

GUY WHO WORKED AT WHITE HOUSE WHEN IT SELF-AUTHORIZED DRAGNET THINKS DRAGNETS ARE COOL

Eleven judges from the DC Circuit denied Larry Klayman's request to overturn the stay that a panel put on Richard Leon's injunction against the dragnet today.

Of those 11 judges, just one decided to weigh in on the legality of the dragnet Leon had ruled unconstitutional: Brett Kavanaugh. In doing so, he laid out a condensed version of the Special Needs search used by dragnet boosters.

I vote to deny plaintiffs' emergency petition for rehearing en banc. I do so because, in my view, the Government's metadata collection program is entirely consistent with the Fourth Amendment. Therefore, plaintiffs cannot show a likelihood of success on the merits of their claim, and this Court was right to stay the District Court's injunction against the Government's program.

[snip]

Even if the bulk collection of telephony metadata constitutes a search, cf. *United States v. Jones*, 132 S. Ct. 945, 954-57 (2012) (Sotomayor, J., concurring), the Fourth Amendment does not bar all searches and seizures. It bars only unreasonable searches and seizures. And the Government's metadata collection program readily qualifies as reasonable under the Supreme Court's case law. The Fourth Amendment allows governmental searches and seizures without individualized suspicion when the Government demonstrates a sufficient

“special need” – that is, a need beyond the normal need for law enforcement – that outweighs the intrusion on individual liberty.

[snip]

The Government’s program for bulk collection of telephony metadata serves a critically important special need – preventing terrorist attacks on the United States. See THE 9/11 COMMISSION REPORT (2004). In my view, that critical national security need outweighs the impact on privacy occasioned by this program.

Kavanaugh, of course, served as a White House lawyer and as Staff Secretary during the period when George Bush kept self-authorizing such a dragnet. While there’s no reason to believe he was involved in the dubious theories used to justify Stellar Wind (which were largely a version of this Special Needs argument), he may well have been consulted – as he apparently was on detainee treatment, though he claimed not to have been during his confirmation. He may also have seen the paperwork authorizing the program.

No doubt Kavanaugh would espouse this view whether or not he had worked for a guy who might face real legal trouble if this theory didn’t hold sway. But as people cite from this language in the future, they should remember that of all the judges who reviewed this decision, only Kavanaugh had this kind of personal tie to the dragnet. And only Kavanaugh saw fit to weigh in.