

# Federal judge allows US government to destroy evidence in suit against NSA

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In a ruling handed down June 6 in a civil suit challenging the constitutionality of the National Security Agency's mass surveillance programs, a federal judge granted the US government permission to destroy evidence.

The ruling came only one day after the same judge--Judge Jeffrey White of the US District Court for the Northern District of California--issued an order requiring the government to refrain from the destruction of evidence.

"In order to protect national security programs, I cannot issue a ruling at this time. The Court rescinds the June 5 order," Judge White said during Friday's hearing.

This is not the first time a federal judge has ruled that the need to "protect national security" justifies the abrogation of a basic democratic right, and it will not be the last. This, however, does not detract from the significance of Friday's ruling, which grants government lawyers and high-ranking intelligence and military officials the power to select which evidence should be admitted at trial and which should remain off-limits.

The evidence in question is the metadata and content obtained by government surveillance programs conducted illegally and behind the backs of the population under section 215 of the PATRIOT Act and section 702 of the 2008 Foreign Intelligence Surveillance Act.

The destruction of five-year-old data will materially affect two pending cases that were filed before whistleblower Edward Snowden's revelations. Judge White is presiding over both cases, though the official rescission was announced as part of the first suit, *Jewel v. Obama*.

The suit in *Jewel* was filed in 2008 by the Electronic Frontier Foundation on behalf of several AT&T customers after former AT&T technician Mark Klein revealed that the company was re-routing Internet traffic to a secret NSA office in San Francisco.

The government destruction of evidence will also affect

another EFF-led suit brought in 2013 by 23 California organizations against the NSA's bulk metadata collection program. In this second suit, *First Unitarian Church of Los Angeles v. NSA*, the plaintiffs argue that the government's collection of the phone records of political groups violates the First Amendment right of association.

According to the EFF, the destruction of relevant evidence has already been taking place for years. A motion filed by the EFF on May 30 states that "*for the entire lifetime of this now six-year-old litigation* the government has been routinely destroying the information it has illegally seized (emphasis in the original)."

These actions violate prior court orders proscribing the government from destroying evidence relating to the case. An initial preservation order was issued in 2009 and another temporary restraining order was issued in March.

The government continued illegally and secretly destroying evidence. The most recent dispute arose only after a Justice Department lawyer inadvertently referenced ongoing destruction of evidence in an email to an EFF attorney.

Although the plaintiffs' suit relies heavily on the content of government surveillance from before 2009, a motion filed by NSA Deputy Director Richard Ledgett asserts that preserving the evidence would have "an immediate, specific, and harmful impact on the national security of the United States."

This is the all-purpose "national security" claim that is routinely brought forward, generally without any substantiating evidence, to justify brazen violations of privacy rights spelled out in the US Constitution. At this stage in the decay of American democracy, the government need not rely on any serious arguments to trample on legal rights that had been in place for hundreds of years.

The government's "national security" rationale is supported by Orwellian legal theories. For example, the

government has asserted in *Jewel* that the suit should be dismissed because it is “highly unlikely” that the plaintiffs’ communications were acquired through section 702.

Another claim put forward by the NSA in its motion to reverse the ban on destroying evidence is that “[a] requirement to preserve all data acquired under section 702 presents significant operational problems, only one of which is that the NSA may have to shut down all systems and databases that contain section 702 information.”

This is not the first judicial barrier placed on the AT&T customers involved in the *Jewel* suit, which was dismissed in 2010 by Judge Vaughn Walker on the grounds that the plaintiffs asserted only a “general grievance” and did not have standing to bring suit. It was only on appeal to the Ninth Circuit Court of Appeals that the case was reinstated.

Once the case was reinstated before the district court, the NSA then sought dismissal by asserting the “state secrets privilege,” claiming in effect that government surveillance is too important to “national security” to face constitutional scrutiny. In July 2013, however, Judge White rejected this argument, allowing the case to be litigated under FISA.

In reality, the government opposes the preservation of evidence because its exposure at trial would serve as further proof of a massive surveillance campaign being carried out in violation of the First and Fourth amendments to the US Constitution.

Under the blanket pretext of “national security,” the judicial system is being transformed into a rubber-stamp authority for the build-up of a police-state apparatus.



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