



Written by [Warren Mass](#) on November 11, 2015

## Judge Calls NSA Phone Data Collection Unconstitutional

Judge Richard J. Leon of U.S. District Court for the District of Columbia, delivering a ruling on November 9, blocked the National Security Agency's (NSA) program that collects Americans' domestic phone records in bulk. It was the second ruling that Leon had delivered pertaining to the case of *Klayman, et al v. Obama, et al* — his first being on December 16, 2013.



At the beginning of his opinion, Leon summarized the subject matter of the case. He noted that the plaintiffs, Larry Klayman (the founder of Judicial Watch and Freedom Watch) and Charles and Mary Ann Strange (parents of Michael Strange, a Navy officer killed in Afghanistan), filed the original motion back in 2013 seeking to prevent the NSA “from collecting and querying their telephone metadata pursuant to the NSA’s classified bulk telephony metadata collection program ... under which the NSA indiscriminately collects the telephone call records of millions of Americans.”

Leon granted the plaintiffs’ motion in his December 16, 2013 opinion, but “stayed his injunction pending the appellate review that would undoubtedly follow.” Leon stayed his own injunction against the NSA because he “assumed that the appeal would proceed expeditiously, especially considering that the USA PATRIOT ACT, the statute pursuant to which the NSA was acting, was due to expire on June 15, 2015. However, noted Leon, the Circuit Court surprised him by not issuing its “decision until August 28, 2015 — nearly three months after the USA PATRIOT Act had lapsed and had been replaced by the USA FREEDOM Act, which was enacted on June 2, 2015.”

While the USA FREEDOM Act prohibits the bulk collection of telephone metadata, the prohibition does not take effect until November 29. Leon noted that during the intervening 180-day period, “NSA is continuing to operate the Bulk Telephony Metadata Program while it transitions to [a] new, more targeted program whereby the NSA, pursuant to authorization by the Foreign Surveillance Court (FISC), can require telecommunications service providers to run targeted queries against their customers’ telephony metadata records and then produce the results to those queries to the NSA.”

One of the more significant statements that Leon made in his 43-page November 9 ruling quoted the Fourth Amendment and noted:

A Fourth Amendment “search” occurs when “the government violates a subjective expectation of privacy that society recognizes as reasonable” [Citation:] *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring)). In my



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December 2013 Opinion, I explained at length why both the indiscriminate bulk collection of telephony metadata and the analysis of that data each separately constitute a search within the meaning of the Fourth Amendment.... Neither the recent changes in the operation of the Program, not the passage of the USA FREEDOM Act, has done anything to alter this analysis. The fact remains that the indiscriminate, daily bulk collection, long-term retention, and analysis of telephony metadata almost certainly violates a person's reasonable expectation of privacy....

Notwithstanding the government's strong protestations, I conclude the plaintiffs will likely succeed in showing that the searches during the 180-day transition period still fail to pass constitutional muster.

Despite promises made by its supporters, the USA FREEDOM Act did not end government snooping. Under the act, starting on November 29, records collection will continue but will be done by private telephone companies, and the government must obtain a court order to query information. When the House-passed version of the USA FREEDOM Act reached the Senate, a three-way battle erupted: One group of senators wanted to pass it; Senate Majority Leader Mitch McConnell opposed even its very limited restrictions on NSA snooping and wanted to renew the expiring portions of the PATRIOT Act intact; and others, including Senator Rand Paul (R-Ky.), opposed both the PATRIOT Act and the USA FREEDOM Act.

Paul took to the Senate floor for 10 and a half hours on May 20 to hold up McConnell's bill, which would have extended the government's surveillance authority to the end of 2020.

The USA FREEDOM Act was passed by the Senate on June 2 by a 67-32 vote, after which it was quickly signed by President Obama. Both McConnell and Paul voted against it, for the reasons we noted.

Senator Paul's father, former Rep. Ron Paul (R-Texas), had publicly criticized the USA FREEDOM Act in a column he wrote, stating:

The USA FREEDOM Act has about as much to do with freedom as the PATRIOT Act had to do with patriotism. If Congress truly wanted to protect our liberties it would pass the Surveillance State Repeal Act [(H.R. 1466)], which repeals the PATRIOT Act.

Further along in his opinion, Leon made a statement sure to please constitutionalists: "This Court simply cannot, and will not, allow the Government to trump the Constitution merely because it suits the exigencies of the moment."

The *Washington Post* reported that immediately following the ruling, Justice Department officials, playing the "national security" card, asked Leon to immediately stay his opinion pending appeal. Since Leon did that two years ago, it seems unlikely he would do so again.

The *Post* noted that Leon previously had called the NSA program "almost Orwellian," and said he thought "that tens of millions of Americans' constitutional rights have been — and are being — violated." The reference to Orwell, author of *1984*, a novel depicting a world in which the head of an all-powerful government, "Big Brother," watches all of his citizens via TV screens installed in people's flats, and listens to their conversations on hidden microphones, represents a refreshing awareness of the dangers of big government by a federal judge.

Leon noted in his conclusion:

With the government's authority to operate the bulk telephony metadata program quickly coming to an end, this case is perhaps the last chapter in the judiciary's evaluation of this particular



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program's compatibility with the Constitution. It will not, however, be the last chapter in the ongoing struggle to balance privacy rights and national security interests under our Constitution in an age of evolving technological wizardry. Although this Court appreciates the zealotry with which the Government seeks to protect the citizens of our Nation, that same Government bears just as great a responsibility to protect the individual liberties of those very citizens.

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