

# NSA surveillance program exposed by Edward Snowden ruled illegal by US Ninth Circuit

By Kevin Reed  
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A three-judge panel of the Ninth Circuit Court of Appeals issued an opinion on Wednesday that ruled illegal the US government surveillance program that collected metadata from every international and domestic phone call and was exposed by Edward Snowden in 2013.

The decision said that the National Security Agency's bulk phone record collection program "may have violated the Fourth Amendment and did violate the Foreign Intelligence Surveillance Act ('FISA') when it collected the telephony metadata of millions of Americans, including at least one of the defendants."

Phone call metadata is the information about the calls such as the phone numbers and duration of a call, but not the content of the conversations themselves.

Although the ruling said the surveillance program was against the law, the Ninth Circuit upheld the conviction of four Somali immigrants—who were also US citizens—of providing financial assistance to a "foreign terrorist group." The ruling states that "suppression is not warranted on the facts of this case" and "we affirm the convictions in all respects" because, "the metadata collection, even if unconstitutional, did not taint the evidence introduced by the government at trial."

The case against the four Somali men—Basaaly Saeed Moalin, Ahmed Nasir Taalil Mohamud, Mohamed Mohamud, and Issa Doreh, of San Diego—began in October 2010 and was based, in part, on recorded phone calls of Moalin that took place in 2007 and 2008. The men were convicted by a jury on February 22, 2013 of giving \$10,600 to al-Shabaab, which was identified by the US government as a foreign terrorist organization in March 2008.

Significantly, the Ninth Circuit ruling reviews the impact of the Snowden revelations on the convictions of the four men. It states, "Months after the trial, in June

2013, former National Security Agency ('NSA') contractor Edward Snowden made public the existence of NSA data collection programs. One such program, conducted under FISA Subchapter IV, involved the bulk collection of phone records, known as telephony metadata, from telecommunications providers."

The ruling explains that public officials, who were defending the NSA phone call surveillance program in the face of public outrage over the Snowden exposures, boasted about how that "the program had played a role in the government's investigation" of Moalin. Specifically, then-FBI Deputy Director Sean Joyce told the House Permanent Select Committee on Intelligence that the NSA program had "provided us a telephone number only in San Diego that had indirect contact with an extremist outside the United States."

This information then led to the defendants' filing a motion for a new trial on September 5, 2013, arguing that Moalin's Fourth Amendment rights against unreasonable searches and seizures had been violated. The motion for a new trial also argued that "the government had failed to provide notice of the metadata collection or of any surveillance of Moalin it had conducted under the FISA Amendments Act."

The lower court denied the motion on November 14, 2013 on the grounds that the "public disclosure of the NSA program adds no new facts to alter the court's FISA. .. rulings." The court also ruled that the telephony metadata program did not violate the Fourth Amendment. The defendants appealed this decision to the Ninth Circuit on October 29, 2015.

The bulk phone record collection program was but one of the mass electronic surveillance operations of the NSA and CIA exposed by Edward Snowden. The whistleblower smuggled an estimated 1.7 million

documents out of a clandestine NSA facility in Honolulu, Hawaii on micro secure digital cards and shared portions of them with news outlets.

Snowden's exposures proved that the US government, in cooperation with the so-called Five Eyes partners (UK, Australia, New Zealand and Canada), had built a global electronic spying apparatus. The documents showed that this apparatus was not only gathering phone metadata but had electronic surveillance tools that were capturing in real time the email, phone call, text messaging and online browsing activity of anyone, anywhere in the world.

Responding to the court's opinion, Edward Snowden tweeted, "Seven years ago, as the news declared, I was being charged as a criminal for speaking the truth, I never imagined that I would live to see our courts condemn the NSA's activities as unlawful and in the same ruling credit me for exposing them. And yet that day has arrived."

The American Civil Liberties Union, one of several organizations that supported the appeal, welcomed the court's ruling. Patrick Toomey, senior staff attorney with the ACLU's National Security Project, said, "The ruling makes plain that the NSA's bulk collection of Americans' phone records violated the Constitution. The decision also recognizes that when the government seeks to prosecute a person, it must give notice of the secret surveillance it used to gather its evidence. This protection is a vital one given the proliferation of novel spying tools the government uses today."

The ruling by the Ninth Circuit regarding the NSA's bulk collection of phone call metadata—a program the government claims as of 2015 is no longer in use, but which is but the "tip of the iceberg" of unconstitutional surveillance activities of US intelligence—raises many more questions than it answers. While the Ninth Circuit opinion most definitely does not indicate that the US courts are now going on the offensive against the undemocratic practices of the surveillance state, the decision does point to ongoing divisions within the ruling establishment over US intelligence matters.

It should be pointed out as an important political fact that none of the US courts involved in the case of Moalin and his associates questioned the role of US imperialism in Somalia. While all of the courts supported the claims that Somali defendants were supporting "terrorism," the Ninth Circuit Court ruling states, "In March 2008, the United States designated al-Shabaab a foreign terrorist organization. A key figure in al-Shabaab, Aden Hashi Ayrow, was killed in a U.S. missile strike on May 1, 2008."

In any case, during his podcast on Thursday, right-wing Representative Matt Gaetz (Republican from Florida) called for President Trump to pardon Snowden, saying, "As of today, the case has never been stronger, that Edward Snowden deserves a pardon from President Trump," adding, "If it were not for Snowden, we might not know today that our own government was engaged in an activity that now a federal appellate court has deemed illegal."

Gaetz also said that pardoning Snowden would be a good political move for Trump because Libertarians in key swing states would support the president if he did so.

At the same time, those sections of the US political establishment with close ties to US intelligence, including Attorney General William Barr who said he was "vehemently opposed" to a pardon for Snowden, consider the whistleblower a "traitor" who should be brought back to the US and executed.

Both Democrats and Republicans, as well as the corporate media, ferociously attacked the idea floated by President Trump that he was taking "a good look at" pardoning Snowden. For example, a right-wing publication founded by Bill Kristol called TheBulwark.com, wrote on August 20, "The prospect of a presidential pardon for Snowden, whose revelations about the National Security Agency's foreign and domestic surveillance techniques were disclosed at his personal whim rather than through democratic audit, is a befitting offering from a chief executive whose flagrant criminality and contempt for the democratic process will be his most enduring legacy."

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