DC CIRCUIT REVERSES JUDGE LEON ORDER OVERTURNING PHONE DRAGNET

In a per curium decision, a DC Circuit panel including Janice Rogers Brown, Stephen Williams, and David Sentelle has reversed Judge Richard Leon's decision preliminary injunction against the phone dragnet. They reversed on standing (which I'll return to) but found the issue remains ripe.

This will be my working thread.

The panel pointed to the immediate resumption of the dragnet after USA F-ReDux to argue that the alleged violation could recur.

> Cessation of a challenged practice moots a case only if "there is no reasonable expectation . . . that the alleged violation will recur." Larsen v. U.S. Navy, 525 F.3d 1, 4 (D.C. Cir. 2008) (quotations and citations omitted). Here, any lapse in bulk collection was temporary. Immediately after Congress acted on June 2 the FBI moved the FISC to recommence bulk collection, United States' Mem. of Law, In re Application of the FBI, No. BR 15-75 (FISC, filed Jun. 2, 2015), and the FISC confirmed that it views the new legislation as effectively reinstating Section 215 for 180 days, and as authorizing it to resume issuing bulk collection orders during that period.

Brown reversed because Klayman had shown it likely his records were collected, but had not reached the bar for a preliminary injunction.

> However, plaintiffs are Verizon Wireless subscribers and not Verizon Business

> Network Services subscribers. Thus, the facts marshaled by plaintiffs do not fully establish that their own metadata was ever collected.
>
> [snip]
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> Contrary to the assertions of my colleagues, these facts bolster plaintiffs' position: where the Clapper plaintiffs relied on speculation and conjecture to press their claim, here, plaintiffs offer an inference derived from known facts.
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> However, the burden on plaintiffs seeking a preliminary injunction is high. Plaintiffs must establish a "substantial likelihood of success on the merits." Sottera, Inc., 627 F.3d at 893. Although one could reasonably infer from the evidence presented the government collected plaintiffs' own metadata, one could also conclude the opposite. Having barely fulfilled the requirements for standing at this threshold stage, Plaintiffs fall short of meeting the higher burden of proof required for a preliminary injunction. [citation omitted]

Williams reversed because he doesn't think Klayman has standing. He points to *Amnesty v Clapper* to suggest he has only speculative standing.

> Plaintiffs' contention that the government is collecting data from Verizon Wireless (a contention that the government neither confirms nor denies, Gov't's Br. at 38-39), depends entirely on an inference from the existence of the bulk collection program itself. Such a program would be ineffective, they say, unless the government were collecting metadata from every large carrier such as Verizon Wireless; ergo

> it must be collecting such data. Appellee's Br. 27-28. This inference was also the district judge's sole basis for finding standing. Klayman v. Obama, 957 F. Supp. 2d 1, 27 & n.36 (2013).
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> Yet the government has consistently maintained that its collection "never encompassed all, or even virtually all, call records and does not do so today."
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> [snip]
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> Here, the plaintiffs' case for standing is similar to that rejected in Clapper. They offer nothing parallel to the Clapper plaintiffs' evidence that the government had previously targeted them or someone they were communicating with (No. 3 above). And their assertion that NSA's collection must be comprehensive in order for the program to be most effective is no stronger than the Clapper plaintiffs' assertions regarding the government's motive and capacity to target their communications (Nos. 2 & 4 above).
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> [snip]
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> Accordingly, I find that plaintiffs have failed to demonstrate a "substantial likelihood" that the government is collecting from Verizon Wireless or that they are otherwise suffering any cognizable injury. They thus cannot meet their burden to show a "likelihood of success on the merits" and are not entitled to a preliminary injunction.

Sentelle would boot the case entirely because Klayman doesn't have standing.

> Like Judge Williams, I believe that the failure to establish the likelihood of success depends at least in the first instance on plaintiffs' inability to establish the jurisdiction of the court.

> I also agree with Judge Williams that plaintiffs have not established the jurisdiction of the court. That being the case, I would not remand the case for further proceedings, but would direct its dismissal.
>
> [snip]
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> Plaintiffs have not demonstrated that they suffer injury from the government's collection of records. They have certainly not shown an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." Friends of the Earth, Inc., 528 U.S. at 180. I agree with the conclusion of my colleagues that plaintiffs have not shown themselves entitled to the preliminary injunction granted by the district court. However, we should not make that our judicial pronouncement, since we do not have jurisdiction to make any determination in the cause. I therefore would vacate the preliminary injunction as having been granted without jurisdiction by the district court, and I would remand the case, not for further proceedings, but for dismissal.