

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KLAYMAN et al.,
Plaintiffs,
v.
OBAMA et al.,
Defendants.
Civil Action No. 13-0851 (RJL)

STATEMENT OF MATERIAL FACTS IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h), Plaintiffs submit the following statement of material facts as to which they contend there is no genuine disputed issue.

1. On June 5, 2013, The Guardian, a British newspaper, reported the first materials leaked by former NSA contract employee Edward Snowden that revealed the existence of U.S. government intelligence collection and surveillance programs on American citizens, regardless of any probable cause they were in communication with terrorists. See Greenwald, NSA collecting phone records of millions of Verizon customers daily, GUARDIAN (London), June 5, 2013; Leon Memorandum Opinion, dated Dec. 16, 2013 ("Mem. Op.") at 6.

2. The Guardian's report disclosed a secret Foreign Intelligence Surveillance Court ("FISC") order, dated April 25, 2013, that required Verizon Business Network Services to produce to the NSA on "an ongoing daily basis . . . all call detail records or 'telephony metadata' create by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls." Secondary Order, In re Application of the [FBI] for an Order Requiring the Production of Tangible Things from Verizon Business

Network Services, Inc. on Behalf of MCI Communication Services, Inc. d/b/a/ Verizon Business Services, No. BR 13-80 at 2 (FISC Apr. 25, 2013) (“Secondary Order”); Mem. Op. at 6.

3. The Secondary Order “show[ed] . . . that under the Obama administration the communication records of millions of US citizens are being collected indiscriminately and in bulk—regardless of whether they are suspected of any wrongdoing.” Greenwald, *supra*; Mem. Op. at 6-7.

4. **The Government Defendants had confirmed and admitted to** the authenticity of the Secondary Order as well as the existence of the Bulk Telephony Metadata Program (“Program”) under which “the FBI obtains orders from the FISC pursuant to Section 215 [of the USA PATRIOT Act] directing certain telecommunications service providers to produce to the NSA on a **daily basis** electronic copies of ‘call detail records.’” Govt.’s Opp’n at 8; Mem. Op. at 7 (emphasis added).

5. The Program is “a ‘counterterrorism program’ under [50 U.S.C. §] 1861[, **conducted for more than seven years**, that] collect[s], compiles, retains, and analyzes certain telephony records, which it characterizes as “business records” created by certain telecommunications companies.” Mem. Op. at 15-16 (emphasis added).

6. In principle, but not in practice, the Program is “meant to detect: (1) domestic U.S. phone numbers calling outside of the United States to foreign phone numbers associated with terrorist groups; (2) foreign phone numbers associated with terrorist groups calling into the U.S. to U.S. phone numbers; and (3) ‘possible terrorist –related communications’ between numbers inside the U.S.” Mem. Op. at 20-21.

7. The records collected under the Program consist of “metadata,” which includes information about what phone numbers were used to make and receive calls, when the calls took place, and how long the calls lasted. Mem. Op. at 15.

8. Through targeted searches of metadata records, the NSA “tries to discern connections between terrorist organizations and previously unknown terrorist operatives located in the United States.” Mem. Op. at 16.

9. The telephone metadata records, which “[telecommunications] companies create and maintain as part of their business of providing telecommunications services to customers[,]” have been continually produced since May 2006 under the FBI’s production orders from the FISC. *See* Mem. Op. at 16.

10. The NSA consolidates the metadata records provided by different telecommunications companies into one database and under the FISC’s orders, the NSA may retain the records for up to five entire years. Mem. Op. at 16.

11. When an NSA intelligence analyst runs a query, the quantity of phone numbers captured is very large, potentially and sometimes up to 1,000,000 numbers total. Mem. Op. at 18-19.

12. Since, the Program began in May 2006, the FISC has repeatedly issued orders directing telecommunication service providers to produce records in connection with the Program. Mem. Op. at 21.

13. Fifteen different FISC judges have issued thirty-five orders authorizing the Program and under those orders, the Government defendants must continuously seek renewal of the authority to collect telephony records, which occurs as often as every ninety days. Mem. Op. at 21.

14. The Government Defendants admit that they have failed to comply with the minimization procedures set forth in the orders. Mem. Op. at 21.

15. The Honorable Reggie Walton of the FISC concluded he had no confidence that the Government was doing its utmost to comply with the court's orders. Mem. Op. at 21-22.

16. The Honorable John Bates, Presiding Judge of the FISC, found that the Government had misrepresented the scope of its targeting of certain internet communications pursuant to 50 U.S.C. § 1881a. Mem. Op. at 22.

17. The Government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the Government disclosed a substantial misrepresentation regarding the scope of a major collection program. Mem. Op. at 23.

18. Plaintiffs filed a complaint on June 6, 2013 (*Klayman I*). See Mem. Op. at 8.

19. *Klayman I* Plaintiffs Larry Klayman, Charles Strange, and Mary Ann Strange brought suit against the NSA, the Department of Justice ("DOJ"), multiple executive officials, whom include President Barack H. Obama, Attorney General Eric H. Holder, Jr., General Keith B. Alexander, Director of the NSA, and U.S. District Judge Roger Vinson, and Verizon Communications as well as its chief executive officer. Second Am. Compl. ¶¶ 9-19; Mem. Op. at 8.

20. Plaintiffs Larry Klayman and Charles Strange are subscribers of Verizon wireless for cellular phone service. Mem. Op. at 3 n.5.

21. The United States District Court for the District of Columbia ("the Court") has the authority to evaluate Plaintiffs' constitutional challenges to the NSA's conduct. Mem. Op. at 5.

22. Plaintiffs have standing to challenge the constitutionality of the Government Defendants' bulk collection and querying of phone record metadata. Mem. Op. at 5.

23. Plaintiffs have standing to challenge both of the NSA's Bulk Telephony Metadata Program's searches: (1) the bulk collection of metadata and (2) the analysis of that data through the NSA's querying process. Mem. Op. at 36.

24. The NSA's bulk telephony metadata collection and analysis violates a reasonable expectation of privacy. Mem. Op. at 47.

25. A Fourth Amendment search occurred in this case. Mem. Op. at 56.

26. Plaintiffs have demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim. Mem. Op. at 5.

27. Plaintiffs will suffer irreparable harm absent injunctive relief. Mem. Op. at 5.

28. The public interest weighs heavily in favor of granting an injunction. Mem. Op. at 65.

29. The NSA's bulk collection program is indeed an unreasonable search under the Fourth Amendment. Mem. Op. at 62.

Dated: April 15, 2014

Respectfully submitted,

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