JUDGE PAULEY'S DELIBERATE BLIND SPOT: SYSTEMATIC SECTION 215 ABUSES

Sorry for my silence of late, particularly regarding William Pauley's ruling finding the phone dragnet legal. The good news is my mom can now reach the light switch in her sewing room without risk of falling.

As noted, Judge Pauley ruled against the ACLU in their suit challenging the phone dragnet. A number of commentators have pointed to some bizarre errors or focus in Pauley's ruling, including,

- Pauley says the government could not find the "gossamer threads" of terrorist plotters leading up to 9/11. They did find them. They simply didn't act appropriately with them.
- He unquestioningly considers the 3 uses of Section 215 (with Zazi, Headley, and Ouazzani) proof that it is effective. He does not note that even Keith Alexander has admitted it was only critical in one case, one not even mentioned in the government's filings in this case.
- He ignores the role of the Executive in willingly declassifying many details

this program, instead
finding it dangerous to
allow the ACLU to sue based
on an unauthorized leak. The
government has actually been
very selective about what
Snowden-leaked programs
they've declassified, almost
certainly to protect even
more problematic programs
from legal challenge.

- He claims Congress has
  renewed Section 215 7 times
  (including 2001, it was
  renewed it 5 times).

- He claims there is no doubt
  the Intelligence and
  Judiciary Committees knew
  about the rulings underlying
  the program in spite of the
  fact that some rulings were
  not provided until after
  Section 215 was renewed; he
  admits that the limits on
  circulation of notice in
  2011 was "problematic" but
  asserts the Executive met
  its statutory requirements
  (he doesn't deal with the
  evidence in the record that
  the Executive Branch lied in
  briefings about the conduct
  of the dragnet).

There are also Pauley's claims about the amount
of data included — he says the government
collects all phone metadata; they say NSA
collects far less data. This is a more

complicated issue which I'll return to, though maybe not until the New Year.

But I'm most interested in the evidence Pauley points to to support his claim that the FISC (and Congress) conduct adequate oversight over this program. He points to John Bates' limits to the government's intentional collection of US person data via upstream collection rather than Reggie Walton's limits to Section 215 abuses.

> For example, in 20011, FISC Judge Bates engaged in a protracted iterative process with the Government—over the Government's application for reauthorization of another FISA collection program. That led to a complete review of that program's collection and querying methods.

He then immediately turns to Claire Eagan's opinion reiterating that the government had found and dealt with abuses of the phone dragnet program.

In other words, for some bizarre reason he introduces a series of rulings pertaining to Section 702 — and not to Section 215 — to support his argument that the government can regulate this Section 215 collection adequately.

It's particularly bizarre given that we have far more documents showing the iterative process that took place in 2009 pertaining directly to the phone dragnet. Why even mention the Bates rulings on upstream collection when there are so many Reggie Walton ones pertaining directly to Section 215?

I suspect this is because Pauley relies so heavily on the adequacy of the minimization procedures imposed by the FISC, as when he cites Claire Eagan's problematic opinion to claim that without adequate minimization procedures, FISC would not approve Section 215 phone dragnet orders.

> Without those minimization procedures,

> FISC would not issue any section 215
> orders for bulk telephony metadata
> collection.

(Note, Pauley doesn't note that the government
has not met the terms of the Section 215 itself
with regards to minimization procedures, which
among other things would require an analysis of
the NSA using a statute written for the FBI.)

The only way Pauley can say the limits he points
to in his analysis — that NSA can only analyze 3
hops deep, that FBI only gets summaries of the
queries, that every query got approved for RAS —
is if he ignores that for the first 3 years of
the program, all of these claims were false.

He uses similar analysis to dismiss concerns
about the power of metadata.

> But [ACLU's contention that the
> government could use metadata analysis
> to learn sensitive details about people]
> is at least three inflections from the
> Government's bulk telephony metadata
> collection. First, without additional
> legal justification—subject to rigorous
> minimization procedures—the NSA cannot
> even query the telephony metadata
> database. Second, when it makes a query,
> it only learns the telephony metadata of
> the telephone numbers within three
> "hops" of the "seed." Third, without
> resort to additional techniques, the
> Government does not know who *any* of the
> telephone numbers belong to.

These last assertions are all particularly
flawed. Not only have these minimization
procedures failed in the past, not only has the
government been able to go four hops deep in the
past (which could conceivably include all
Americans in a query), not only is there
abundant evidence — which I'll lay out in a
future post — that the government does know the
identities of at least some of those whom it is

chaining, but there are two ways the government accesses this data for which none of this is true: when "data integrity analysts" fiddle with the data to prepare it for querying, and when it is placed in the "corporate store" and analyzed further.

All the claims about minimization Pauley uses to deem this program legal have big big problems.

The NSA conducted a fraud on the FISC for 3 years (and still is, to the extent they claim the violations under the program arose from complexity rather than their insistence on adopting all the practices used under the illegal program for the FISC-authorized program). Yet Pauley points to the FISC to dismiss any Constitutional concerns with this program.

And to do that, he ignores the abundant evidence that all his claims have been — and may still be, in some cases — false.