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NSA Ruling Opens Door For Fresh Take On Spying Regime

By **Allison Grande**

Law360, New York (December 17, 2013, 8:48 PM ET) -- A Washington federal judge ruled Monday that the National Security Agency's hotly contested bulk collection of domestic phone records is likely unconstitutional, a finding that attorneys say sets the stage for higher courts to revisit established Fourth Amendment and standing precedent in light of game-changing technological and societal advancements.

In a 68-page ruling, U.S. District Judge Richard J. Leon issued a preliminary injunction barring the government from collecting metadata associated with the personal accounts of Verizon Inc. customers Larry Klayman and Charles Strange, based on his finding that the pair had established standing and were substantially likely to succeed on claims that the government's data collection efforts violated the Fourth Amendment's prohibition on unreasonable searches and seizures.

While the ruling only applies to the two plaintiffs' accounts and was immediately stayed pending the government's appeal to the D.C. Circuit, Judge Leon's conclusions — which are directly at odds with those of at least 15 U.S. Foreign Intelligence Surveillance Court judges who have upheld the constitutionality of the data program on more than 30 occasions — represent a sweeping indictment of the government's conduct that will likely prompt the reassessment of long-running notions about what information should be considered private, according to attorneys.

"A lot of folks had assumed that everything regarding the legality of the metadata collection program had been settled, but the ruling allows for an important moment of pause and the opportunity to revisit the certainty with which people had approached the program," American University Washington College of Law professor Stephen Vladeck told Law360.

In arguing for the continuation of the program, the government contended that its bulk data collection efforts were legal under the precedent set by the U.S. Supreme Court in its 1979 decision in Smith v. Maryland, which held that the use of a pen register to record numbers dialed from an individual's home telephone could not be considered a Fourth Amendment search because individuals do not have a reasonable expectation of privacy in information that they voluntarily provide to third parties such as telephone companies.

The case is frequently cited to stave off claims related to the unlawful collection of private data by the government as well as companies like Google Inc., which recently used the premise articulated in Smith to counter allegations that the company violated state and federal wiretap laws by harvesting data from email sent to Gmail users.

But Judge Leon issued a blow to the argument in his ruling Monday by finding that the government could not rely on the Smith case because the relevance of the 34-year-old decision "has been eclipsed by technological advances and a cellphone centric lifestyle heretofore inconceivable."

"What Judge Leon is saying is that, while Smith is still good law, because of the comprehensive nature of the data collection being carried out by the government and changes in technology, this situation isn't Smith anymore," Reed Smith LLP counsel Timothy Nagle said. "So what we need is a Smith II, an update that applies the same constitutional standards to the current state of affairs in order to see if the outcome in Smith is applicable."

A majority of U.S. Supreme Court justices signaled that the question was ripe for review in their January 2012 decision in U.S. v. Jones. While the case was decided on the narrow grounds that the installation of GPS devices on suspects' vehicles violated the Fourth Amendment, five justices signed or joined concurring opinions acknowledging that it was leaving questions about digital privacy unanswered.

"We've known since the Jones case that the time was coming when the Supreme Court would have to revisit Smith," Vladeck said. "Now with Judge Leon's decision, the gauntlet has been thrown down, and the question that the justices said they would one day likely have to answer could very well be squarely presented to them if and when the case makes its way to the high court."

While the pressure to establish new Fourth Amendment precedent in light of technological developments is obvious, the way that the debate should be resolved is less clear-cut.

On the one hand, Smith appears to be out of sync with the current events because the scope and reach of the contested government data collection program is much broader than the narrow targeting that was at issue in the older case, according to attorneys.

"The facts in the most recent case are different than anything we've seen before," Mayer Brown LLP partner Alex Lakatos said. "Judge Leon makes the point extremely effectively that the Smith decision dealt with very narrow data collection efforts done in a different world than we are in today, and that that holding seems to have gradually expanded into the notion that none of us have any expectations of privacy in anything that we share with service providers."

But on the other hand, Smith "is still the law of the land, as much as Judge Leon would like to dismiss it as outdated," according to Steptoe & Johnson LLP partner Jason Weinstein.

"The bottom line is that whether the Fourth Amendment applies depends on whether there is a reasonable expectation of privacy in the metadata at issue — and not on the volume of data collected, or the technology used to collect it, or the prevalence of cellphone use in America — and certainly not on the variety of cool features cellphones now have," Weinstein said.

The review of the current dispute will also require higher courts to evaluate Judge Leon's handling of the standing precedent that the Supreme Court recently established in Clapper v. Amnesty International, according to attorneys.

While the Supreme Court in Clapper dismissed the plaintiffs' surveillance challenge on the grounds that they could not prove that their records had ever been intercepted by the government, Judge Leon ruled Monday that this "is not the case here" because plaintiffs could point to a secret court order leaked by

former NSA contractor Edward Snowden in June that revealed the government received telephony metadata on all subscribers from Verizon on a real-time basis.

“If the standing issue is left alone on appeal, that could really embolden plaintiffs who have wanted to challenge this type of ruling but have had trouble getting past the standing hurdle because they are not criminal defendants who know they are the subject of surveillance,” Lakatos said.

The shift in plaintiffs' standing fortunes between the Clapper ruling in February and the decision issued by Judge Leon on Monday was made possible by what Vladeck described as the “Snowden effect,” a shift in the public's perception of government surveillance programs that provided plaintiffs with ammunition to back up their spying suspicions, according to attorneys.

“We're living in a different environment now than before the Snowden leaks,” Snell & Wilmer LLP partner Patrick Fowler said. “Who knows if Clapper would have been decided in the same way if Snowden had leaked this information earlier.”

Judge Leon's case is Klayman v. Obama, case number 1:13-cv-00851, in the U.S. District Court for the District of Columbia.

--Additional reporting by Andrew Scurria. Editing by John Quinn and Kat Laskowski.
