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CFPB: Spying to Protect the Consumer

It all began with a Bloomberg article. Although the CFPB spying on the financial habits of at least 10 million consumers seems to be a far cry from NSA's spying on the telephone calls, emails, snail mails, website usage, and many other communication media used by hundreds of millions of US citizens, the timing of the Bloomberg article comes at, shall we say, a rather sensitive time - given its publication just shortly prior to the recent revelations regarding the NSA's rather unique way of interpreting the Fourth Amendment of the US Constitution regarding search and seizure.

Probable Cause Conundrum

I call it the "probable cause conundrum," because (1) the Fourth Amendment expressly states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," yet (2) a warrant to spy on Americans these days, at least with respect to probable cause and the requirement that a warrant to spy must be limited in scope according to specific information, has been hugely expanded. At least one of the Supremes has interpreted "probable cause" to mean "reasonable." For some reason, I really don't think that point of view was ever the way the Framers considered it, based on the law extant at the time the Constitution was actually drafted. But I digress.

As a result of *Tennessee v. Garner* [471 U.S. 1 (1985)], *inter alia*, we all learned that the "reasonableness requirement" applies not just to a search in combination with a seizure, but also to a search without a seizure, as well as to a seizure without a search. But, again, I digress. So not to go too far afield, let us return to that Bloomberg article which, by the way, was published back in April of this year.

[To quote the very first paragraph of the article](#), its author, Carter Dougherty, writes that "the new U.S. consumer finance watchdog is gearing up to monitor how millions of Americans use credit cards, take out mortgages and overdraw their checking accounts. Their bankers aren't happy about it." And Mr. Dougherty later on states that "Director Richard Cordray has said that the consumer bureau needs raw material to make 'data-driven' decisions based on how financial products and services are used or abused. Research will improve regulation as well as the marketplace."

We don't like to think that our federal agencies are spying on us, watching our communications, perhaps especially our financial habits, determining therefrom how best to "serve" the public interest. Sure, we know that Google and other web giants are constantly monitoring our financial habits - presumably with our permission to do so. Somehow, it's acceptable if private corporations do it, but when the government does it - not so much!

It all becomes rather weird when the NSA (backed by, say, the DOJ) orders private corporations to spy on us, but the latter are not permitted to admit that the former ordered them to do so - with or without our permission - on the basis of what appears to be a new meaning of "probable cause."

What I find interesting is the similarity between the NSA's and the CFPB's reasons for the need to collect, respectively, virtually all communication data on American citizens

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and also the financial data on millions of American consumers. It seems that spying has an underlying positive cause, one that apparently we citizens simply don't fully appreciate. For if we did appreciate the workings of these agencies that are just trying to protect us, watch over us to make sure we are safe, and do what they can to mitigate our worst fears, we would overwhelmingly and clearly express our gratitude to the NSA and CFPB for their commitment to our protection - and some Americans certainly seem very grateful.

The Fourth Amendment - how quaint it has become!

Justifying Spying NSA and CFPB – Two Peas in a Pod

But let's look at some of these justifications that both the NSA and the CFPB have in common for spying on us. Or, if you find that phrase to be nettlesome, perhaps the phrase 'conducting surveillance on us' is easier to accept.

First Justification: We need a bogeyman, whom we shall call El Coco, its Spanish version, as when a Spanish-speaking parent tells a child 'si no te portas bien vendrá el coco' ("if you're not good the bogeyman will come and get you"). Almost every civilization has had some version of the bogeyman, that amorphous, unpredictable, malevolent being whose primary role is to scare the living daylights out of us and make us willingly compliant and malleable victims.

So, in the case of the NSA, El Coco comes in the form of terrorists and other malcontents; and, in the case of the CFPB, El Coco seems to be residential mortgage lenders and originators (RMLOs) and other members of the financial markets and sometimes even consumers themselves. In both instances, we can thank the government for protecting us from the mischievous schemes of El Coco.

Fortunately, these federal agencies keep guard against El Coco and make sure that nothing physically or financially bad will happen to Americans. If you take the position, as did President Franklin Roosevelt, that "there is nothing to fear but fear itself," then you're really not showing much appreciation for the many protective efforts being done on your behalf, to protect you from the wrathful and heinous acts of El Coco.

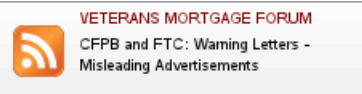
Second Justification: The euphemisms "data collection" and "data mining" have become virtually the same meaning, one giving way to the other, as surely as night follows the day. After all, what good is getting all that data about us if you can't mine it for something practical? And what could be more practical than mining data on Americans to catch terrorists hiding among them or non-Americans trying to harm Americans or demolishing supposedly deceptive RMLOs preying on the financial well-being of Americans?

But there are those who resist such sound reasoning, using case law and the Constitution to argue that putting everybody into one massive group lacks the very specificity that the Fourth Amendment requires, with the hope of finding a few bad actors - like casting out large metal nets dragged along by trawling ships, hauling for a large plunder of fish, hoping for a big catch.

As it has been recently reported, the NSA's perception of probable cause - *excuse me*, 'reasonable' cause - is that 51% passes, but 49% fails, when determining which 'fish' shall live and which 'fish' shall die; or, put otherwise, which Americans are bad, deserving of full-court press investigations and the impoverishment caused by litigation defending themselves, and which Americans are good, spared the invasiveness and poverty, but deserving to remain permanently ensconced in the Pool (that is, the deep and dark pool of collected data).

So, a cover story is needed to push back on these recalcitrant, defiant extremists who do not accept the new *status quo*. And in the case of the NSA, the cover story has been that the purpose of the immense electronic dragnet is this: information is power against El Coco, giving the US a policing and enforcement edge over its adversaries outside of the United States and, as we now know, even within it, by and between American citizens.

The CFPB's cover story is a bit more nuanced, but essentially similar, using the American sense of commitment to a free enterprise system and expectations of market stability. Here's Director Cordray's statement, offered to explain the CFPB's own dragnet: "The more information there is, the more innovation there can be and the more competition there is among the institutions around customer service. ... It's something we want to encourage."



It's a good thing, too, that the CFPB is so concerned about encouraging innovation and competition, otherwise we might think it was not complying with the Dodd-Frank Act's restrictions that prohibit it from data collection "for purposes of gathering or analyzing the personally identifiable financial information of consumers."

I'm sure that the CFPB believes that the cost of \$15 million for the outsourced data extraction and analytical work regarding credit cards will be well worth it. Whatever the expense for collecting data on other financial products under the CFPB's purview will surely also be worth the cost. After all, any information on consumers that the CFPB cannot get by the foregoing extraction process will hopefully be obtained by paying \$8.4 million to Experian for data on 5 to 10 million Americans. And that is why the CFPB really must pay \$443,260 to Clarity Services, Inc. for providing data on payday loans. And also why it is coordinating with the Federal Housing Finance Agency (FHFA) in building a database of mortgage originations that integrates consumer credit information with loan and property records, for which Core Logic will be paid \$796,000 to provide loan-level data on mortgages.

Given the selfless spirit in which these agencies seek to deploy data collection, it seems only fair that we give them the chance to use it in order to protect us not only from the nefarious, outsider El Coco (viz., non-Americans) but also from the nefarious, insider El Coco in our midst and among ourselves (viz., Americans). Really, how else to ensure that more innovation and competition is made available to American consumers? Protecting us from others and even from ourselves surely must be a full time job and certainly costs a lot of money, but it's worth it!

Third Justification: It may seem 'invasive' to take such liberties with our liberties, but by what other means might the NSA and CFPB execute their responsibilities, well, responsibly? One distinct difference between data mined by the NSA and that mined by the CFPB is that we do not get to know anything about the former, virtually forever, but we do get to know about the latter, eventually. Or, at least that is how it is supposed to happen.

Director Cordray has opined that the research developed from the data collection will be made available to the public. Maybe. But to what benefit? I translate the proposition that the developed research will be made public, as follows: "based on our selection criteria, we will make available the results of our selection criteria." This kind of circular reasoning is endemic and pervasive among the bureaucratic wonks that torment data into a statistically useless condition. It is the same kind of reasoning that evoked the confirmation bias leading up to the great market meltdown a few years ago.

I see virtually no difference between being deprived of mined data on Americans by the NSA and useless data being mined and then provided by the CFPB. My concern is that people are falling into the same kind of conceptual trap that caused the last combustible financial disaster: everybody becomes conditioned to looking at and for a concocted El Coco in one area, thereby confirming one another's biases, while the authentic El Coco is getting ready to launch its new brand of terror.

Congress Takes Notice

And now, just a few days ago, on Tuesday, July 9th, we were treated to a sequel to that first Bloomberg article. This second report, published by Housing Wire, is provided by reporter Megan Hopkins. [According to the news report](#), Mike Crapo (R-ID) "recently asked the Government Accountability Office to investigate the 'big data' collection efforts underway on consumer habits at the CFPB."

On that Tuesday, the House Financial Services Committee expressed considerable concern about the CFPB's data collection initiative. Ms. Hopkins editorially surmises: "The bureau is in a Catch-22: it collects data to inform opinions on how to help borrowers, but this data also remains a privacy concern for government officials and the general public."

One member of the Committee (David Scott, D-GA) said this: "The CFPB was put in with Dodd-Frank to protect consumers. You cannot protect consumers without the capacity of gathering information" ... "If you limit that capacity of the CFPB, it's like cutting the legs out from under them and then condemning them for being a cripple." (**See Second Justification**)

To the CFPB's defense at this hearing came its Acting Director Steven Antonakes, who offered some creative, bureaucratic newspeak by saying that the collected data will be "desensitized." As reported, he said: "We're looking at individual loan-level account information, but we're not seeking to determine who that particular consumer is. ... We have no interest whatsoever in trying to determine who that specific individual is."

Sure you do! It's El Coco - if you can catch him!

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