

**GOVERNMENT
SURVEILLANCE
OF U.S.
CITIZENS
AT HOME AND
ABROAD**

New York Inn of Court
March 19, 2014

The Issues

Are the records collected
“relevant to an authorized investigation?”



FISA Framework

- FISA allows for collection of multiple types of data from various sources.
- Section 215 of the USA PATRIOT Act amended FISA to allow for bulk metadata collection.



FISA Framework

- Government may obtain order from the FISC “requiring the production of any tangible thing” if:
 1. There “are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation.”
 2. The item sought “can be obtained with a subpoena duces tecum . . . in aid of a grand jury investigation or with any other [court] order . . . directing the production of records or tangible things.”



FISA Framework

- “[A]uthorized investigation” must be “to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.”



FISA Framework

- Documents are “presumptively relevant to an authorized investigation if . . . they pertain” to:
 - A foreign power or an agent of a foreign power
 - The activities of a suspected agent of a foreign power who is the subject of such authorized investigation
 - An individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation



FISA Framework

- FISA prohibits an “investigation of a United States person” that is “conducted solely on the basis of activities protected by the first amendment to the Constitution.”
- Government must also enumerate minimization procedures.



Relevant to an Authorized Investigation?

- **FISA only authorizes the collection of records if they are “relevant to an authorized investigation.”**
- The item sought must be the type of item that “can be obtained with a subpoena duces tecum . . . in aid of a grand jury investigation or with any other [court] order . . . directing the production of records or tangible things.”
- Relevance has broad legal meaning—anything that bears on or could reasonably lead to other matter that bears on any issue relevant to investigation.



The Issues

Does the bulk metadata collection program
violate the 4th Amendment?



Fourth Amendment

“[T]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”

Two Issues

1. Is it a search?
2. If so, is it reasonable?



Fourth Amendment

- **Is it a search? Is there an expectation of privacy?**
 - Use of drug sniffing dogs at airport does not constitute search because it only reveals whether or not a person is carrying contraband.
 - Use of infrared imaging to detect marijuana growing operating in suspect's garage is search because it requires use of advanced technology not commonly available to public.
 - Placement of GPS tracker on car constitutes search because installation of device requires a physical trespass.
 - Use of “pen register” not a search because information was being provided to third party (the phone company) (*Smith v. Maryland*)



Fourth Amendment

- **Is the search reasonable?**
 - Fourth Amendment only forbids “unreasonable” searches.
 - Absent special circumstances, warrantless searches are per se unreasonable.
 - **BALANCING TEST** Special circumstances exist where the privacy interests are outweighed by an important government interest that would be placed in jeopardy if a warrant were required.



The Issues

Does the bulk metadata program violate
the **First Amendment**?



First Amendment

- The First Amendment protects expressive activities like belonging to political party or advocacy group.
- Privacy may be necessary to preserve freedom of association, especially where group is unpopular.
- Protections exist out of the fear that disclosure will chill expressive activities.



First Amendment

- Laws compelling the disclosure of membership information will only be upheld when there is a compelling government interest, when viewed in the light of less drastic means for achieving the same basic purpose.
- No showing of actual harm required; declarations that compelled disclosure will have a chilling effect on expressive activities are sufficient to trigger First Amendment protection.



First Amendment

- Sufficiently tight nexus between a compelling government interest and particular information requested.
 - A state law requiring applicants to the bar to disclose their memberships serves the compelling interests in evaluating the candidates, but the law would have an unacceptable chilling effect on expressive activities given the other alternatives for gathering the same information.
 - A law requiring the disclosure of all political donations did not violate the First Amendment, because there was no alternative means of ensuring that campaign financing is fair and transparent.



First Amendment

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- No showing of actual harm required; declarations that compelled disclosure will have a chilling effect on expressive activities are sufficient to trigger First Amendment protection.



The Issues

Does **Article II** of the Constitution give the President the **authority to conduct surveillance**?



Executive Authority

- Article II of the Constitution vests the powers of the Commander in Chief in the President, including the power “to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in a time of war.”
- Two questions:
 1. Can the President perform surveillance without congressional authorization?
 2. Can the President perform surveillance even where Congress has forbidden it?



Executive Authority

- The *Youngstown* Framework
 - *Youngstown Sheet & Tube Co. v. Sawyer*, involving the attempted nationalization of nation’s steel industry during Korean War.
 - Justice Jackson concurrence set standard for executive power.
 - There are three “zones”
 - **Zone 1** – Where Congress has explicitly authorized executive action, the President’s power is at its “zenith,” and consists of all executive and congressional powers authorized by the constitution.
 - **Zone 2** – Where Congress has neither authorized nor forbidden executive action, the President's power is in a “zone of twilight.”
 - **Zone 3** – Where Congress has explicitly forbidden executive action, the President’s power is at its “lowest ebb,” and consists only of the powers granted exclusively to the executive.



Executive Authority

- What zone are we in?
 - If we are in Zone 2, does the President have the authority to collect metadata?
 - What about if we are in Zone 3?

