

PRIVACY TIMES

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Privacy Times, Inc. Suspends Publication of *Privacy Times*

That's correct we are suspending publication of *Privacy Times*, ending 33 years of consecutive publishing of 23 Issues of the newsletter annually. The main reason for the suspension is the unenviable economics of print journalism. While it's always possible that some sort of financial miracle will enable us to resume publishing the newsletter, it is not likely. Those subscribers, whose renewals would be due between February and November 2014, will be entitled to pro-rated refunds.

When we launched *Privacy Times* in January 1981 (the month President Reagan was sworn in), there were only a handful of people working full-time on privacy issues. Now with growing networks of Privacy Act Officers, Chief Privacy Officers, lawyers, lobbyists and public interest advocates and other privacy professionals, as well as a plethora of specialized privacy publications and consulting services, there are thousands.

I have been proud to have been part of this history and evolution. It strongly refutes that uninformed and superficial claims that "privacy is dead," or that we "no longer have any privacy." The debate over privacy, and the fundamental notion that regular people should have the legal right to maintain reasonable control over their personal information, rages on – stronger than ever – particularly because it is constantly threatened by powerful sources. *Privacy Times* also has been proud to document this history and evolution, and to have served as its "Paper of Record."

I particularly want to express my heart-felt gratitude to our loyal subscribers, many of whom have been with us for decades. It's been a fun, useful, and perhaps an historic ride.

Through Privacy Times, Inc., we will continue to provide expert consulting and expert witness services. Please contact us if you have any questions. (See back page)

■ Evan Hendricks
Editor/Publisher

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OPPOSITE RULINGS BY U.S. JUDGES PORTENDS SUPREME COURT REVIEW

Prospects for U.S. Supreme Court review of the National Security Agency's massive and indiscriminate collection of millions of Americans' telephone records spiked in December when a federal judge in Washington ruled the program violated the U.S. Constitution, and a federal judge in New York came to the opposite conclusion and affirmed the program's legality.

On Dec. 16, Judge Richard Leon declared that the mass collection of phone "metadata" probably violates the fourth amendment, which prohibits unreasonable searches and seizures, and was "almost Orwellian" in its scope. In an opinion chock full of literary punches at the NSA, he said James Madison, the architect of the US constitution, would be "aghast" at the scope of the agency's collection of Americans' communications data. Judge Leon issued a preliminary injunction, but stayed his ruling, pending an appeal by the Obama Administration.

On Dec. 27, however, Judge William H. Pauley III in New York, said the NSA program was legal and necessary to fight terrorism. "The question for this court is whether the government's bulk telephony metadata program is lawful. This court finds it is. But the question of whether that program should be conducted is for the other two coordinate branches of government to decide," he wrote. He bought the government's claim that there was no expectation of privacy in the phone numbers people dial (i.e., metadata), pursuant to the U.S. Supreme Court's 1979 ruling in Maryland v. Smith.

Judge Pauley concluded the program was a necessary extension of steps taken after the Sept. 11 terrorist attacks. He said the program lets the government connect fragmented and fleeting communications and "represents its counter-punch" to the al-Qaida's terror network's use of technology to operate decentralized and plot international terrorist attacks remotely.

"This blunt tool only works because it collects everything," Judge Pauley said. "The collection is broad, but the scope of counterterrorism investigations is unprecedented." The American Civil Liberties Union said it would appeal the ruling to the U.S. Court of Appeals for the 2nd Circuit in New York.

On the other hand, Judge Leon expressed doubt about the central rationale for the program cited by the NSA: that it is necessary for preventing terrorist attacks. "The government does not cite a single case in which analysis of the NSA's bulk metadata collection actually stopped an imminent terrorist attack," he wrote.

"Given the limited record before me at this point in the litigation – most notably, the utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other investigative tactics – I have serious doubts about the efficacy of

the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism,” Judge Leon wrote.

“Plaintiffs have a substantial likelihood of showing that their privacy interests outweigh the government’s interest in collecting and analyzing bulk telephony metadata and therefore the NSA’s bulk collection program is indeed an unreasonable search under the Fourth Amendment.”

Judge Leon said that the mass collection of phone metadata, revealed by the *Guardian* and the *Washington Post* last June, was “indiscriminate” and “arbitrary” in its scope. “The almost-Orwellian technology that enables the government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979,” he wrote, disputing the government’s rationale that the U.S. Supreme Court’s ruling in *Maryland v. Smith* authorized the secret seizure of phone data on millions of Americans never suspected of wrongdoing.

The case was brought by Larry Klayman, a conservative lawyer, and Charles Strange, father of a cryptologist killed in Afghanistan when his helicopter was shot down in 2011. His son worked for the NSA and carried out support work for Navy Seal Team Six, the elite force that killed Osama bin Laden.

Judge Leon wrote that ongoing stories on the NSA’s bulk telephone records collection, made possible by leaks by former NSA contractor Edward Snowden, means that citizens now have standing to challenge it in court, since they can demonstrate for the first time that the government is collecting their phone data.

“The government asks me to find that plaintiffs lack standing based on the theoretical possibility that NSA has collected a universe of metadata so incomplete that the program could not possibly serve its putative function,” he wrote. “Candor of this type defies common sense and does not exactly inspire confidence!”

Judge Leon also held that courts had the power to review government surveillance practices even when Congress explicitly restricts the ability of citizens to sue for relief. “While Congress has great latitude to create statutory schemes like FISA,” he wrote, referring to the seminal 1978 surveillance law, “it may not hang a cloak of secrecy over the constitution.”

EMBARRASSING HERSELF: ‘INSUFFERABLE’ RUTH MARCUS BLEATS & WHINES ABOUT NSA WHISTLEBLOWER EDWARD SNOWDEN

Due largely to what the public has learned about the massive invasions of privacy occasioned by the National Security Agency because of the leaks by Whistleblower Edward Snowden, there’s been a marked shift in both public opinion and “establishment” consensus on at least two fronts.

First, that NSA secret seizure of all Americans’ phone records (“metadata”) should end,

and second, that some sort of clemency or immunity should be considered for Snowden.

Despite the tide turning against the NSA's unwarranted invasions of privacy, and in favor of Snowden, *Washington Post* columnist Ruth Marcus, downplayed the NSA's wrongdoing and instead demonized Snowden, calling him "Insufferable, smug, self-righteous, egotistical, disingenuous, megalomaniacal (and) overwrought." (www.washingtonpost.com/opinions/ruth-marcus-snowden-the-insufferable-whistleblower/2013/12/31/7649539a-7250-11e3-8b3f-b1666705ca3b_story.html)

"My scale weighs against Snowden ... The degree of intrusion on Americans' privacy, while troubling, is not nearly as menacing as he sees it," she wrote, without citing any expert or authority. Many observers said she was speaking for cranky old anti-Snowden officials in Washington's so-called "Intelligence Establishment."

"In the government's massive database is information about who I called and who they called in turn. Perhaps the government shouldn't have it; surely, there should be more controls over when they can search it. But my metadata almost certainly hasn't been scrutinized; even if it has, the content of the calls remains off-limits," she wrote, focusing, as she said, on "I" and "my" metadata – not those of over 200 million Americans who clearly don't share her callous disregard for privacy.

Marcus's bleating against Snowden came after the *Washington Post's* Barton Gellman's scoop/interview with Snowden from Moscow. In that story, Snowden declared that the worldwide debate that has ensued because of his unauthorized disclosures meant that he was "already winning." (www.washingtonpost.com/world/national-security/edward-snowden-after-months-of-nsa-revelations-says-his-missions-accomplished/2013/12/23/49fc36de-6c1c-11e3-a523-fe73f0ff6b8d_story.html)

Marcus and the rest of the dwindling anti-Snowden crowd are becoming increasingly isolated – which may have provoked her to embarrass herself with the latest tantrum.

In days and weeks preceding her column:

- The Obama Administration indicated it was seriously considering changes in the NSA spy program.
- Those indications came after a Presidential panel recommended changes in the metadata program, and said that the program had not been "essential to preventing attacks" since its creation.
- The *New York Times* editorialized in favor of Snowden and privacy, stating, "Considering the enormous value of the information he has revealed, and the abuses he has exposed, Mr. Snowden deserves better than a life of permanent exile, fear and flight. He may have committed a crime to do so, but he has done his country a great service. It is

time for the United States to offer Mr. Snowden a plea bargain or some form of clemency that would allow him to return home, face at least substantially reduced punishment in light of his role as a whistle-blower, and have the hope of a life advocating for greater privacy and far stronger oversight of the runaway intelligence community.”

- The *Times* cited Rick Ledgett, who leads the NSA’s own task force on the Snowden leaks, that he would consider amnesty if Snowden would stop any additional leaks. (www.cbsnews.com/news/nsa-leaders-split-on-giving-amnesty-to-snowden/)
- *Washington Post* Columnist Eugene Robinson said Snowden should be named “Person of the Year. His whistleblowing “has galvanized efforts throughout the [world to protect what little privacy](#) we have left ... These ongoing disclosures provide a detailed map of a shadow realm that spans the globe. We now know how technology is destroying privacy — and what steps governments and communications companies must be pressured to take in order that privacy survives.” (www.washingtonpost.com/opinions/eugene-robinson-edward-snowden-was-the-person-of-the-year/2013/12/23/34551caa-6c13-11e3-a523-fe73f0ff6b8d_print.html)
- *Washington Post* Columnist Richard Cohen said Snowden admitted he was “just plain wrong when he initially declared that Snowden was “no real whistleblower,” as well as “ridiculously cinematic” and “narcissistic.” Cohen wrote that “the early denunciations (by others) of Snowden (as a traitor) now seem both over the top and beside the point.” He added, “I am sure, though, that he has instigated a worthwhile debate. I am sure that police powers granted the government will be abused over time and that Snowden is an authentic whistleblower, appalled at what he saw on his computer screen and wishing, like Longfellow’s Paul Revere, to tell “every Middlesex village and farm” what our intelligence agencies were doing. Who do they think they are, Google?” (www.washingtonpost.com/opinions/richard-cohen-edward-snowden-is-no-traitor/2013/10/21/f9d2ae5a-3a74-11e3-a94f-b58017bfee6c_story.html)

Glenn Greenwald, the American Blogger based in Brazil, who helped break the entire Snowden story (along with Barton Gellman and Laura Poitras), debated Marcus on CNN, stating, “The really important point is that people in Washington continuously make excuses for those in power when they break the law. Ruth Marcus was one of the leaders in 2008 saying that Bush officials that torture people shouldn’t be prosecuted, they should be protected. She praised and protected FBI agents in the ‘70s who entered people’s homes without warning and were criminally prosecuted, saying they shouldn’t have been prosecuted. That’s what people in Washington do. They would never call on someone like James Clapper, who got caught lying to Congress, which is a felony, to be prosecuted. They only pick on people who embarrass the government and the administration to which they are loyal, like Edward Snowden. It’s not about the rule of law.” (Marcus did not deny Greenwald’s charges about torture or the FBI.)

NEW STATE LAWS CURB EMPLOYERS ON JOB APPLICANTS’ CRIMINAL HISTORIES

(Continued on next page)

Minnesota and North Carolina are two of the latest States to join the “ban the box” movement. “Ban the box” laws, which vary in terms of scope and detail, generally prohibit employers from requesting information about job applicants’ criminal histories.

According to the Hunton & Williams *Employment & Labor Perspectives Blog*, as well as its *Privacy and Information Security Law Blog*:

- On December 1, 2013, a new North Carolina law went into effect that prohibits employers from inquiring about job applicants’ arrests, charges or convictions that have been expunged. This prohibition applies to requests for information on applications and during interviews with applicants.
- On January 1, 2014, a new Minnesota law goes into effect that prohibits employers from inquiring into, requiring disclosure of or considering the criminal record or criminal history of an applicant until the applicant has been selected for an interview or, if there is no interview, until after a conditional offer of employment has been made.

Hunton & Williams advised employers to review their applications and hiring practices to ensure compliance with new laws, and verify that managers involved in the hiring process understand when, and to what extent, they are permitted to inquire about applicants’ criminal histories.

FOIA CT ROUNDUP: STATE, U.S. AID LOSE ON EX. 5, PRESIDENTIAL PRIVILEGE

The following is a summary of a recent court opinion under the Freedom of Information Act.

Center for Effective Govt. v. Dept. of State & U.S. Agency for Intl. Dev. et al.: No. 13-0414

Court: U.S. District Court for the District of Columbia
Judge: Judge Ellen S. Huvelle
Exemptions: FOIA (b)(5)
Issues: Presidential Communications Privilege
Documents: Presidential Policy Directive on Global Development (PPD-6)
Date: December 17, 2013

After *in camera review*, the court ruled that President Obama’s Policy Directive on Global Development was not protected by Exemption 5 and thus had to be disclosed to the Center for Effective Government (CEG).

Judge Ellen S. Huvelle rejected the government’s claim that the Directive, known as “PPD-6,” was distributed too widely and therefore not covered by the Exemption 5’s “presidential communications privilege.” The Center requested the document from the State Dept. and the U.S. Agency for International Development (AID).

Obama’s Global Development Directive (PPD-6) was widely and publicly touted as a “first of its kind by a U.S. Administration” recognizing that “development is vital to U.S.

national security and is a strategic, economic, and moral imperative for the United States.”

Although the Directive purported to communicate policy relevant to national security and foreign relations topics, no part of it was classified, nor had the government claimed any protection for the document under FOIA Exemption 1. Indeed, upon its issuance, the White House posted online a detailed fact sheet regarding the PPD-6,

The White House said the PPD-6 “calls for the elevation of development as a core pillar of American power and charts a course for development, diplomacy and defense to mutually reinforce and complement one another in an integrated comprehensive approach to national security.” It also “provides clear policy guidance to all U.S. Govt. agencies and enumerates the core objectives, the operational model, and the modern architecture needed to implement this policy.”

The government declared that the President initially distributed the PPD-6 to a “limited group of senior foreign policy advisors, cabinet officials, and agency heads concerning the global development policy of the United States.” But the PPD-6 was accompanied by a transmittal memo emphasizing “a need for the recipients to safeguard carefully the Directive’s content” and informing the recipients to “not distribute the document beyond their departments or agencies without advance approval of the NSS. However, the recipients were not so limited in their ability to distribute the PPD-6 within their own departments or agencies, where it was permissible to circulate the directive on a ‘need-to-know basis,’” Judge Huvelle noted.

“As one example, lower-level staff members at State and USAID used the PPD-6 during their preparation of the First Quadrennial Diplomacy and Development Review. The team responsible for that review ‘was guided by the [PPD-6] to ensure that [the review’s] findings and recommendations were aligned and complementary,” she continued.

“This team included QDDR senior leadership, a fourteen-member executive council, four drafters and editors, and a QDDR leadership team of at least 20 people from the Depts. of State and Defense, the USAID, and the Millennium Challenge Corp., including an ‘Office Mngmnt. Specialist,’ several ‘Staff Assts.,’ and an advisor serving as a Presidential Management Fellow.”

“In sum, the PPD-6 is a widely-publicized, non-classified Presidential Policy Directive on issues of foreign aid and development that has been distributed broadly within the Executive Branch and used by recipient agencies to guide decision-making. Even though issued as a directive, the PPD-6 carries the force of law as policy guidance to be implemented by recipient agencies, and it is the functional equivalent of an Executive Order. The government, however, claims that the PPD-6 is protected from disclosure under FOIA by Exemption 5’s presidential communications privilege. The application of the presidential communications privilege to an unclassified, widely distributed presidential directive is an issue of first impression, but the Court is guided by Exemption 5 jurisprudence that teaches that the determination will ultimately turn on the ‘factual content and purpose of’ the PPD-6,” Judge Huvelle wrote.

She noted that courts have considered the application of the presidential communications

privilege to audio recordings of confidential communications between the President and his advisers, (see, e.g., *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 446-50 (1977); deliberative documents created by White House advisers, but never viewed by the President, agency documents created to advise, but never reaching, the Office of the President, and advisory documents from an agency that were not solicited, but were received, by the President.

As a case of first impression, she said she was obligated “to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President’s ability to obtain candid, informed advice.” She added, “In so doing, the Court must bear in mind that “the very reason that presidential communications deserve special protection, namely the President’s unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance.”

CEG argued the PPD-6 was not protected by the presidential communications privilege “because it was not made in the course of making decisions, but instead is the final decision itself – one that has been widely circulated and implemented within the Executive Branch ... The govt. takes the position that the PPD-6 is protected by the privilege because, regardless of how widely the document has been distributed within the Executive Branch, it originated with the President, and relying on the privilege protects the President’s final decisions,” Judge Huvelle wrote.

“Thus, when a court decides whether the privilege extends to a document or class of documents, it must ask whether application of the privilege is necessary to protect the confidentiality of communications as between the President and his advisers. The rationale of *In re Sealed Case* is instructive. In ruling the privilege can apply to ‘final’ documents, the Appeals Ct. rested on the fact that the privilege also protects the President’s ability to ‘operate effectively.’”

“However, this broad purpose is not implicated in this case. First, this is not a case involving ‘a quintessential and non-delegable Presidential power’ – such as appointment and removal of Executive Branch officials, where separation of powers concerns are at their highest. Instead, the development and enactment of foreign development policy can be and is ‘exercised or performed without the President’s direct involvement.’ Second, having reviewed the PPD-6, the Court finds, contrary to the assertions in the Sanborn Declaration that the forward-looking PPD-6 is not ‘revelatory of the President’s deliberations’ such that its public disclosure would undermine future decision-making.”

Finally, she said, the “President’s ability to communicate his [final] decisions privately, is not implicated, since the PPD-6 was distributed far beyond the President’s close advisers and its substance was widely discussed by the President in the media.” She added, “There is no evidence that the PPD-6 was intended to be, or has been treated as, a confidential presidential communication,” noting that it was a “non-classified document setting forth Executive Branch policy that lacks any inherent (or claimed) basis for secrecy. As such, the claim of the privilege is absent of any “need to protect military, diplomatic, or sensitive national security secrets, but

instead it depends solely on the broad, undifferentiated claim of public interest in the confidentiality of' the document."

"Second, from its issuance, the President has publicly touted the directive, referring to it as a 'change in the way the United States does business' with regard to foreign aid and development and informing the public in no uncertain terms that the document 'provides clear policy guidance to all U.S. Government agencies' regarding the trajectory of U.S. development policy."

"Although the government is correct that the disclosure of portions of a document subject to the presidential communications privilege does not waive the privilege as to the entire document, the widely publicized nature of the PPD-6 is important in considering the confidentiality interests implicated by the directive's disclosure under FOIA," Judge Huvelle wrote

"Third, although the original recipients of the PPD-6 were instructed not to distribute the directive beyond their departments or agencies without approval of the NSS they were free to distribute the directive within their departments or agencies based on an undefined 'need-to-know' basis. Of course, permitting distribution of a document on a 'need-to-know' basis does not automatically undermine the confidentiality of a document."

"But 'need to know must be defined, and adhered to, in a context-specific manner for a given privilege to apply. And, the government has not, even after plaintiff raised the issue defined what 'need to know' means as to an extensive intra-agency distribution of the PPD-6. This failure on the part of the government is important. As in the attorney-client privilege context, the scope of the "need to know" is relevant to the presidential communications privilege, where, for the privilege to apply, the reason a given recipient 'needs to know' must implicate the purposes that animate the privilege: the promotion of candor and effective presidential decision-making," she continued.

"Thus, it is axiomatic that the privilege's purpose of promoting candor and confidentiality between the President and his closest advisers becomes more attenuated, and the public's interest in transparency and accountability more heightened, the more extensively a presidential communication is distributed. Simply put, the purposes of the privilege are not furthered by protecting from public disclosure presidential directives distributed beyond the President's closest advisers for non-advisory purposes. Nor does invocation of an amorphous "need to know" cure the problem where there is no claim of an advisory role between the document-recipient and the President."

"Thus, since the government has not satisfied its burden to demonstrate that the document was intended to be confidential for the purpose of the presidential communications privilege, the Court cannot agree that Exemption 5 applies to the PPD-6," Judge Huvelle reasoned.

"Even more troubling for the government, however, is the evidence that the PPD-6 has in fact been distributed widely within the Executive Branch for non-advisory purposes. Instead, the government doubles down and asserts that as a matter of law 'widespread dissemination of

the PPD-6 within the Executive Branch’ does not undermine the confidentiality of the document for the purpose of the presidential communications privilege.”

“Rather, the government takes the position that the only relevant question is ‘whether the document at issue originated with (or at the request of) the President or one of his close advisers’ and, if the answer is yes, the fact that the “original recipients of the document subsequently distributed it beyond the President’s inner circle” is irrelevant,” she wrote.

“This position is flawed. First, the government seems to base its argument on the fundamental and oft-repeated principle that communications that ‘directly involve’ the President are covered by the privilege. But no court has suggested that the mere fact that a President’s direct involvement in a communication, either as an author or recipient, renders it automatically protected. Instead, the privilege has always been limited to certain types of communications directly involving the President, specifically those communications in performance of (a President’s) responsibilities’ ‘of his office’ and made ‘in the process of shaping policies and making decisions.’”

“The government also argues that, independent of the specific purposes underlying the presidential communications privilege, ‘it is difficult to imagine how the President could govern effectively if the substance of the President’s orders could not be communicated to the Administration officials and their subordinates charged with carrying them out.’”

“In so arguing, the government attempts to sidestep the real question before the Court. The question is not whether policy decisions made by the President, as reflected in his directives, can be communicated to his administration officials and then down the chain of command to those rank-and-file staffers charged with carrying them out. Clearly, the President and his administration officials can do that. The question is when, if at all, the government must then disclose those orders under FOIA,” she wrote.

“As to that question, the government appears to adopt the cavalier attitude that the President should be permitted to convey orders throughout the Executive Branch without public oversight – to engage in what is in effect governance by ‘secret law.’ Such a position conflicts with the very purpose of FOIA,” Judge Huvelle concluded.

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