

Government Data Breaches

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Lots and Lots of Data

- Census data
 - Personal tax data
 - Military records
 - Immigration records
 - National security intercepts
 - Law enforcement data
 - Prison records
 - Transfer program records
 - Social Security
 - Food Stamps
 - Veterans
 - Passport applications
 - Health records
 - Federal employee records
- Corporate Records
- Regulatory disclosures
 - Trade secrets
 - Required disclosures
 - Results of inspections
 - Contracting, purchasing
 - Sealed court records
 - Corporate tax data

Government Data Is Different

- Some it acquired under legal compulsion
 - Census
 - IRS
 - LEOs
- Some 'only game in town'
 - Permits
 - Benefits
- Governments operate with different incentives
 - Not profit motive
 - But sensitive to publicity

Therefore...

- There is a moral duty to safeguard the data
- And, I argue, there are legal duties too
- Not a hypothetical: there are *lots* of breaches. (And a lack of great data, too.)

Report From the Front: Some Mostly Good News

■ Federal

- OMB has had a good 2-3 years
 - Major initiatives on best practices
 - Agencies falling into line
 - Serious commitment to encryption & notice
 - Some provision for credit monitoring
 - BUT -- Dead silence on other compensation

...And Less Good News

■ States

- Very mixed...
- Of the 44 with disclosure laws, many do not cover selves;
- Others exempt parts of state government
- Again, laws are notice-oriented
 - Maybe fines for lack of notice
 - Most lack rights of action/compensation except sometimes for failure to notify

Privacy Act

- Only applies to feds
- Rarely provides actual \$\$\$ in breach cases
 - Issues of “actual damage”, valuation
 - Doe v. Chao
 - Tantalizing settlements, e.g. *AFGE v. Hawley* at \$20 million
 - Theft of a laptop hard drive containing personnel data for 100,000 TSA employees, including SSNs, birth dates, payroll information, bank account numbers, and routing data

Is There a Constitutional Right Here? YES

- Doctrine

- It only relies a little on *Whalen*
- And a little on *Bivens* (which is a problem); § 1983 version for states
- It's substantive due process based on *DeShaney v. Winnebago County Dept. of Social Services*

- Yes, that *DeShaney*

Facts of DeShaney

- Joshua is a kid whose dad beats him
- Child services is informed about his emergency room visits
- They visit the home, note that he's being abused, is in danger, don't do anything
- Dad eventually kills him
- Supreme Court majority says that there is no affirmative Constitutional duty to protect one person from another
- Duties arise only when taken into care/custody

Thank You, Chief Justice Rehnquist

- In *DeShaney*, the Chief delineates cases where there is a right: those where the government took control (i.e. not private-private)
- In those, government must act “in a reasonably competent fashion” only if (and therefore, if) person is “wholly dependent on the state” due to “limitation ... imposed on freedom to act on his own behalf”

How This Works for Data

- Government has full control of the data
 - Nothing person/firm can do to self-help
 - Harm can be direct government negligence (lose computer)
 - Or, 3rd party is cause, government's role is 'enabling tort' (misconfiguration)
- Very close analogy

Yes, There is are Counter-Arguments

- Rehnquist was writing about people with no chance for self-help (prisoners, mental patients)
 - Here, it's only the data that was imprisoned; it's a small part of our life
 - But it's only a small extension, since state's control *in this* realm is total, and it did something to make us more vulnerable which we had no way to stop.
- Is Privacy Act sufficient remedy to prevent the *Bivens* part
 - No Bivens if there's some other remedy
 - NB. § 1983 argument would still work, and states are behind feds

And Yes, There Are Limits

- Argument trumps sovereign immunity
- But will not in some cases trump qualified immunity
- And applies only to failure to adhere to reasonable standards
- May not apply to 'über-hacker' cases

The Goal: Real Remedies

- Advantage of theory is that it take us beyond notice + credit monitoring
- Opens up new world of monetary remedies...
- ...or at least *motivated* discussions about valuation.

Thank You

- Questions, comments to:
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