

Judges hear arguments over NSA surveillance (Update)

December 8 2014, by Gene Johnson

A federal appeals court heard arguments Monday in an Idaho woman's challenge to the National Security Agency's bulk collection of phone records—the third time in recent months that appeals courts around the country have considered the controversial counterterrorism program.

Calling herself an ordinary American upset about the program, nurse Anna J. Smith sued the government last year, arguing the agency's collection of call records violates the Fourth Amendment's prohibition on unreasonable searches and seizures.

In June, U.S. District Court Judge Lynn Winmill in Boise, Idaho, disagreed—but nevertheless noted that the case raised privacy questions that could wind up before the Supreme Court.

"We're dealing with a dragnet of call records," Smith's attorney and husband, Peter Smith, told a three-judge panel of the 9th U.S. Circuit Court of Appeals on Monday. "Anna's not a criminal defendant. She's not a suspect in any crime. And yet her records are being swept up."

The government has acknowledged that under a USA Patriot Act provision, and with authorization from the Foreign Intelligence Surveillance Court, it collects data from telecommunications companies showing the time and length of calls, along with numbers dialed. With a further showing to the Foreign Intelligence Surveillance Court, investigators can then run queries of that data in an effort to uncover links involving suspected terrorists.

The Justice Department called it an "important government anti-terrorism program" in its briefing to the 9th Circuit.

"It is true that, under the program, the government acquires a large volume of business records containing telephony metadata," department lawyers wrote. "But consistent with the governing Foreign Intelligence Surveillance Court orders authorizing the program, that information is used and analyzed only under highly restricted circumstances."

The New York-based 2nd U.S. Circuit Court of Appeals recently heard arguments in an appeal of a judge's opinion that upheld the program's legality, while the D.C. appeals court heard arguments last month after a judge there found the program probably is unconstitutional.

The flurry of cases followed revelations by former NSA contractor Edward Snowden about once-secret intelligence collection programs.

President Barack Obama has called for an end to the bulk collection of phone records of millions of Americans not suspected of crimes. Earlier this year, he suggested instead that Congress make changes that would have telecommunications companies—not the government—maintain the records, which could then be queried by investigators with appropriate court orders.

The arguments in Smith's case Monday focused on how to interpret the Supreme Court's 1979 ruling in *Smith v. Maryland*.

In that case, the justices upheld a decision by Baltimore police to collect, without a warrant, phone numbers a criminal suspect dialed over three days. The court held that people have no expectation of privacy in phone records because information about who they call is provided to a third party—the phone company.

Peter Smith told the judges that the NSA's bulk collection of phone records concerning millions of Americans bears little resemblance to the 1979 case. The scope of data collected here could allow the government to piece together an intimate picture of someone's life: whether a person has a medical problem or has been calling a suicide hotline or getting counseling for alcoholism, he said.

Judge Richard C. Tallman questioned whether Anna Smith had standing to challenge the program.

While the government has acknowledged that records of Verizon business clients are among those collected, it has not confirmed that Verizon's personal phone customers, including Smith, are among them.

However, Smith also is represented by the American Civil Liberties Union and the Electronic Frontier Foundation. The ACLU is a Verizon business client, and her communications with the organization could be swept up, Jameel Jaffer, the ACLU's deputy legal director, noted after the hearing.

Appeals judges M. Margaret McKeown and Richard C. Tallman questioned Justice Department lawyer H. Thomas Byron III about whether people would have constitutional privacy rights in other records turned over to a third party, such as medical records. Byron said it would depend on the context.

"I agree it's a very difficult inquiry," he said.

But as for the bulk collection of telephone records, Byron said, the steps the government takes to minimize any privacy violations should ease concerns. He noted that Congress, the administration and the Foreign Intelligence Surveillance Court have all authorized the program.

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