

# Federal judge holds NSA telephone surveillance unconstitutional

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A federal judge in Washington, DC on Monday declared that the National Security Agency's collection of telephone "metadata" from virtually every call made to, from or within the United States violates the Fourth Amendment, the constitutional provision protecting the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Judge Richard J. Leon granted the plaintiffs' request for a preliminary injunction, ordering the government to stop collecting data on their telephone calls and to destroy their call records. But he stayed his ruling pending an appeal by the Obama administration, which argued in court in defense of the program. This effectively allows the government to continue spying on the calls of the plaintiffs while the case winds its way through the federal appeals courts and, very likely, makes its way to the US Supreme Court, a process that could take years.

The case, *Klayman v. Obama*, was brought by two conservative activists, Larry Klayman, who founded the libertarian Freedom Watch organization, and Charles Strange, whose son was a Navy Seal killed while on a mission in Afghanistan. Their suit is based on the same revelations by NSA whistle-blower Edward Snowden as those underlying *American Civil Liberties Union v. Clapper*, which was argued in a New York federal court last month. (See "Obama administration defends NSA against civil liberties lawsuit").

Leon was appointed by President George W. Bush to the United States District Court, generally viewed as the most influential trial court in the US since it hears many disputes regarding the legality of official US government actions. Coincidentally, Leon was nominated the day before the September 11, 2001 attacks that are still being used more than a decade later as the pretext for the dismantling of democratic rights in the name of the "war on terrorism."

In his 68-page ruling, Judge Leon, employing unusually blunt—and in places openly contemptuous—language, slammed the profoundly anti-democratic arguments of the Obama administration lawyers. His ruling—that the NSA telephone metadata program defies a cornerstone of the Bill of Rights—stands as an indictment of the anti-democratic and authoritarian consensus within the political establishment and the corporate-controlled media, and between both the Democratic and Republican parties, all of which have overwhelmingly supported the establishment of such police state spying programs and joined in witch-hunting Snowden.

Judge Leon's decision follows on the heels of media reports that an advisory panel set up by Obama, ostensibly to "reform" the NSA, will recommend keeping its mass surveillance programs in place, with the addition of a few cosmetic "checks" designed to blunt popular opposition.

On the same day as Leon's ruling, moreover, the White House rejected any suggestion that the US might grant amnesty to Snowden, who was forced to accept asylum in Russia to avoid extradition to the US to face espionage charges.

While declaring the NSA program unconstitutional, Judge Leon deferred to the military/intelligence establishment by staying his ruling, saying he did so in recognition of the "significant national security interests at stake in this case and the novelty of the constitutional issues."

Journalist Glenn Greenwald released a statement by Snowden on Leon's ruling that read, in part, "Today, a secret program authorized by a secret court was, when exposed to the light of day, found to violate Americans' rights. It is the first of many."

The Supreme Court dismissed an earlier lawsuit last February on the disingenuous basis that no particular person could establish legal "standing" because the NSA kept its targets secret. (See: "US Supreme Court dismisses

lawsuit challenging secret wiretaps”).

However, the question on whom the NSA was spying changed abruptly last June, when the *Guardian* published the first of Snowden’s revelations. It is now clear that the NSA is collecting telephone metadata on *everyone* “on an ongoing daily basis” pursuant to secret orders issued by the Foreign Intelligence Surveillance Court (FISC) against Verizon, AT&T and other service providers.

Judge Leon, for the purpose of his ruling, accepted the Obama administration lawyers’ description of the telephone metadata program. Since May 2006, the NSA has consolidated metadata records provided by the different telecommunications companies into a single, gargantuan database.

“NSA intelligence analysts, *without seeking the approval of a judicial officer*, may access the records” for a five-year period, Leon wrote. (The emphasis is his.) Each inquiry—called a “seed”—can be approved by any one of 22 different officials in the NSA’s “Signals Intelligence Directorate.” The data collected can expand three “hops” from the “seeds,” meaning, for example, if each telephone number called 100 other numbers over the last five years, an inquiry about one telephone number would return metadata on 1,000,000 different telephone numbers.

Leon described “the spider web-like reach of the three-hop search growing exponentially and capturing even higher numbers of phone numbers.” He used as an example a “seed,” who “may or may not actually be associated with any terrorist organization,” calling “his neighborhood Domino’s Pizza shop.” The judge continued: “The Court won’t hazard a guess as to how many different phone numbers might dial a given Domino’s Pizza outlet in New York City in a five-year period.”

The judge pointed out that even with this virtually unlimited remit, the NSA defied the secret court authorizing the program. He wrote: “Judge Reggie Walton of the FISC concluded that the NSA had engaged in ‘systematic noncompliance’ with FISC-ordered minimization procedures... and had also repeatedly made misrepresentations and inaccurate statements about the program to the FISC judges.”

Double-talk by Obama administration lawyers clearly annoyed Leon. Arguing that the plaintiffs could not prove the NSA had their phone records because they subscribed to Verizon Wireless, while the FISC order named “Verizon Business Network Services,” Judge Leon wrote: “The Government asks me to find that plaintiffs lack

standing based on the theoretical possibility that the NSA has collected a universe of metadata so incomplete that the program could not possibly serve its putative function. Candor of this type defies common sense and does not exactly inspire confidence!”

Leon explained that the Fourth Amendment prohibits a search that “violates a subjective expectation of privacy that society recognizes as reasonable.”

“The threshold issue,” Leon wrote, “is whether plaintiffs have a reasonable expectation of privacy that is violated when the Government indiscriminately collects their telephone metadata along with the metadata of hundreds of millions of other citizens without any particularized suspicion of wrongdoing, retains all of that metadata for five years, and then queries, analyzes, and investigates that data without prior judicial approval of the investigative targets.”

Leon’s response to his own rhetorical question is worth quoting at length: “I cannot imagine a more ‘indiscriminate’ and ‘arbitrary invasion’ than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on ‘that degree of privacy’ that the Founders enshrined in the Fourth Amendment. Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware ‘the abridgement of freedom of the people by gradual and silent encroachments by those in power,’ would be aghast.”

While finding that the NSA has violated the Fourth Amendment rights of virtually every person in the United States, the actual reach of Judge Leon’s injunction—stayed pending appeal—is limited to the telephone records of the two plaintiffs.



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