effect of the bulk data collection. The court found that the government collection of metadata affected plaintiffs' "members' interests in keeping their associations and contacts private," resulting in a chilling effect traceable to the government's actions.[13]

Statutory Preclusion From Bringing Suit. After explaining that the Administrative Procedure Act[14] creates a broad right of judicial review for administrative actions, the court analyzed whether there existed clear and convincing evidence of legislative intent required to preclude judicial review. The court noted that "[i]mplied preclusion of review is thus disfavored," and rejected the government's arguments that Section 215, FISA, and the PATRIOT Act preclude judicial review.[15]

The government argued that because of the secrecy provisions of Section 215 orders, plaintiffs must be precluded from seeking public judicial review of those orders. The court determined that simply because Congress did not anticipate that targets of Section 215 orders would become aware of the orders did

not mean that Congress intended to preclude targets from bringing suit.

The government also argued that the statutory scheme of FISA and the PATRIOT Act precluded plaintiffs' suit, relying on the Supreme Court's decision in *Block v. Community Nutrition Institute*[16] and its progeny, which held that ordinary judicial review is precluded where there would be an end-run of the administrative review requirements of the statute. The court rejected this argument, because Section 215 calls for judicial review of Section 215 orders, and contains no administrative review requirements similar to the statutory scheme at issue in *Block*. The court determined that it would be anomalous to preclude judicial review of the legality of Section 215 orders under the statute itself, while still permitting judicial review through constitutional challenges.

Finally, the government argued that the private right of action for money damages against the United States contained in 18 U.S.C. §2712 for other provisions of FISA meant that review for Section 215 orders was impliedly precluded. The court rejected this argument, finding that the exclusion of Section 215 from 18 U.S.C. §2712 supported plaintiffs' arguments for judicial review under their statutory claims.

Statutory Claims. Plaintiffs argued that the telephone metadata collection program exceeded the scope of Section 215. The court found that "[t]he basic requirements for metadata collection under §215, then, are simply that the records be relevant to an authorized investigation."[17] The government argued that because relevance is a low standard, especially under the relevance requirement of Section 215 which merely requires that the materials could be obtained in aid of a grand jury investigation, the telephone metadata program was permitted by Section 215.

The court agreed with plaintiffs that "relevance" could not encompass collecting vast amounts of data that contain a large amount of irrelevant information that may become relevant in the future. The court remarked that "[t]he sheer volume of information sought is staggering," because there was no limitation in the Section 215 orders to a particular person or a particular time frame.[18] The court found that the government's arguments regarding relevance "essentially read[ ] the 'authorized investigation' language out of the statute."[19] The court concluded that Congress intended for Section 215 orders to be used in connection with specific investigations, even a preliminary one, and not to create a large data compilation that could be used to conduct any inquiry.

The government additionally argued that there was an implicit authorization of the telephone metadata program based on Congress' reauthorization of Section 215 in 2010 and 2011, after FISC had issued the orders to Verizon. The court rejected this argument, due to the fact that most members of Congress were unaware of the full extent of the telephone metadata collection because of its classified nature. Thus, the court reversed the dismissal of the complaint and held "that the text of §215 cannot bear the weight the government asks us to assign to it, and that it does not authorize the telephone metadata program."[20]

Constitutional Claims. Plaintiffs also mounted constitutional challenges to the program, arguing that even if the telephone metadata program was authorized by statute, it violated the First and Fourth Amendments. Because the court found the program exceeded its statutory authorization, the court did not analyze plaintiffs' First Amendment claims and discussed the Fourth Amendment claims without reaching a conclusion.

In discussing the Fourth Amendment implications of the telephone metadata program, the court noted the particularly complicated notions of privacy following the Supreme Court's decision in *U.S. v. Jones*,[21] in which five of the Supreme Court justices, speaking through concurring opinions, suggested that a surveillance program that takes into account large amounts of information generated in the digital age by carrying out routine tasks might violate the Fourth Amendment. The court also noted that, at the time the case was decided, Congress was debating the USA FREEDOM Act of 2015, which had just passed the House Judiciary Committee, and could moot the issues presented by the telephone metadata program in its current form.

Judge Sack's Concurrence. Sack issued a concurring opinion to "offer[ ] several additional observations about the import of [the] decision."[22] Sack observed that because the court's decision turned on the statutory authority for the program rather than its constitutionality, Congress could overturn the decision by explicitly authorizing such a program. Sack also discussed the challenges the FISC and all Article III courts face in closing their doors to adjudicate issues of classified and sensitive materials. He discussed the importance of adversary proceedings in our court system, even when the courtroom doors must be sealed to the general public, analogizing FISC hearings to the Pentagon Papers case.[23]

Conclusion

While Congress has now passed the USA FREEDOM Act of 2015, debate rages over the degree to which national security should subordinate individual liberties in keeping the nation safe. The Second Circuit's ruling in *American Civil Liberties Union v. Clapper*, as the first appellate court to issue a decision regarding Section 215, underscores the concerns many have with large-scale surveillance programs and secret court proceedings. Moreover, the program as authorized by the USA FREEDOM Act may itself be subject to constitutional challenges as outlined here, and the courts may be called upon once again to determine the legality of future surveillance programs.

1. No. 14-42-cv, 2015 WL 2097814 (2d Cir. May 7, 2015).
2. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§1801 et seq.).
3. Pub. L. No. 107-56, 115 Stat. 272 (2001) (relevant portion codified at 50 U.S.C. §1861).
4. 407 U.S. 297 (1972).
5. 50 U.S.C. §1861(a)(1).
6. Id. at §1861(c)(2)(D).
7. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011).
8. 50 U.S.C. §1861(g)(1).
9. This was subsequently passed by both houses of Congress and enacted as Public Law No. 114-23.
10. *ACLU v. Clapper*, 959 F.Supp.2d 724 (S.D.N.Y. 2013).
11. 18 U.S.C. §2712.
12. 133 S. Ct. 1138 (2013).
13. No. 14-42-cv, 2015 WL 2097814, at *10 (2d Cir. May 7, 2015).
14. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§500 et seq.).
15. 2015 WL 2097814, at *11.
16. 467 U.S. 340 (1984).
17. 2015 WL 2097814, at *18.
18. Id. at *20–21.
19. Id. at *23.
20. Id. at *28.
21. 132 S. Ct. 945 (2012).
22. 2015 WL 2097814, at *33 (Sack, J., concurring).
23. *United States v. N.Y. Times Co.* (Pentagon Papers), 328 F.Supp. 324 (S.D.N.Y.), remanded 444 F.2d 544 (2d Cir.) (en banc) (per curiam), rev'd 403 U.S. 713 (1971) (per curiam).

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