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Peter Margulies
Roger Williams University School of Law

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FISA: 215 COLLECTION

Judge Pauley's Opinion in Clapper: Reset Button for Bulk Collection Debate?

By **Peter Margulies** Saturday, December 28, 2013, 8:00 AM

Privacy Paradox: Rethinking Solitude

Friday's ruling by S.D.N.Y. judge William H. Pauley in Clapper is a welcome corrective to the anti-metadata clamor triggered by Judge Leon's Klayman opinion and the President's Review Group Report. While no district court opinion represents the last word, the opinion by Judge Pauley deflates the overblown arguments made by metadata critics on the program's efficacy, the quality of judicial and congressional oversight, and the continued vitality of the Supreme Court's precedent in Smith v. Maryland. Because Judge Pauley's opinion is balanced, it also provides some support for reform of the Section 215 process to ensure more public input. The care and balance evident in Judge Pauley's opinion make it a useful template for further deliberation.

On the question of efficacy, Judge Pauley is emphatic that the metadata program helps the government connect the dots. The opinion cites 9/11 hijacker Khalid al-Mihdhar, who made calls from San Diego to an Al Qaeda safe house in Yemen. Had the metadata program been in place before September 11, Judge Pauley notes, the government would have had a better chance of detecting the 9/11 conspiracy. Judge Pauley finds that the ability to query metadata with identifiers based on "reasonable and articulable suspicion" of links to terrorism allows the government to find "connections between known and unknown international terrorist operatives." He cites the arrest of aspiring New York subway bomber Najibullah Zazi and the investigation of Mumbai bombing conspirator David Headley.

Sometimes, as Ryan Goodman suggests in a useful post over at *Just Security*, the NSA's connect-the-dots capability permits ruling out foreign connections to plots such as the Boston Marathon bombing. This capability, while it may not be as snazzy to metadata critics as sniffing out a pending plot, can inform law enforcement allocation of resources in the frenzied hours after an attack. If the quick elimination of speculation about a foreign link in the Boston Marathon bombing helped focus resources on the Tsarnaev brothers' role, that benefit supplies at least a partial justification for the metadata program. Moreover, Judge Pauley's careful analysis of the efficacy issue contrasts with the truncated approach in the President's Review Group report, which devoted less than one page of a 300-page study to this crucial question (see my post here).

Judge Pauley's nuanced discussion of efficacy also demonstrates how the metadata program meets Section 215's relevance standard. As Judge Pauley indicates, Congress clearly understood the threat posed by Al Qaeda's ability to develop lethal plots in a "decentralized" fashion. Neutralizing Al Qaeda's asymmetric advantage, Judge Pauley finds, requires that the government have the ability to connect "fragmented and fleeting communications." Without the "counter-punch" supplied by metadata collection, the government risks ceding the long-term initiative to Al Qaeda and associated forces. Allowing the concept of relevance to evolve with the shifting terrorist threat was an eminently sensible strategy for Congress in 2006, when it added the relevance standard. As Judge Pauley points out, any doubt about Congress's calculus is extinguished by Congress's reauthorization of Section 215 in 2010 and 2011, when members of Congress had the twin benefits of, (1) access to documents that described the metadata program, and, (2) the public criticism of the metadata program by senators Wyden and Udall, who warned (in Wyden's words) of the "discrepancy between what most Americans believe is legal and what the government is actually doing under the Patriot Act."

Judge Pauley asserts that these two sources would place any legislator not in a coma on notice that the NSA and the FISC had broadly interpreted the statutory relevance standard. Indeed, Judge Pauley describes as "curious" Wisconsin representative James Sensenbrenner's claim that he had no inkling of the metadata program before the Snowden disclosures. Judge Pauley bases his skepticism on Sensenbrenner's receipt, as a Judiciary Committee member, of summaries of FISC decisions, the decisions themselves, and access to government briefings and white papers. Congress could not have ensured knowledge of the metadata program by the American public, Pauley explains, without disclosing the program's operation to our adversaries. Congress reasonably concluded, Pauley intimates, that this disclosure posed an unacceptable risk to national security.

Pauley's discussion of Congress's role dovetails with his discussion of robust oversight by the FISC. Pauley cites the "iterative process" (quoting ODNI Counsel Bob Litt) that the FISC engages in with the government, often requiring changes in initial requests. This iterative process does not resemble the "rubber stamp" label that metadata program critics have tried to paste on the FISC's efforts. In addition, Pauley's own pedigree as a Clinton appointee (as well as Judge Leon's nomination by George W. Bush) subtly counters the glib claims of NSA critics, embraced by the Presidential Review Group, that the selection of FISC judges requires reform. For federal judges like Pauley and Leon and the subset of judges serving on the FISC, the identity of the appointing authority is not destiny. The vigilance of FISC judges like Reggie Walton and John Bates demonstrates that the appointment of FISC judges by the Chief Justice promotes sound judicial oversight. In contrast, the Presidential Review Group's recommendation that Associate Justices of the Supreme Court designate members of the FISC would prove cumbersome in implementation and detract from the functioning of both the FISC and the Supreme Court.

On the Fourth Amendment, Judge Pauley's opinion also counsels a salutary caution on the premature burial of *Smith v. Maryland* and the third-party doctrine. Judge Leon dismissed the third-party doctrine as obsolete in *Klayman*. However, Judge Pauley's opinion reminds us that reports of the doctrine's demise are greatly exaggerated. As Orin Kerr observes in a paper cited by Judge Pauley, the third-party doctrine is based on consent – a caller who avails herself of a carrier's services has implicitly consented to reasonable government access to call record (but not content)

information. The third-party doctrine, Kerr points out, is defensive in nature: it deprives "savvy wrongdoers" (including terrorists) of the ability to use third-party services such as telecom carriers as safe harbors in the planning and execution of crimes. A different result would disturb the Fourth Amendment's careful balance between liberty and security. The Supreme Court's 2012 requirement in *Jones* of a warrant for planting a GPS device does not discredit the third-party doctrine, Judge Pauley asserts. *Jones*, according to Judge Pauley, merely requires a heightened standard for the physical, more comprehensive intrusion connoted by the surveillance in that case, which has none of the elements of consent that drive the third-party doctrine.

While Judge Pauley's opinion redresses the balance in the metadata debate, it is not a recipe for complacency. Judge Pauley acknowledges that the FISC's current ex parte procedures, while useful for preserving secrecy, are not "ideal" for deciding questions about statutory authority. Accordingly, Judge Pauley ventures, debate should progress on institutional means for giving the public "a voice" in the FISC's deliberations. Senator Feinstein's reform bill, approved by the Senate Intelligence Committee, proposes changes along these lines; more far-reaching reforms are also worthy of discussion. Judge Pauley's judicious opinion can help anchor that discussion in a more reflective assessment of the metadata program's role.

Topics: FISA: 215 Collection, FISA

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of Law's Detour: Justice Displaced in the Bush Administration (New York: NYU Press, 2010).