

FISA court rejects Verizon suit vs. NSA telephone metadata surveillance

Eric London
28 April 2014

A previously classified FISA court (FISC) opinion made public last week underscores once more the secret court's role as the rubberstamp legal authority for the government's erection of the framework for a global police state.

The opinion, penned in March by Judge Rosemary Collyer, reads as a brief for the military-intelligence apparatus.

Her order denies a petition filed in January by Verizon in which the corporation expressed doubts on the constitutionality of the warrantless bulk metadata collection program put in place by Section 215 of the PATRIOT Act.

As a preliminary matter, Verizon filed its petition not as a defender of democratic rights, but as a formality that the company hopes will ensure its own legal immunity. The complicity of Verizon and other corporations in the state surveillance programs is underscored by the fact that Verizon's petition was the first challenge of its kind ever filed in response to a FISC metadata order, despite their issuance every 90 days by the FISC.

According to the newly-released FISC opinion, Verizon's petition "arises entirely from" a December decision from the District Court of the District of Columbia, in which Judge Richard Leon ruled that the government's metadata collection program violates the Fourth Amendment to the US Constitution, which protects the population from "unreasonable searches and seizures."

In his opinion in *Klayman v. Obama*, Judge Leon explained the fallacious legal rationale provided by the government to justify its massive global surveillance operation.

In ruling that the metadata collection program is "almost Orwellian," Judge Leon rejected the

government's contention that the bulk collection program does not amount to a "search" and that the population is therefore not entitled to those protections guaranteed by the Fourth Amendment. Judge Leon put a stay on his own decision, however, so as not to hamper state surveillance while his ruling is on appeal at the Court of Appeals for the DC Circuit.

Coming in the wake of Judge Leon's decision, Judge Collyer's FISC opinion takes aim at Judge Leon and seeks to aid the Obama administration in the removal of any obstacles that might delay the rapidly expanding state surveillance campaign.

In authoring the opinion, Judge Collyer plays less the role of an independent representative of the judiciary and more the role of legal clerk for the National Security Agency.

Decrying the arguments asserted by Judge Leon as "immaterial," "misplaced," and "irrelevant," Judge Collyer repeats the basic legal refrain of the Obama administration.

She explains that the protections of the Constitution do not apply because metadata collection does not constitute a "search" for the purposes of the Fourth Amendment. Judge Collyer reaches this conclusion by claiming that the population does not have a "reasonable expectation of privacy" in the detailed information included in telephone metadata because individual phone users have turned this data over to the phone companies.

In other words, the FISC opinion concludes that hundreds of millions of phone users forfeit their Fourth Amendment rights because they "voluntarily convey[ed] [metadata] information to the telephone company," and that when users sign a phone contract, they therefore "assum[e] the risk that the company would reveal [the metadata] to the police."

This rationale relies on direct quotations from the 1979 Supreme Court case *Smith v. Maryland*, where police—without seeking a warrant—required a local phone company to install a pen register device on a criminal suspect’s phone. Over a 13-day period, police then recorded the phone numbers dialed by the suspect and used the information to convict the suspect. The Supreme Court ruled that the use of a pen register did not constitute a search and was constitutionally permissible under the circumstances.

Judge Collyer wrote that “[t]he information Verizon produces to NSA as part of the telephony metadata program is indistinguishable in nature from the information at issue in *Smith* and its progeny.”

That the government is forced to rely on such clearly false assertions points to the unprecedented character of the constitutional violations it is attempting to paper-over. As Judge Leon wrote in relation to *Smith*, “the notion that the government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was at best, in 1979, the stuff of science fiction.”

The government also claims that a similar rationale grants the government the right to gather and store the content of peoples’ emails, phone calls, text messages, cell phone app use, license plate data, bank statements, and other information.

According to the Obama administration and the FISC, Section 702 of the FISA Amendments Act creates a sweeping “foreign intelligence” exception to the Fourth Amendment. Under Section 702, the Fourth Amendment requirements for warrants, probable cause, and individual suspicion do not apply, provided the government claims it has a “reasonable belief” that the “target” is a non-US person located outside of the US.

The government treats as merely technical those minimal restrictions that are included in the FISA statutes. As Edward Snowden has explained, “the reality is this: if an NSA, FBI, CIA, DIA, etc., analyst has access to query raw [signals intelligence] databases, they can enter and get results for anything they want.”

The recent FISC decision makes clear that contrary to the repeated assertions of the Obama administration, the vast surveillance apparatus is being expanded with no oversight whatsoever.

Judge Collyer and her colleagues on the FISC operate

as a secret parallel judicial body whose purpose is to rubberstamp the executive branch’s unprecedented constitutional violations. It decides constitutional questions in a non-adversarial (*ex-parte*) format, hearing only the government’s arguments and receiving only the government’s briefs, and it issues its decisions in secret (*in camera*). As Judge Collyer herself recognized, the recent opinion was only made public (in redacted form) because of the Snowden revelations, or, in her words, because of the pressures that have arisen “in light of those disclosures” that have been made “since last summer.”

Furthermore, the FISC’s patchwork legal justifications for state surveillance are an exercise in “teleological jurisprudence,” a process practiced by Nazi jurists through which judges first reach a decision in defense of the military-police apparatus and then backtrack to provide a pseudo-legal rationale for their anti-democratic and unconstitutional conclusions.

Judge Collyer’s decision is not the first and will not be the last example of the courts abrogating those basic democratic rights protected by the Constitution. But the decision is another expression of the fact that in its drive to war and social counterrevolution, the American ruling class increasingly views the Constitution as a dead letter.



To contact the WSWs and the Socialist Equality Party visit:

wsws.org/contact