The NSA's Bulk Metadata Program and the Fourth Amendment: Holding True to the Spirt of The Constitution in the Face of Technology

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Dan O'Hanlon Essay Contest

June 30, 2014

Edward Snowden's release of the National Security Agency's (NSA) spying practices alerted Americans to the extent of the government's knowledge of its citizens' telephone metadata. Because Americans are protected by the Fourth Amendment of the U.S. Constitution, by which the government cannot search or seize a citizen's private property without court approved justification, Snowden's leak of government secrets shows that the NSA's telephone metadata collection program is straddling the line between behaving within the limits of the Constitution and acting outside of its bounds.[1]

Snowden revealed that the NSA enlists U.S. telephone companies to create a daily updating database full of metadata from all telephone subscribers' phones. The metadata collected includes the time of the call, duration, in and outgoing numbers, and completion of call.[2] Notably, data about the location, owner of the number, and content of call is not recorded.[3] The program requests the data from telephone providers through judicial approval or through issuing a national security letter, which is beyond judicial approval.[4] The NSA claims that this data is used solely for identifying terrorist cells through finding associations between numbers.[5]

It is up to the courts to decide whether the NSA's program is constitutional. So far, two separate district court judges came to different opinions on the matter. Judge William Pauley of the Southern District Court of New York found the program constitutional, whereas Judge Richard Leon of the D.C. District Court found the program unconstitutional. Judge Pauley argues

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[1] Andrew Cohen, *The Atlantic,* "Is the NSA's Spying Constitutional? It Depends Which Judge You Ask." December 2014.
[2] *Klayman v. Obama,* 957 F.Supp.2d 1, (D.D.C. 2013), 52.
[3] *American Civil Liberties Union v. Clapper,* Civil Action No. 13-3994, slip op. (S.D.N.Y. Dec. 27, 2013), 41.
[4] Id. at 26.
[5] For example, a "seed" number is searched in the database. The agent searching will receive all numbers that the "seed" number has dialed, which is the first "hop". From there he will get two more "hops" of numbers. A third "hop" telephone number would be a number that the second "hop" had called, which had been in contact with the first "hop", which would have had contact with the "seed" number (*ACLU v. Clapper* 40-41).

that *Smith v. Maryland* should be the guiding case to determine the Fourth Amendment constitutionality of the NSA's bulk metadata gathering program. He finds that there is no expectation of privacy for information given to third parties. Judge Leon interprets *Smith* differently. He finds that the NSA program is so far removed from what the judges could imagine in 1979 that *Smith's* ruling is irrelevant today. While Judge Pauley makes a convincing argument, Judge Leon's opinion is more in tune with the spirit of the Fourth Amendment.

In order to better examine both judges' opinions on the metadata program, it is necessary to examine the precedents on which their decisions rely, namely *Katz v. U.S.* and *Smith v. Maryland.*

In the *Katz* case*,* federal agents wiretapped a phone booth based on their suspicion that the person making the phone call was involved in illegal gambling.[6] Unlike the bulk metadata program, this ruling concerns actual call content. In *Katz,* the justices found that the "…Fourth Amendment protects people, not places"[7] and that wiretapping constitutes a search.[8] Prior to this, a physical invasion of property served as the main marker of a search.[9] The justices decided that when someone makes a call, the Fourth Amendment guarantees "…that the words he utters into the mouthpiece will not be broadcast to the world."[10]

Smith v. Maryland, using *Katz* as its basis, set the stage for Judge Leon's and Pauley's rulings on the metadata collection program. The *Smith* case involved a woman receiving harassing phone calls, which led police to install a pen register at the phone company that

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[6] *Katz v. U.S.*, 389 U.S. 347, 1 (1967).
[7] Id. at 3.
[8] Id. at 1.
[9] Id. at 1.
[10] Id. at 4.

recorded the numbers the suspect dialed.[11] The justices decided that installing the pen register did not violate the Fourth Amendment because a search did not occur, in turn defining a search by whether or not there was an expectation of privacy and whether that expectation was reasonable.[12]

The phone company routinely charged for long distance numbers, suggesting that a subscribers should be aware that the numbers they dialed would be recorded; therefore, the Supreme Court majority held that there should be no expectation of privacy in the case. Furthermore, "society" would not recognize phone numbers as private, because the numbers are revealed to a third party.[13]

In the dissenting opinion, Justice Stewart stated that, "Privacy is not a discrete commodity, possessed absolutely or not at all." He found the notion of forfeiting privacy when information is given to third parties disturbing and noted that there was no "realistic alternative" for phone service.[14]

Both Judge Pauley and Judge Leon took *Katz* and *Smith* into consideration when ruling on the constitutionality of the metadata program. Before proceeding with an evaluation of how Pauley's and Leon's decisions accord with the Fourth Amendment, an overview of the judges' decisions is prudent.

Judge Pauley, in *ACLU v. Clapper,* found the NSA bulk metadata program constitutional. In *Clapper,* the American Civil Liberties Union attempted to prevent the government from further collecting the agency's call data, insisting the government remove from their database

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[11] *Smith v. Maryland*, 442 U.S. 735, 1 (1979).
[12] Id. at 2.
[13] Id. at 3.
[14] Id. at 6.

information previously collected about them, [15] arguing that such a method produced a "chilling effect" on sources' willingness to talk.[16] The ACLU asserted the collection of call data constituted a search under the Fourth Amendment.

Judge Pauley's argument is grounded on the idea that "…*Smith's* bedrock holding is that an individual has no legitimate expectation of privacy in information provided to third parties."[17] Judge Pauley contends that the government must have legal permission to search the database, that there are "minimization procedures" in place to prevent implicating too many numbers, and that the name of the telephone subscriber is not attached to his or her metadata. Therefore, a "rich mosaic" of someone's life cannot be pieced together using solely the metadata.[18] Pauley also denies that the database could be formed other ways because " … the Supreme Court has 'repeatedly refused [to hold] that only the 'least intrusive' search practicable can be reasonable.'"[19]

Pauley continues his argument by stating Verizon owns the call records, which means privacy had already been surrendered according to *Smith*. In Pauley's view, the metadata program has constitutional grounding because of its similarity to a DNA database.[20] The sheer volume of data possessed by the federal government should not implicate it in regard to violating the Constitution.[21]

U.S. v. Jones is also brought into the fray of Pauley's argument. In *Jones,* the Supreme Court decided that a GPS placed on a car constituted a search, even though there was precedent

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[15] *ACLU v. Clapper*, 42.
[16] Id. at 45.
[17] Id. at 39.
[18] Id. at 40.
[19] Id. at 41, citing *City of Ontario, Cal. v. Quon.*
[20] Id. at 42.
[21] Id. at 42.

in *U.S. v. Knotts* that a tracking beeper did not. He finds *Jones* irrelevant since the devices had to be physically placed on the car. *Smith*, he notes, has not been overruled, therefore it is not up to the lower courts to move beyond it.[22] Moreover, Pauley affirms that the relationship between telephone companies and their subscribers is fundamentally unchanged. Regardless of user ubiquity, metadata is the same.[23]

Pauley addresses First Amendment concerns by arguing that since the Fourth Amendment has not been violated, the First has not either.[24] He ends his argument by giving examples of the bulk metadata's successes in catching terrorist threats.[25]

In sharp contrast to Judge Pauley, Judge Leon in *Klayman v. Obama* argues that the bulk metadata program indeed violates the Fourth Amendment. Utilizing the same cases and background, he concludes that *Smith* is outmoded and that the NSA program violates a reasonable sense of privacy.

In *Klayman,* Leon identifies two types of searches: first, the process of collecting data, and second, querying within the database.[26] He defines unconstitutional search by following Supreme Court precedent, namely when the "'…government violates a subjective expectation of privacy that society recognizes as reasonable.'"[27]

Leon disagrees with the NSA's stance that the metadata program is analogous to the pen register in *Smith*. The metadata program is so far removed from what was happening in *Smith,* the decision is not binding. In order to justify circumvention of *Smith,* Leon notes that in *Jones,*

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[22] *ACLU v. Clapper*, 43.
[23] Id. at 44.
[24] Id. at 45.
[25] Id. at 48.
[26] *Klayman v. Obama* , 36.
[27] Id. at 43, citing *Kyllo v. U.S.*

which said a GPS placed on someone constituted a search, the justices sidestepped *Knotts,* which ruled a tracking beeper was not a search. The justices in *Jones* reasoned that a GPS is fundamentally different than a tracking beeper because it provides a great deal more information.[28]

The bulk metadata program is a far cry from the simple pen register in *Smith*. Leon provides multiple reasons. First, *Smith's* pen register was only operative for a few weeks and, in contrast, the bulk metadata program is forging a tool for historical analysis.[29] Second, in *Smith* the telephone company made a one time, good faith, effort to assist the police, while with the metadata program, the phone company and the government have "effectively a joint intellegence-gathering operation."[30] Third, the ability to store and manage all of these numbers would have been utterly impossible, possibly inconceivable, in 1979.[31] He further argues that the sheer quantity of phones makes the data outlook different than it ever appeared in *Smith.*[32]. Leon upholds the view that a mosaic of a person's life could be pieced together from the metadata.[33] Further, he argues that the metadata database is unlike a DNA database because it is constantly updating and is not simply a 'snapshot' of a person.[34] He concludes that a search has occurred.

Judge Leon then moves onto the reasonableness of the search.[35] He thinks the government goes too far in finding a "special need" to search "…virtually every American citizen without any particularized suspicion."[36] The government's interest is in speed too, which

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[28] *ACLU v. Clapper*, 44-45.
[29] Id. at 47.
[30] Id. at 48.
[31] Id. at 49.
[32] Id. at 50.
[33] Id. at 54.
[34] Id. at 40.
[35] Id. at 56.
[36] Id. at 58.

alludes to the fact that the same terrorists could be found out through slower methods.[37] The government, he points out, has not provided any evidence that the bulk metadata program has thwarted any particular terrorist threat.[38]

Judge Leon makes a stronger, more legally sound case than Judge Pauley about the constitutionality of the bulk metadata program. Judge Leon's argument aims to be true to the spirit of the Fourth Amendment, whereas Judge Pauley's argument aims to be true to the letter of the law. Trueness to the spirit involves envisioning what the Amendment's goal and intention is, while trueness to the letter follows a more concrete, literal, path to what the Amendment means. The central problem with Judge Pauley's interpretation is that it does not allow for change. The supreme law of the land should not fluctuate too easily or quickly and should be subject to a long legal line of precedent. In this, Judge Pauley's argument has merit. However, rather more importantly, his interpretation runs the risk of violating the intention behind the Amendments. Judge Leon's opinion, on the other hand, allows for the ebb and flow of change and reinterpretation. His method of interpretation is flawed in that it moves well beyond what the framers of the Constitution could have imagined and therefore runs the risk of stretching an Amendment too far. This, however, is a flaw of less substance than that of Pauley's, in which an attempt to follow the exact letter of an Amendment obscures the Amendment's original intention.

Judge Leon follows the spirit of the Constitution in that the individual liberties trump the whims of the state. Power inherent in the Constitution does not retract or expand based on matters of national security. Judge Pauley, in contrast, follows the line of reasoning that national security reigns over the rights of the individual because without a safe state there is no liberty. In

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[37] *ACLU v. Clapper*, 60.
[38] Id. at 61.

other words, in the spirit of Thomas Jefferson, individuals are willing to sacrifice certain liberties in order to gain other liberties.

The issue of national security first crops up in *Katz,* with one justice making the point that by giving the Executive branch the ability to wiretap without a warrant, a separation of government is not maintained since the branch is wholly vested in the case.[39] Having a judge intermediary is what the Constitution intended. The Fourth Amendment does not make exceptions for treason or national security.

Judge Leon views the Constitution this way too. The spirt of the Constitution is to keep the branches separate and not let national security override the people. He gives evidence that the metadata program is being abused by the government because a national security letter may override a judge, and that they are not truly following minimization procedures.[40] This also strikes a chord with *Katz* from the fact that even though those agencies in that case minimized their impact, they still did not have a judge watching over them.[41] Judge Leon further doubts the effectiveness of the program.[42] Thus, it is better to be in tune with the spirt of the law, as outside pressures attempt to erode the original meaning.

Judge Pauley's opinion is in disagreement with Judge Leon's here. Beyond finding that the metadata program is on a tight leash, he argues that the program is effective in keeping a free society by keeping terrorism in check.[43] He contends that the Constitution is not a "suicide-pact,"[44] in which personal rights will be taken to the extreme, even to the detriment of the nation.

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[39] *Katz. v. U.S.*, 8.
[40] *Klayman v. Obama*, 21.
[41] Id. at 6.
[42] Id. at 61.
[43] A*CLU v. Clapper*, 2.
[44] Id. at 51, quoting Justice Jackson.

One of the justices in *Katz* felt similar.[45] However, this line of reasoning is suggestive of bowing to political influences, not the Constitution. Furthermore, in *Katz* the decision makes a distinction that even though the FBI agents showed restraint when listening in, they ultimately were not bound by a judicial officer and that the officers cannot make an argument that they were in "hot pursuit." [46] By allowing the program to continue with dubious oversight, it violates the spirit of separation of powers and the tendency for a pursuer to become caught up in the hunt, which a judge prevents. Furthermore, Judge Leon casts doubt on Judge Pauley's examples of terrorist plots that were found through the program seem lacking any real immediate, visible, threat.[47]

One point neither judge addresses is the case of false positives the metadata could create. With so much data, it would be easy to misconstrue an identity that marks someone a terrorist, even if it is coincidental, which could lead to more invasive privacy concerns. It does not take a leap of imagination to see how this could occur. For example, an *Atlantic* editor ordered a kitchen scale that was apparently popular with people who sell drugs. Amazon's "Customers Who Bought This Item Also Bought" recommended items that were obviously related to selling drugs.[48] An innocent connection suddenly becomes cause for investigation if the government analyzed this data in a particular light. Such guilt by association is certainly not within the spirit of the Constitution. This supports Judge Leon's opinion in staying true to the intention of the Fourth Amendment.

Another important point, in terms of evaluating both judges' opinions, is the notion of immediacy and plain view. Judge Leon sees that the immediacy of a terrorist threat is not

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[45] *Katz v. U.S.*, 10.
[46] Id. at 6.
[47] *Klayman v. Obama*, 61.
[48] Alexis C. Madriga, *The Atlantic,* "The (Unintentional) Amazon Guide to Dealing Drugs." April 15, 2014. http://www.theatlantic.com/technology/archive/2014/04/the-unintentional-amazon-guide-to-dealing-drugs/360636/

impending enough to justify the program.[49] There is no sense of "hot pursuit," consistent with *Katz*. It is conceivable that the same conclusions about terrorists threats can be found via traditional intelligence methods without essentially rifling through every American's constantly updating stream of data. Furthermore, Judge Leon is in good company: *Kyllo v. U.S.* ruled that a thermal imaging gun shone over a house constitutes a search because evidence revealed could only otherwise be found through a physical examination of the property.[50] This is consistent with the spirit of the Fourth Amendment in that there there should be no "digging" through a person's artifacts because such an action merits a warrant. Unless it is publicly evident, it should be protected. Every citizen who owns a phone is having to surrender their privacy on the ghost of a chance that a terrorist may be identified.

Judge Pauley goes a different route here, in that the easiest way to find something is not the only acceptable one because people can can conjecture all day about what is the "least intrusive."[51] Furthermore, he relates that metadata is akin to seeing someone in a public place![52] He is forcing a reconciliation between the letter of the Constitution and the reality of the metadata program. Just because the data contains some relevant information does not make mining it justifiable as a legal tool. It is unlike anything found in plain sight and there is no proof of the necessity of urgency.

Moving to the root issue in evaluating the judges' conclusions, Judge Leon essentially throws *Smith* out as a guiding principle on the basis that collecting telephone data on every telephone subscriber is much different than a one time pen register.[53] The NSA is gathering data

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[49] *Klayman v. Obama*, 60.
[50] *Kyllo v. U.S.*, 533 U.S. 27 (2001).
[51] *ACLU v. Clapper*, 41.
[52] Id. at 45.
[53] *Klayman v. Obama*, 56.

that is not in plain view. Thus the decision shows clear allegiance to the intention of the Constitution that a warrant must be secured to search. He declares that expectation of privacy and reasonableness should be the basis for examining the metadata program and the Fourth Amendment. He cites the fact that the justices did not throw out *Knotts* but sidestepped it in their *Jones* opinion on a basis of technological differences between a beeper and a GPS, the latter, in *Jones,* unconstitutional in that it provided more data than was reasonable.[54] *Jones* also shows that the justices do follow a similar line of reasoning as Judge Leon.

Meanwhile, Judge Pauley follows historical precedent to the letter, and argues that *Smith* clearly shows that when information is given to a third party, an expectation of privacy is gone.[55] He further reflects a tendency to hold on to the idea that physical intrusion is an important determinate in Fourth Amendment claims, even though he too is following the reasonableness standard as found in *Katz*. The very idea of a third party being relevant in determining expectation of privacy clearly shows a tendency to find physical, explicit, sole ownership of the item in question an important part in staking Fourth Amendment protection. Basing the criteria of a search on physical intrusion is more in tune with a strict interpretation because the framers could have never imagined an electronic search. This view hails back to the dissenting *Katz* opinion of Justice Black (and the overruled *Olmsted* opinion), in which he upholds the idea of physical invasion serving as the basis for a Fourth Amendment claim and that the framers of the Constitution were aware of eavesdropping and made no protections against it.[56] However, this viewpoint is flawed because an eavesdropper in Black's casual sense does not provide

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[54] *Klayman v. Obama*., 43.
[55] *ACLU v. Clapper,* 39.
[56] *Katz v. U.S.*, 10-14.

indisputable evidence, but only provides possibly misheard testimony. Furthermore, he dismisses *Jones* as irrelevant on the basis that the device had to be physically placed on the car, which runs true to the founder's conception of a search.[57] Dismissing *Jones* on this account underplays the pivotal role that ruling plays. The opinion in *Knotts* was that a beeper was not a search because the justices considered it a plain view method of tracking, analogous to how a private eye might track someone on a freeway. By using Judge Pauley's own reasoning, if he is consistent in his argument, he should not treat *Knotts* as overruled. It is the same thing he accuses Judge Leon of doing in regard to *Smith,* which is not permissible in a strict world view.

In contrast, Judge Leon's opinion falls in line with the concurring opinion of *Katz* in that the "…Fourth Amendment protects people, not places."[58] This shows a greater interest in the idea behind the Fourth Amendment rather than the exact wording. *Jones* showed the Supreme Court grappling with the changes brought about by technology. Just because something similar toed the line of constitutionality in the past does not necessarily mean the spawn of that technology will in the future. Judge Leon is justified in circumventing *Smith* on this account, especially because his method of reasoning allows for it and the situation is different enough. Judge Pauley's method of reasoning does not allow for such a move.

A key problem with Judge Pauley's argument and his view on technology is that it desperately attempts to make the metadata program, which is so far removed from the original constitutional ideas and earlier judgements, fit into the same world that these precedents came from, when, fundamentally, it is not a part of those settings. To pretend that something so

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[57] *ACLU v. Clapper*, 43.
[58] *Katz v. U.S.*, 3.

dramatically different can fit into that world forces one to make false analogies and leaps of faith to place it into that world.

Furthermore, Judge Pauley's continual reliance on the idea that third parties completely negate privacy expectations fails to recognize the interconnectivity of the world; simply surrendering these devices is no longer viable. *Smith* bases its claim of no constitutional protection of privacy to third parties on the fact that it is constitutional for banks to reveal their records to the government.[59] However, one can circumvent using a bank a number of ways. Unfortunately, a telephone is much more akin to a necessity with no other substitute.

Judge Leon recognizes the issue of needing to move with the times and uses this idea as a center point for leaving *Smith* in the wake of this new technology. He recognizes that the amazing amounts of data the government can store, the computing power available today, the ubiquity of phones, and the contractual relationship between the telephone companies and the government makes the metadata program a totally different problem than what was presented in *Smith.*[60] What metadata has remained the same,[61] but the amazing amount of quantity the government has makes analysis a totally different question. Thus, his assessment is more in agreement with the intention behind the Constitution.

Judge Leon reached the conclusion more in spirit with the Fourth Amendment. He recognizes the violation of privacy in the name of national security, and argues it was never the intention of the Fourth Amendment to have this loophole. He also grapples with the notion of immediacy and plain sight and views that the Constitution allows for citizens to have privacy

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[59] *Smith v. Maryland*, 3-4.
[60] *Klayman v. Obama*, 47-50.
[61] *ACLU v. Clapper,* 44.

from all forms of intrusion. Most importantly, he recognizes that the justices of *Smith*, much less the framers of the Constitution, could never envision a world with the technological capabilities we have today. It is easy to fall into the trap of thinking that one can make a chain of analogies that will bridge the technological gap back into the words and direct meaning of the Constitution. It is better to envision the intention behind the Amendment and move forward. As Justice Stewart states, in the majority opinion of *Katz*, "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."[62]

[62] *Katz v. U.S.*, 4.

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