Obama administration defends NSA against civil liberties lawsuit

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In New York federal court last Friday, the US Justice Department defended the National Security Agency (NSA) program that compiles telecommunications "metadata" on virtually every call made to, from or within the United States.

The massive database, which already contains seven years of personal data on the telephone habits of virtually every American—including telephone numbers, dates, times and durations of calls—"gives the government a comprehensive record of our associations and public movements, revealing a wealth of detail about our familial, political, professional, religious and intimate associations," asserted a brief filed by the American Civil Liberties Union (ACLU).

US District Judge William H. Pauley, III heard more than two hours of oral arguments in *American Civil Liberties Union v. Clapper*. (James Clapper is the director of national intelligence). At issue were both the Obama administration's request to dismiss the case and the ACLU's motion for a preliminary injunction to suspend the metadata collection program pending a trial on its legality.

"If you accept the government's theory here, you are creating a dramatic expansion of the government's investigative power," Jameel Jaffer, lead attorney for the ACLU, argued.

Calling the NSA program "a general warrant for the digital age"—a reference to the written authorizations for indiscriminate British searches that were a primary catalyst for the American Revolution—the ACLU claimed that the government surveillance had a "chilling effect" on its ability to communicate with "whistleblowers" and others, a violation of the First Amendment's right to free speech. The civil liberties organization also maintained that the program violated the "subjective expectation of privacy that society recognizes as reasonable," a right protected by the Fourth Amendment. The First and Fourth amendments are part of the US Constitution's Bill of Rights.

"Generalized surveillance of this kind has historically been associated with authoritarian and totalitarian regimes," the ACLU argued, "not with constitutional democracies."

This statement is absolutely correct. It underscores the extent to which the Obama administration and the US ruling class have in practice repudiated the Constitution and its guarantees of democratic rights.

Stuart F. Delery, an assistant attorney general for the Justice Department's civil division, defended the unprecedented accumulation of personal information as "an important element of the government's efforts to protect the nation from the very real and unrelenting threat of terrorist attack." Delery added, "These investigations are different from ordinary criminal investigations."

The US Supreme Court dismissed a similar ACLU lawsuit last February. In a 5-4 decision by Justice Samuel Alito, the right-wing bloc ruled—in "Catch-22" fashion—that because the NSA does not reveal its surveillance targets, no one can establish a privacy violation and therefore no one has legal "standing" to bring a court challenge. (See: "US Supreme Court dismisses lawsuit challenging secret wiretaps").

The legal landscape changed last June, however, when former NSA contractor Edward Snowden disclosed through the *Guardian* newspaper the secret order of the Foreign Intelligence Surveillance Act (FISA) court requiring Verizon to turn over the metadata for calls made by its subscribers "on an ongoing daily basis."

Within a week, the ACLU filed this new lawsuit, claiming that as a Verizon subscriber, its metadata had

been collected and it could now prove legal standing to challenge the NSA program.

In response to the suit, the Justice Department issued a "white paper" acknowledging that the secret FISA court order to Verizon was only a "secondary order" within a much broader program, through which the NSA compiled seven years of telephone metadata.

According to the FISA court's "primary order," the NSA can query the metadata whenever any "designated approving official" decides "there are facts giving rise to a reasonable, articulable suspicion" that the target is "associated with a foreign terrorist organization." The request can include metadata for "second and third-tier contacts," referred to as "hops."

Based on the assumption that each person telephones 40 others during the seven years of data collection, a single three-hop query about one individual can take in records for more than 2 million people.

Even under these wide open and self-administered guidelines, the FISA court decided in 2009 that due to "inaccurate statements made in the government's submissions," the "NSA had been routinely running queries of [telephone metadata] using query terms that did not meet the required standard."

Republican Congressman Jim Sensenbrenner of Wisconsin, an author of the 2001 Patriot Act, filed an amicus curiae "friend of the court" brief in support of the ACLU. He "vehemently disputes that Congress intended to authorize the program challenged by this lawsuit, namely, the unprecedented, massive collection of the telecommunications data of millions of innocent Americans."

The Obama administration lawyers continued to argue that the ACLU lacked standing. They acknowledged that the plaintiffs' telephone metadata had been collected, but maintained they could not show that the government had actually accessed those records because the NSA queries are still secret. In support of its position, the Justice Department released previously secret FISA court decisions upholding the legality of its actions.

The Obama administration also relied on a five-page report made available to members of Congress to read in secure locations when considering whether to expand FISA and the Patriot Act. The brief summary did not include the secret FISA court orders directing the collection of all call data.

In one of the more heated exchanges, Judge Pauley challenged Delery's claim that Congress knew the scope of data collection when FISA was reauthorized in 2012. Delery cited certain Democrats as being fully informed, including Senator Ron Wyden of Oregon and Dianne Feinstein of California, but conceded that many were not.

How could Congress have been briefed, Judge Pauley asked, when "a classified document describing the program was not even made available to the House of Representatives in 2011?" When Delerey responded that "the intelligence community had made every effort to give context," Judge Pauley responded, "You didn't succeed, did you?"

Summing up his argument, ACLU Deputy Legal Director Jameel Jaffer said: "The Constitution does not permit the NSA to place hundreds of millions of innocent people under permanent surveillance because of the possibility that information about some tiny subset of them will become useful to an investigation in the future."

Judge Pauley took both matters—whether to dismiss the case and the ACLU's request for an injunction to suspend the NSA program—under submission, making no indication of how or when he would rule.