

# US Judges Square Off over NSA Spying

President Obama is expected to impose new but fairly modest constraints on the NSA's vast surveillance program, leaving open the legal issue, moving through the federal courts, whether the metadata collection violates the Fourth Amendment, writes Marjorie Cohn.

By Marjorie Cohn

Edward Snowden, who worked for the National Security Agency (NSA), revealed a secret order of the Foreign Intelligence Surveillance Court (FISC), that requires Verizon to produce on an "ongoing daily basis ... all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."

The government has admitted it collects metadata for all of our telephone communications, but says the data collected does not include the content of the calls. In response to lawsuits challenging the constitutionality of the program, two federal judges issued dueling opinions about whether it violates the **Fourth Amendment's** prohibition on unreasonable searches and seizures.

Judge Richard J. Leon of the U.S. District Court for the District of Columbia **held** that the metadata program probably constitutes an unconstitutional search and seizure. Judge William H. Pauley III of the U.S. District Court for the Southern District of New York **determined** that it does not violate the Fourth Amendment.

Leon wrote, "Because the Government can use daily metadata collection to engage in 'repetitive surreptitious surveillance of a citizen's private goings on,' the 'program implicates the Fourth Amendment each time a government official monitors it.'"

The issue is "whether plaintiffs have a reasonable expectation of privacy that is violated when the Government indiscriminately collects their telephony 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.

"If they do, and a Fourth Amendment search has thus occurred, then the next step of the analysis will be to determine whether such a search is 'reasonable.'" The first determination is whether a Fourth Amendment "search" has occurred. If so, the second question is whether that search was "reasonable."

The judicial analyses of both Leon and Pauley turn on their differing interpretations of the 1979 U.S. Supreme Court decision, Smith v. Maryland. In Smith, a robbery victim reported she had received threatening and obscene phone calls from someone who claimed to be the robber.

Without obtaining a warrant, the police installed a pen register, which revealed a telephone in the defendant's home had been used to call the victim. The Supreme Court held that a person has no reasonable expectation of privacy in the numbers dialed from his telephone because he voluntarily transmits them to his phone company.

### **Judge Leon's Logic**

Leon distinguished Smith from the NSA program, saying that whether a pen register constitutes a "search" is "a far cry from the issue in [the NSA] case." Leon wrote, "When do present-day circumstances, the evolution of the Government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and telecom companies, become so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like Smith simply does not apply? The answer, unfortunately for the Government, is now."

Then Leon cited the 2012 Supreme Court case of United States v. Jones, in which five justices found that law enforcement's use of a GPS device to track the movements of a vehicle for nearly a month violated a reasonable expectation of privacy.

"Significantly," Leon wrote, "the justices did so without questioning the validity of the Court's 1983 decision in United States v. Knotts, that the use of a tracking beeper does not constitute a search because '[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'" Leon contrasted the short-range, short-term tracking device used in Knotts with the constant month-long surveillance achieved with the GPS device attached to Jones's car.

Unlike the "highly-limited data collection" in Smith, Leon noted, "[t]he NSA telephony metadata program, on the other hand, involves the creation and maintenance of a historical database containing five years' worth of data. And I might add, there is the very real prospect that the program will go on for as long as America is combating terrorism, which realistically could be forever!" He called the NSA program "effectively a joint intelligence-gathering operation [between telecom companies and] the Government."

"[T]he almost-Orwellian technology that enables the Government to store and

analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979," Leon exclaimed, calling it "the stuff of science fiction."

He cited Justice Antonin Scalia's opinion in Kyllo v. United States, which held the use of a thermal imaging device, that measures heat waste emanating from a house, constitutes a "search." Justice Scalia was concerned about increasing invasions of privacy occasioned by developing technology.

Leon wrote, "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." Quoting Justice Sonia Sotomayor's concurrence in Jones, Leon noted the breadth of information our cell phone records reveal, including "familial, political, professional, religious, and sexual associations."

Having determined that people have a subjective expectation of privacy in their historical record of telephony metadata, Leon turned to whether that subjective expectation is one that society considers "reasonable." A "search" must ordinarily be based on individualized suspicion of wrongdoing in order to be "reasonable." One exception is when there are "special needs," beyond the need for ordinary law enforcement (such as the need to protect children from drugs).

"To my knowledge, however, no court has ever recognized a special need sufficient to justify continuous, daily searches of virtually every American citizen without any particularized suspicion," Leon wrote. "In effect," he continued, "the Government urges me to be the first non-FISC judge to sanction such a dragnet."

Leon stated that 15 different FISC judges have issued 35 orders authorizing the metadata collection program. But, Leon wrote, FISC Judge Reggie Walton determined the NSA has engaged in "systematic noncompliance" and repeatedly made misrepresentations and inaccurate statements about the program to the FISC judges. And Presiding FISC Judge John Bates noted "a substantial misrepresentation [by the government] regarding the scope of a major collection program."

Significantly, Leon noted that "the Government does not cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature." [For Judge Leon's political background, see Consortiumnews.com's "Judge Leon's Dirty Climb to the Bench."]

## Judge Pauley's Opinion

Pauley's analysis of the Fourth Amendment issue was brief. He explained that prior to the September 11th terrorist attacks, the NSA intercepted seven calls made by hijacker Khalid al-Mihdhar to an al-Qaeda safe house in Yemen. But the overseas signal intelligence capabilities the NSA used could not capture al-Mihdhar's telephone number identifier; thus, the NSA mistakenly concluded that al-Mihdhar was not in the United States.

Pauley wrote: "Telephony metadata would have furnished the missing information and might have permitted the NSA to notify the Federal Bureau of Investigation (FBI) of the fact that al-Mihdhar was calling the Yemeni safe house from inside the United States."

"If plumbed," Pauley noted, the telephony metadata program "can reveal a rich profile of every individual as well as a comprehensive record of people's association with one another." He noted, "the Government acknowledged that since May 2006, it has collected [telephony metadata] for substantially every telephone call in the United States, including calls between the United States and a foreign country and calls entirely within the United States."

But, unlike Leon, Pauley found Smith v. Maryland controls the NSA case. He quoted Smith: "Telephone users ... typically know that they must convey numerical information to the telephone company; that the telephone company has facilities for recording this information; and that the telephone company does in fact record this information for a variety of legitimate business purposes." Thus, Pauley wrote, when a person voluntarily gives information to a third party, "he forfeits his right to privacy in the information."

While Leon's distinction between Smith and the NSA program turned on the breadth of information collected by the NSA, Pauley opined, "The collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search." And whereas Leon's detailed analysis demonstrated how Jones leads to the result that the NSA program probably violates the Fourth Amendment, Pauley failed to meaningfully distinguish Jones from the NSA case, merely noting that the Jones court did not overrule Smith.

In my view, Leon's decision is the better-reasoned opinion.

This Fourth Amendment issue is headed to the Court of Appeals. From there, it will likely go the Supreme Court. The high court checked and balanced President George W. Bush when he overstepped his legal authority by establishing military commissions that violated due process, and attempted to deny constitutional

habeas corpus to Guantanamo detainees.

It remains to be seen whether the court will likewise refuse to cower before President Barack Obama's claim of unfettered executive authority to conduct dragnet surveillance. If the court allows the NSA to continue its metadata collection, we will reside in what can only be characterized as a police state.

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**[Link to original story:**

<http://jurist.org/forum/2014/01/marjorie-cohn-nsa-metadata.php>]

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## US Intel Veterans Honor Pvt. Manning

A group of former U.S. national security officials will bestow its annual award for integrity in intelligence on U.S. Army Pvt. Manning, honoring the imprisoned whistleblower's release of evidence showing the human consequences of the wars in Iraq and Afghanistan.

The Sam Adams Associates for Integrity in Intelligence (SAAII) have voted overwhelmingly to present the 2014 Sam Adams Award for Integrity in Intelligence to Chelsea (formerly Bradley) Manning.

A Nobel Peace Prize nominee, U.S. Army Pvt. Manning is the 25-year-old intelligence analyst who in 2010 provided to WikiLeaks the "Collateral Murder" video gun barrel footage from a U.S. Apache helicopter, exposing the reckless murder of 12 unarmed civilians, including two Reuters journalists, during the "surge" in Iraq.

The Pentagon had repeatedly denied the existence of the "Collateral Murder" video and declined to release it despite a request under the Freedom of Information Act by Reuters, which had sought clarity on the circumstances of its journalists' deaths.

Release of this video and other documents sparked a worldwide dialogue about the importance of government accountability for human rights abuses as well as the dangers of excessive secrecy and over-classification of documents.

On Feb. 19, 2014, Pvt. Manning – currently incarcerated at Leavenworth Prison – will be recognized at a ceremony in absentia at Oxford University's prestigious

Oxford Union Society for casting much-needed daylight on the true toll and cause of civilian casualties in Iraq; human rights abuses by U.S. and “coalition” forces, mercenaries and contractors; and the roles that spying and bribery play in international diplomacy.

The Oxford Union ceremony will include the presentation of the traditional SAAII Corner-Brightener Candlestick and will feature statements of support from former SAAII awardees and prominent whistleblowers. Members of the press are invited to attend.

On Aug. 21, 2013, Pvt. Manning received an unusually harsh sentence of 35 years in prison for exposing the truth – a chilling message to those who would call attention to wrongdoing by U.S. and “coalition” forces.

Under the 1989 Official Secrets Act in the United Kingdom, Pvt. Manning, whose mother is British, would have faced just two years in prison for whistleblowing or 14 years if convicted under the old 1911 Official Secrets Act for espionage.

Former senior NSA executive and SAAII Awardee Emeritus Thomas Drake has written that Manning “exposed the dark side shadows of our national security regime and foreign policy follies ... [her] acts of civil disobedience strike at the very core of the critical issues surrounding our national security, public and foreign policy, openness and transparency, as well as the unprecedented and relentless campaign by this Administration to snuff out and silence truth tellers and whistleblowers in a deliberate and premeditated assault on the 1st Amendment.”

Previous winners of the Sam Adams Award include Coleen Rowley (FBI); Katharine Gun (formerly of GCHQ, the National Security Agency’s equivalent in the UK); former UK Ambassador Craig Murray; Larry Wilkerson (Col., US Army, ret.; chief of staff for Secretary of State Colin Powell); Julian Assange (WikiLeaks); Thomas Drake (NSA); Jesselyn Radack (former ethics attorney for the Department of Justice, now National Security & Human Right Director of the Government Accountability Project); Thomas Fingar (former Deputy Director of National Intelligence, who managed the key National Intelligence Estimate of 2007 that concluded Iran had stopped working on a nuclear weapon four years earlier); and Edward Snowden (former NSA contractor and systems administrator, currently residing in Russia under temporary asylum).

The Sam Adams Associates for Integrity in Intelligence are very proud to add Pvt. Manning to this list of distinguished awardees.

Sam Adams Associates for Integrity in Intelligence was established in 2002 by colleagues and admirers of the late CIA intelligence analyst Sam Adams to

recognize those who uphold his example as a model for those in intelligence who would aspire to the courage to speak truth to power. In honoring Adams's memory, SAAII confers an award each year to someone in intelligence or related work who exemplifies Sam Adam's courage, persistence, and devotion to truth, no matter the consequences.

It was Adams who discovered in 1967 that there were more than a half-million Vietnamese Communists under arms. This was roughly twice the number that the U.S. command in Saigon would admit to, lest Americans learn that claims of "progress" were bogus.

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