COHEN and WOLF

Publications


# Court Holds NSA Phone Metadata Collection Likely Violates 4th Amendment

*News & Developments section of the ABA's Young Advocates Committee Website*
Winter 2013

In *Klayman v. Obama*, No. 13–0881, 2013 WL 6598728 (D.D.C. Dec. 16, 2013), Judge Richard Leon of the U.S. District Court for the District of Columbia recently granted a preliminary injunction in favor of two plaintiffs who filed suit in response to revelations related to the collection and analysis by the National Security Agency (NSA) of telephone "metadata" from millions of Verizon customers, after holding that the program likely violates the Fourth Amendment.

Telephone "metadata" consists of the telephone numbers used to make and receive calls and the date, time, and length of the calls. In what the court describes as the "Bulk Telephony Metadata Program," the NSA (pursuant to an order of the Foreign Intelligence Surveillance Court) collects and retains metadata from millions of Verizon customers' telephone calls. Using an "identifier" (for example, a telephone number associated with a terrorist organization), intelligence analysts then query the database of metadata with the goal of identifying other telephone numbers associated with terrorist organizations. Slip Op. at 15–18.

The plaintiffs, two Verizon customers, sought a preliminary injunction against their inclusion in the Bulk Telephony Metadata Program, claiming a violation of their Fourth Amendment right to freedom from unreasonable searches. The court granted the preliminary injunction, which it stayed pending appeal.

First, the court held that the collection of telephone metadata constitutes a "search"—rejecting the application of *Smith v. Maryland*, 442 U.S. 735 (1979), which held that the warrantless tracking of numbers dialed from a telephone did not constitute a "search" because the target of the surveillance had no reasonable expectation of privacy in data (the dialed numbers) transmitted to the telephone company. Slip Op. at 44. In rejecting the applicability of *Smith*, the court found that the Bulk Telephony Metadata Program is for more intrusive: "In *Smith*, the Court considered a one-time, targeted request for data regarding an individual suspect in a criminal investigation, *see Smith*, 442 U.S. at 737, which in no

way resembles the daily, all-encompassing, indiscriminate dump of phone metadata that the NSA now receives as part of its Bulk Telephony Metadata Program." Slip Op. at 48. The court further noted that the Bulk Telephony Metadata Program involves the collection of "*five years'* worth of data," the relationship between the NSA and Verizon effectively constitutes a joint intelligence-gathering operation, the technology used today is vastly superior to that used in 1979, and "the ubiquity of phones has dramatically altered the *quantity* of information that is now available and, *more importantly*, what that information can tell the Government about people's lives." Slip Op. at 47–53 (emphases in original).

After concluding that the collection and analysis of metadata constitutes a "search," the court held that there is a significant likelihood that plaintiffs will succeed in showing the searches—conducted without a warrant—to be unreasonable. Specifically, the court rejected the government's argument that the warrantless searches are justified by "special needs"—an exception that generally gives the government the authority to conduct a warrantless search where obtaining a warrant would be impracticable. "To my knowledge . . . no court has ever recognized a special need sufficient to justify continuous, daily searches of virtually every American citizen without any particularized suspicion." Slip Op. at 58. In addition, the court rejected the argument that the Bulk Telephony Metadata Program was necessary to investigate terrorist threats more quickly, finding an "utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other investigative tactics." Slip Op. at 62.

Interestingly, the court's decision in *Klayman v. Obama* is not the first to address the NSA's collection of telephone metadata but is the first to find that it violates the Constitution. Inthe recent case of *United States v. Moalin*, Crim. No. 10–4246, 2013 WL 6079518, at *5–8 (S.D. Cal. Nov. 18, 2013), Judge Jeffrey Miller reached the opposite conclusion, following *Smith v. Maryland*, *supra*, and holding that the NSA's collection of a defendant's telephone metadata does not constitute a search because he "had no legitimate expectation of privacy in the telephone numbers dialed." *Id.* at *7. Opposing opinions about the constitutionality of the NSA's data collection programs are likely to make their way to the federal appeals courts and, ultimately, the Supreme Court. The decisions present courts with the opportunity to define the scope of Fourth Amendment protections during the twenty-first century.

## ATTORNEYS

David E. Dobin

## PRACTICE AREAS

Litigation & Dispute Resolution