Written by **Joe Wolverton, II, J.D.** on June 6, 2014

Fed. Judge Upholds NSA Phone Data Collection, Despite Doubts

Earlier this week a federal judge in Idaho upheld the National Security Agency's (NSA) dragnet surveillance of phone metadata.

In his decision, Judge B. Lynn Winmill indicated that his decision could have gone another way had he not considered himself bound to confine his opinion to guidelines set out in current Supreme Court decisions.

Had he felt free from such fetters, Winmill may have ruled against the program which he reckons likely violates the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures.

Despite his apparent misgivings, however, Judge Winmill held that the ruling in *Smith v. Maryland* applies to the case he was called to consider.

In light of the broad discretion granted to government and law enforcement by the Supreme Court in the 1979 case of *Smith v. Maryland*, police (and those to whom the information gleaned from the cellphone was shared) could do whatever they deem "reasonable" with regard to the information obtained from the warrantless search of the cellphone.

In the case of *Smith v. Maryland*, the court held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."

The court in that case ruled that if someone is talking to another person by way of a medium provided by a third party (in the Smith case it was a telephone company), both parties must expect that the "intermediary" will have access to the content of the communication.

Regarding the telephone company, the court explained that when a person uses a telephone, he "voluntarily convey[s] numerical information to the telephone company and 'expose[s]' that information to its equipment in the ordinary course of business."

Documents released by former NSA subcontractor Edward Snowden reveal that the NSA "has the ability to record '100 percent' of the phone calls of a foreign country and then access those calls, replaying them months after they were made." The NSA claims that the data collected include phone numbers, call duration, and other so-called "metadata," but, the agency insists, the content of the calls is not recorded.

Other federal judges who considered the wholesale collection of phone data by the NSA haven't felt compelled to come down on the side of the government, however.

In a 68-page Memorandum Opinion issued on December 16, 2013, Judge Richard J. Leon of the U.S. District Court for the District of Columbia ruled that the NSA's unwarranted surveillance of telephone calls is prohibited by the Fourth Amendment's protections against unreasonable searches and seizures.

Judge Leon begins his analysis of the plaintiff's Fourth Amendment claim by establishing the actions of the government that are being challenged. He notes that the government

> indiscriminately collects their [the plaintiff's] telephony metadata along with the metadata of hundreds of millions of other citizens without any particularized suspicion of wrongdoing, retains all that metadata for five years, and then queries, analyzes, and investigates that data without prior judicial approval of the investigative targets.

That about sums up the wholesale monitoring activity of the NSA that was revealed in the cache of documents released (so far) by Snowden.

In what should be considered a landmark statement of Fourth Amendment jurisprudence, particularly in light of the current climate in regard to the federal government's unbounded bulk collection of private data, Judge Leon says that "unfortunately for the government," the time has come for courts to stop looking to a 34-year-old Supreme Court ruling for guidance in analyzing the contemporary, technologically advanced methods being used by the NSA to keep citizens under the watchful eye of government.

"The 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 writes.

Then, holding that the NSA's collection of telephony metadata "likely violates the expectation of privacy," Judge Leon said his injunction was timely since "there is the very real prospect that the program will go on for as long as America is combatting terrorism, which realistically could be forever!"

Next, distinguishing the corporate-government collusion in the current mass data-collection program from the common cooperation of a phone company with police surveillance, Leon writes, "It's one thing to say that people expect phone companies to occasionally provide information to law enforcement; it is quite another to suggest that our citizens expect all phone companies to operate what effectively is a joint intelligence-gathering operation with the government."

Finally, citing the "utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other investigative tactics," Judge Leon holds:

> Thus, plaintiffs have a substantial likelihood of showing that their privacy interests outweigh the Government's interest in collecting and analyzing bulk telephony metadata and therefore the NSA's bulk collection program is indeed an unreasonable search under the Fourth Amendment.

Addressing the Leon opinion, Judge Winmill essentially says, in the words of King Agrippa, "Almost thou persuadest me." In his own words, Winmill called Leon's decision "thoughtful and well-written."

That commendable soundness, however, is not enough to trump the Supreme Court's holding in *Smith*, and Winmill followed the reasoning in that case. "Judge Leon's decision should serve as a template for a Supreme Court opinion," Winmill wrote. "And it might yet."

With his dismissal, Winmill hands President Obama yet another victory in its war on the Constitution and the civil liberties it was written to protect from government deprivation.

As readers know, there are NSA (and other federal agency) programs that monitor and record every citizen's movements in the virtual and the real world.

One unwarranted wiretap, one unwarranted seizure of a phone record, one search of records of an

individual's digital communications is too many. If we are a Republic of laws, then the supreme constitutional law of the land must be adhered to. The standard is not whether the spies or their bosses think the deprivations are "okay" or even whether or not a federal judge thinks they violate the Fourth Amendment. The standard is the Constitution — for every issue, on every occasion, with no exceptions. Anything less than that is a step toward tyranny.

Taken together, the roster of snooping programs in use by the federal government places every American under the threat of constant surveillance. And, as Judge Winmill's reportedly reluctant ruling demonstrates, the courts, Congress, and the president have presented a united front bent on obliterating the Constitution and establishing a country where every citizen is a suspect and is perpetually under the never-blinking eye of the government.

The establishment will likely continue construction of the surveillance state until the entire country is being watched around the clock and every monitored activity is recorded and made retrievable by agents who will have a dossier on every American.

Though the hour is late, there is still hope. Beginning today, Americans can refuse to reelect any lawmaker who has voted to fund the NSA or any other federal agency whose existence is not specifically permitted by the Constitution. We can unite, as our forefathers, in the ennobling cause of the end of tyranny and the promotion of those unalienable rights granted to us — and revocable only — by our Creator.

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