

RICHARD LEON HALTS THE DRAGNET FOR ONE PLAINTIFF

Judge Richard Leon has just issued an injunction on the NSA's collection of the phone metadata of J.J. Little and his lawfirm. Little got added as a plaintiff to Larry Klayman's suit (in which Leon earlier found the program unconstitutional but stayed his own injunction) so as to have a Verizon Business Services customer who could be certain his phone records had been collected.

The order will undoubtedly set off a bit of a scramble, not because pulling Little's phone records *really* presents any difficulty for the NSA (they already defeat list so many records it's clear they have the ability to at least make those records inaccessible to a search, though they don't want to explain the full application of that process; hopefully this ruling will lead to more candor on this point). Rather, the NSA will want to ensure this program has constitutional sanction because it also collects so many other records of Americans (in his book, for example, Charlie Savage confirmed my earlier analysis that the Internet dragnet moved, in part, overseas rather than being shut down). And the DC Circuit is likely to respond to quickly override Leon.

That said, Leon's order is most interesting for its analysis of the government's claim it can carry out this program because of a Special Need. In it, he repeats efficacy arguments he made in his earlier ruling: rather than present any new evidence that the program has been useful, it has instead just said the threat environment requires it. But he also notes that this special need, unlike that of, say, a TSA check, does not have a deterrence effect. That's interesting because the government's own secrecy about how many calls are collected would make any deterrence uncertain (indeed, terrorists might be expected to move communications to the

Internet, believing falsely that attracts less attention).

As I said, the DC Circuit is likely to overturn this. But it will give the government a few days of headaches until that point.