HASSANSHAHI BIDS TO UNDERMINE THE DEA DRAGNET … AND ALL DRAGNETS

Often forgotten in the new reporting on the DEA dragnet is the story of Shantia Hassanshahi, the Iranian-American accused of sanctions violations who was first IDed using the DEA dragnet. That's a shame, because his case may present real problems not just for the allegedly defunct DEA dragnet, but for the theory behind dragnets generally.

As I laid out in December, as Hassanshahi tried to understand the provenance of his arrest, the story the Homeland Security affiant gave about the database(s) he used to discover Hassanshahi's ties to Iran in the case changed materially, so Hassanshahi challenged the use of the database and everything derivative of it. The government, which had not yet explained what the database was, asked Judge Rudolph Contreras to assume the database was not constitutional, but to upheld its use and the derivative evidence anyway, which he did. At the same time, however, Contreras required the government to submit an explanation of what the database was, which was subsequently unsealed in January.

Not surprisingly, Hassanshahi challenged the use of a DEA database to find him for a crime completely unrelated to drug trafficking, first at a hearing on January 29. In response to an order from Contreras, the government submitted a filing arguing that Hassanshahi lacks standing to challenge the use of the DEA dragnet against him.

> To the extent that defendant seeks to argue that the administrative subpoenas to telephone providers violated the statutory requirements of Section

> 876(a), he clearly lacks standing to do so. See, e.g., United States v. Miller, 425 U.S. 435, 444 (1976) ("this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant"); Moffett, 84 F.3d at 1293-94 (defendant could not challenge a Section 876(a) subpoena to third party on the grounds that it exceeded the DEA's statutory authority).

This is the argument the government currently uses to deny defendants notice on Section 215 use.

The government further argued that precedent permits it to use information acquired for other investigations.

> DEA acquired information through use of its own investigatory techniques and for its own narcotics-related law enforcement purposes. DEA shared with HSI a small piece of this information to assist HSI in pursuing a non-narcotics law enforcement investigation. In doing so, DEA acted consistently with the longstanding legal rule that "[e]vidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that for which it was originally taken." Jabara v. Webster, 691 F.2d 272, 277 (6th Cir. 1982) (quotation marks omitted); accord United States v. Joseph, 829 F.2d 724, 727 (9th Cir. 1987).
>
> Applying an analogous principle, the D.C. Circuit has held that querying an existing government database does not constitute a separate Fourth Amendment search: "As the Supreme Court has held, the process of matching one piece of personal information against government

> records does not implicate the Fourth Amendment." Johnson v. Quander, 440 F.3d 489, 498 (D.C. Cir. 2006) (citing Arizona v. Hicks, 480 U.S. 321 (1987)). The D.C. Circuit observed that a contrary rule would impose "staggering" consequences, placing "an intolerable burden" on law enforcement if each query of a government database "were subject to Fourth Amendment challenges." Id. at 499.

This is a version of the argument the government has used to be able to do back door searches of Section 702 data.

It also argued there was no suppression remedy included in 21 USC 876, again a parallel argument it has made in likely Section 215 cases.

Finally, it also argued, in passing, that its parallel construction was permissible because, "While it would not be improper for a law enforcement agency to take steps to protect the confidentiality of a law enforcement sensitive investigative technique, this case raises no such issue." No parallel construction happened, it claims, in spite of changing stories in the DHS affidavit.

Yesterday, Hassanshahi responded. (h/t SC) In it, his attorneys distinguished the use of the DEA dragnet for purposes not permitted by the law — a systematic violation of the law, they argue — from the use of properly collected data in other investigations.

> Title 21 USC § 876 allows the government to serve an administrative subpoena in connection with a purely drug enforcement investigation. Government has systematically violated this statute for over a decade by using the subpoena process to secretly gather a database of telephony information on all Americans, and then utilizing the database (while

> disguising its source) in all manner of investigations in all fields not related to drugs at all.
>
> [snip]
>
> This was not a one-time or negligent statutory violation that happened to uncover evidence of another crime, or even the sharing of information legitimately gathered for one purpose with another agency. Cf. Johnson v. Quander, 440 F.3d 489 (D.C.Cir. 2006) (government may use DNA profiles gathered pursuant to and in conformance with statute for other investigations). By its very nature, the gathering of telephony information was repeated and systematic, as was the making available of the database to all government agencies, and all aspects of the scheme (from gathering to dissemination outside drug investigations) violated the statute.

But more importantly, Hassanshahi pointed to the government's request — from before they were ordered to 'fess up about this dragnet — that the Judge assume this dragnet was unconstitutional, to argue the government has already ceded the question of standing.

> Defendant herein submits that a systematic statutory violation, or a program whose purpose is to violate the statute continuously over decades, presents a case of first impression not governed by Sanchez-Llamas or other government cases.
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> But the Court need not reach the novel issue because in the instant case, the government *already conceded* that use of the database was a constitutional violation of *Mr. Hassanshahi's rights*. Indeed the Court asked this Court to assume the constitutional violation.

> Mem. Dec. p. 9. Where there is a statutory violation plus an individual constitutional violation, the evidence shall be suppressed even under government's cited cases.
>
> [snip]
>
> Government now argues Mr. Hassanshahi "lacks standing" to contest the statutory violation. Again, government forgets it previously conceded that use of the database was unconstitutional, meaning unconstitutional *as to defendant* (otherwise the concession was meaningless and afforded no grounds to withhold information). Mr. Hassanshahi obviously has standing to assert a conceded constitutional violation. [emphasis original]

In short, Hassanshahi is making a challenge to the logic behind this and a number of other dragnets, or demanding the judge suppress the evidence against him (which would almost certainly result in dismissal of the case).

We'll see how Contraras responds to all this, but given that he has let it get this far, he may be sympathetic to this argument.

In which case, things would get fun pretty quickly. Because you'd have a defendant *with standing* arguing not just that the use of the DEA dragnet for non-DEA uses was unconstitutional, but also that all the arguments that underly the use of the phone dragnet and back door searches were unconstitutional. And he'd be doing so in the one circuit with a precedent on mosaic collection that could quickly get implicated here. This case, far more than even the ACLU lawsuit against the Section 215 database (but especially the Smith and Klayman challenges), and even than Basaaly Moalin's challenge to the use of the 215 dragnet against him, would present real problems for the claims to dragnet

legally.

In other words, if this challenge were to go anywhere, it would present big problems not only for other uses of the DEA dragnet, but also, possibly, for the NSA dragnets.

Mind you, there is no chance in hell the government would let it get that far. They'd settle with Hassanshahi long before they permitted that to happen in a bid to find a way to bury this DEA dragnet once and for all and retain their related arguments for use with the NSA dragnets and related collection.

But we might get the dragnetters sweat just a bit.