Conflicting Court Opinions on NSA Surveillance

By Christopher B. Hopkins

It was one year ago, before anyone had heard of Edward Snowden, that the Supreme Court held that a challenge to spy tactics under Foreign Intelligence Surveillance Act (FISA) failed because there was little evidence in Amnesty International v. Clapper (Clapper I) that the National Security Agency (NSA) had even conducted surveillance which would have touched the petitioners. Four months later, in June 2013, the Snowden disclosures shattered the nation's innocence by revealing that *everyone* in the United States has been the subject of bulk telephony surveillance. As the year 2013 closed, two judges wrote conflicting opinions about whether NSA mass surveillance practices were legal. This article discusses what we have learned from the Klayman I and Clapper II cases.

The Authority for "Bulk Telephony Surveillance"

The 1970's was an era spawning modern distrust in the government: the Vietnam war ended bitterly, the floods of Watergate opened, and two congressional committee investigations concluded there was a conspiracy in the Kennedy assassination (later discredited) and revealed illegal intelligence and covert activities by the CIA and NSA. That latter investigation, the Church Committee, lead to the enactment of FISA which was supposed to "strike a fair and just balance between protection of national security and... personal liberties." Embracing the notion that government has to keep secrets, the Foreign Intelligence Surveillance Court (FISC), a "part time assignment" for federal judges in the D.C. area, was created to discreetly review FISA surveillance.

Originally, FISA provided procedures for ex parte (secret) wiretaps and physical searches. That was later stretched to allow the FBI to obtain "business records" if there were "specific and articulable facts" of foreign surveillance. After 9/11, however, Section 215 of the Patriot Act dispensed with mere "business records" and permitted the FBI to obtain any "tangible thing." Along the way, the standard for such requests loosened from the requirement of "specific and articulable facts" to merely "reasonable grounds" of simple relevancy. Section 1861 of FISA imposes limitations on the government's application for searches.

What Is Being Collected?

After the Snowden disclosures, the government confirmed the authenticity of an April 2013 FISC Order which acknowledged a "Bulk Telephony Metadata Program" where the FBI obtained an order compelling telephone companies to produce "call detail records" to the NSA… *on a daily basis*. This metadata included phone numbers used to make or receive calls, when the calls occurred, and how long the calls lasted (not the content). The metadata from all phone companies were then blended into one massive NSA database which grew every day.

NSA intelligence analysts could access the database, without court approval, for counterterrorism purposes. Specifically, analysts would use an "identifier" (*e.g.*, a suspected terrorist's phone number) to make a "query" to see what other phone numbers were associated (presumably other previously-unknown terrorists). The query, also known as a "seed," only required internal NSA approval. The search could go out three "hops" meaning all of the phone numbers which were directly contacted by the target (first hop); all of the numbers contacted by those numbers (second hop); and all numbers associated with the second hop (third hop). Think of the 1980's shampoo commercial where the announcer suggests that "you tell ten friends and they tell ten friends…" That would be two of the three hops. As mentioned in one case, imagine the expanse of hits if one hop included a "Domino's Pizza outlet in New York City."

Two Differing Court Opinions

In Klayman v. Obama et al. (Klayman I), Judge Leon in D.C. entered a preliminary injunction which was stayed pending appeal. Unlike the petitioners in Clapper I who "could only speculate as to whether they would be surveilled at all," the Klayman petitioners, armed with the Snowden disclosures, were deemed to have standing since everyone was subject to telephony metadata collection and analysis.

The difficulty lay in a 1979 case, Smith v. Maryland, where the Supreme Court held that police could search the same type of phone metadata without a warrant since it was "generally known that phone companies keep such information." The Klayman I opinion declined to apply Smith claiming that profound changes in surveillance capabilities, our phone habits, and the relationship between government and telecom companies meant that "precedent like Smith simply does not apply." There is nominal precedent that a constitutional search (phone records) becomes unconstitutional when it is multiplied exponentially (the "mosaic theory"); even still, that concept has only applied when the government focuses on an individual, not gathering data on the public.

In ACLU v. Clapper (Clapper II), Judge Pauley in New York concluded that, to combat terrorism, the NSA's program was a "blunt tool [which] only works because it collects everything." The ACLU claimed that it contacts journalists, politicians, and activists and the program creates a chilling effect if the government is watching. Unlike Klayman I, the Clapper II court held that the ACLU had standing (again, since *everyone's* metadata is acquired) but that their claim fails under Smith: the records belonged to the phone company which voluntarily complied; a query of the database was akin to running fingerprints; and the "collection of breathtaking amounts of information unprotected by the Fourth Amendment" does not convert it into an unconstitutional search.

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