THE VERIZON PUBLICITY STUNT, MOSAIC THEORY, AND COLLECTIVE FOURTH AMENDMENT RIGHTS

On Friday, I Con the Record revealed that a telecom — Ellen Nakashima confirms it was Verizon — asked the FISA Court to make sure its January 3 order authorizing the phone dragnet had considered Judge Richard Leon's December 16 decision that it was unconstitutional. On March 20, Judge Rosemary Collyer issued an opinion upholding the program.

Rosemary Collyer's plea for help

Ultimately, in an opinion that is less shitty than FISC's previous attempts to make this argument, Collyer examines the US v. Jones decision at length and holds that Smith v. Maryland remains controlling, mostly because no majority has overturned it and SCOTUS has provided no real guidance as to how one might do so. (Her analysis raises some of the nuances I laid out here.)

The section of her opinion rejecting the "mosaic theory" that argues the cumulative effect of otherwise legal surveillance may constitute a search almost reads like a cry for help, for guidance in the face of the obvious fact that the dragnet is excessive and the precedent that says it remains legal.

> A threshold question is which standard should govern; as discussed above, the court of appeals' decision in Maynard and two concurrences in Jones suggest three different standards. See Kerr, "The Mosaic Theory of the Fourth Amendment," 111 Mich. L. Rev. at 329. Another question is how to group Government actions in assessing whether

> the aggregate conduct constitutes a search.See id. For example, "[w]hich surveillance methods prompt a mosaic approach? Should courts group across surveillance methods? If so, how? Id. Still another question is how to analyze the reasonableness of mosaic searches, which "do not fit an obvious doctrinal box for determining reasonableness." Id. Courts adopting a mosaic theory would also have to determine whether, and to what extent, the exclusionary rule applies: Does it "extend over all the mosaic or only the surveillance that crossed the line to trigger a search?"
>
> [snip]
>
> Any such overhaul of Fourth Amendment law is for the Supreme Court, rather than this Court, to initiate. While the concurring opinions in Jones may signal that some or even most of the Justices are ready to revisit certain settled Fourth Amendment principles, the decision in Jones itself breaks no new ground concerning the third-party disclosure doctrine generally or Smith specifically. The concurring opinions notwithstanding, Jones simply cannot be read as inviting the lower courts to rewrite Fourth Amendment law in this area.

As I read these passages, I imagined that Collyer was trying to do more than 1) point to how many problems overruling the dragnet would cause and 2) uphold the dignity of the rubber stamp FISC and its 36+ previous decisions the phone dragnet is legal.

There is reason to believe she knows what we don't, at least not officially: that even within the scope of the phone dragnet, the dragnet is part of more comprehensive mosaic surveillance, because it correlates across platforms and

identities. And all that's before you consider how, once dumped into the corporate store and exposed to NSA's "full range of analytic tradecraft," innocent Americans might be fingerprinted to include our lifestyles.

That is, not only doesn't Collyer see a way (because of legal boundary concerns about the dragnet generally, and possibly because of institutional concerns about FISC) to rule the dragnet illegal, but I suspect she sees the reverberations that such a ruling would have on the NSA's larger project, which very much is about building mosaics of intelligence.

No wonder the government is keeping that August 20, 2008 opinion secret, if it indeed discusses the correlations function in the dragnet, because it may well affect whether the dragnet gets assessed as part of the mosaic NSA uses it as.

Verizon's flaccid but public legal complaint

Now, you might think such language in Collyer's opinion would invite Verizon to appeal this decision. But given this lukewarm effort, it seems unlikely to do so. Consider the following details:

Leon issued his decision December 16. Verizon did not ask the FISC for guidance (which makes sense because they are only permitted to challenge orders).

Verizon got a new Secondary Order after the January 3 reauthorization. It did not immediately challenge the order.

It only got around to doing so on January 22 (interestingly, a few days after ODNI exposed Verizon's role in the phone dragnet a second time), and didn't do several things — like asking for a hearing or challenging the legality of the dragnet under 50 USC 1861 as applied — that might reflect real concern about anything but the public appearance of legality. (Note, that timing is of particular interest, given that the very next day, on January 23, PCLOB

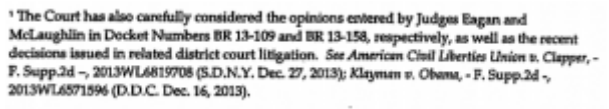
would issue its report finding the dragnet did not adhere to Section 215 generally.)

Indeed, this challenge might not have generated a separate opinion if the government weren't so boneheaded about secrecy.

Verizon's petition is less a challenge of the program than an inquiry whether the FISC has considered Leon's opinion.

> It may well be the case that this Court, in issuing the January 3,2014 production order, has already considered and rejected the analysis contained in the Memorandum Order. [redacted] has not been provided with the Court's underlying legal analysis, however, nor [redacted] been allowed access to such analysis previously, and the order [redacted] does not refer to any consideration given to Judge Leon's Memorandum Opinion. In light of Judge Leon's Opinion, it is appropriate [redacted] inquire directly of the Court into the legal basis for the January 3, 2014 production order,

As it turns out, Judge Thomas Hogan (who will take over the thankless presiding judge position from Reggie Walton next month) did consider Leon's opinion in his January 3 order, as he noted in a footnote.


[1] The Court has also carefully considered the opinions entered by Judges Eagan and McLaughlin in Docket Numbers BR 13-109 and BR 13-158, respectively, as well as the recent decisions issued in related district court litigation. *See American Civil Liberties Union v. Clapper*, - F. Supp.2d –, 2013WL6819708 (S.D.N.Y. Dec. 27, 2013); *Klayman v. Obama*, - F. Supp.2d -, 2013WL6571596 (D.D.C. Dec. 16, 2013).

And that's about all the government said in its response to the petition (see paragraph 3): that Hogan considered it so the FISC should just affirm it.

Verizon didn't know that Hogan had considered the opinion, of course, because it never gets Primary Orders (as it makes clear in its petition) and so is not permitted to know the legal logic behind the dragnet unless it asks

nicely, which is all this amounted to at first.

Note that the government issued its response (as set by Collyer's scheduling order) on February 12, the same day it released Hogan's order and its own successful motion to amend it. So ultimately this headache arose, in part, because of the secrecy with which it treats even its most important corporate spying partners, which only learn about these legal arguments on the same schedule as the rest of us peons.

Yet in spite of the government's effort to dismiss the issue by referencing Hogan's footnote, Collyer said because Verizon submitted a petition, "the undersigned Judge must consider the issue anew." Whether or not she was really required to or could have just pointed to the footnote that had been made public, I don't know. But that is how we got this new opinion.

Finally, note that Collyer made the decision to unseal this opinion on her own. Just as interesting, while neither side objected to doing so, Verizon specifically suggested the opinion could be released with no redactions, meaning its name would appear unredacted.

> The government contends that certain information in these Court records (most notably, Petitioner's identity as the recipient of the challenged production order) is classified and should remain redacted in versions of the documents that are released to the public. See Gov't Mem. at 1. Petitioner, on the other hand, "request[s] no redactions should the Court decide to unseal and publish the specified documents." Pet. Mem. at 5. Petitioner states that its petition "is based entirely on an assessment of [its] own equities" and not on "the potential national security effects of publication," which it "is in no position to evaluate." Id.

I'll return to this. But understand that Verizon

wanted this opinion — as well as its own request for it — public.

I'll return to the apparent fact that Verizon is trying to get credit for challenging the dragnet, after 8 years of not doing so. But consider one other notable detail of this case.

I can see why Verizon made the effort to inquire about Leon's ruling, given that Larry Klayman got standing because he's a Verizon subscriber. But note, Klayman only claims to be **a Verizon cell subscriber**, not a Verizon landline subscriber (as ACLU is). Someone has been running around leading top journalists to believe that the NSA doesn't get cell data, or at least not cell data from non-AT&T providers, and that since Verizon Wireless is gaining more and more of the market share, that means NSA is getting less and less coverage of cell traffic.

But if Verizon is not providing cell data to the NSA (via some means, whether Section 215 or another), then it shouldn't care about the Leon ruling because it doesn't actually change its legal exposure, since the ruling only pertains to cell data which according to reports is purportedly not collected under Section 215. That doesn't mean it wouldn't want to make a public show of caring about the dragnet anyway, given its ongoing exposure and uncertainties about the boundaries of the dragnet. But the detail is worth noting.

The collective Fourth Amendment

In other words, by all appearances (heh) this effort was a publicity stunt on Verizon's part, not a real concern about the legality of their participation in the dragnet (though I do look forward to a similar publicity stunt raising PCLOB's concerns about the statutory compliance).

Which is a pity because of another argument that only Verizon (or another of the telecoms even less likely to raise it) might be able to challenge on appeal.

Collyer dismissed any concern about the bulk of the orders involved using the same argument Judge Jeffrey Miller used to rebut Basaaly Moalin's concerns about the scope of the dragnet: because Fourth Amendment Rights are individual, only an individual enjoys Fourth Amendment protection, not the aggregate group affected by a dragnet.

> Judge Leon also repeatedly emphasized the total quantity of telephony metadata obtained and retained by NSA. That focus is likewise misplaced under settled Supreme Court precedent. The Court has repeatedly reaffirmed that Fourth Amendment rights are "personal rights" that "may not be vicariously asserted." See Rakas v. Illinois, 439 U.S. 128, 133-134 (1978) (citing cases; citations and internal quotation marks omitted); accord Minnesota v. Carter, 525 U.S. 83, 88 (1998). Accordingly, the aggregate scope of the collection and the overall size of NSA's database are immaterial in assessing whether any person's reasonable expectation of privacy has been violated such that a search under the Fourth Amendment has occurred. To the extent that the quantity of metadata is relevant, it is relevant only on a user-by-user basis. The pertinent question is whether a particular user has a reasonable expectation of privacy in the telephony metadata associated with his or her own calls.

But that logic seems to utterly ignore who the petitioner here is: not you and me and ACLU and Larry Klayman, but Verizon, who provides all of us one or another kind of phone service, and has therefore been granted the specific legal right to vicariously assert our Fourth Amendment rights for us.

Collyer analyzes and grants Verizon standing in two different ways here. As a second step, she

points to both the language in 50 USC 1861 and the precedent in In Re Directives (which found that Yahoo had standing to challenge multiple Directives under Protect America Act) to rule that Congress envisioned Verizon having standing to challenge any range of illegality.

> The Court is also satisfied that Congress has [redacted] as the recipient of a Section 1861 production order, the right to bring a challenge in this Court **to enforce the rights of its customers**. As noted above, FISA states that the recipient of a Section 1861 production order "may challenge the legality of that order by filing a petition" with the FISC. 50 U.S.C. § 1861(f)(2)(A)(i). As with the similar provision in In Re Directives, Section 1861(f) "does nothing to circumscribe the types of claims of illegality that can be brought." In Re Directives, 551 F.3rd at 1009 (discussing now-expired 50 U.S.C. § 1805b(h)(1)A)), the PAA provision described above in not 6). Indeed, it provides that this Court may modify or set aside a production order "if the judge finds that such order does not meet the requirements of this section or is otherwise unlawful," thus suggesting that Congress intended to permit the recipients of production orders to bring a range of challenges. [my emphasis]

So the petitioner here is not you and me and ACLU and Klayman separately, but Verizon, representing at least its 40 million landline subscribers and possibly (if they're included in the dragnet) its 103 million cell phone subscribers. I'm not a lawyer, but it seems that even at this level, Verizon's complaint necessarily encompasses tens of millions and probably hundreds of millions of people that, because Verizon is the only entity guaranteed to have standing, must be represented in aggregate.

Moreover, Collyer **on her own** asserts (citing back to In Re Directives) that Verizon has been harmed here.

> To have standing under Article III of the Constitution, "the suitor must plausible allege that it has suffered an injury, which was caused by the defendant, and the effects of which can be addressed by the suit." [reference to Directives citing Warth] The Court is satisfied [redacted] has Article III standing here. Like [redacted] "faces an injury in the nature of the burden it must shoulder" to provide the Government with call detail records. Id. That injury is "obviously and indisputably caused by the [G]overnment" through the challenged Secondary Order, and this Court is capable of redressing the injury by vacating or modifying the order.

Thus, it's not just that Verizon necessarily represents all of our collective Fourth Amendment rights as the entity Congress has given clear standing to, but according to Collyer it has suffered injury in its provision of all our call records.

Verizon didn't argue any of this. Collyer did, on her own (that's what you can do in secret courts, I guess). I'm sure Verizon will find it very useful if the government starts requiring Verizon to keep business records it currently doesn't, which is probably the problem with the dragnet and cell phone problem anyway. But for now, in its flaccid publicity stunt, Verizon seems to have shown no interest in the unique Fourth Amendment considerations raised by asserting the rights of up to 143 million customers, almost half the United States.

But at the core of Collyer's argument is both the affirmation that Verizon can vicariously assert our Fourth Amendment rights — it is the only one who explicitly can, according to

Congress — and that precedents that apply to individual cars and homes at the same time prohibit Verizon from vicariously asserting our Fourth Amendment rights.

That doesn't make any sense! Collyer has laid out both its own individual injury as Verizon serving us all, as well as its vicarious ability to "enforce the rights of its customers," plural.

Again, I'm not a lawyer, so have no idea whether this would fly. But if it would, it'd sure be nice to see Verizon go beyond publicity stunts and really enforce our rights, as only it can do.

Which is why it's unfortunate that Verizon seems primarily interested in publicity stunts, not aggressive legal challenges.

Update: Date for presumed correlations opinion fixed.