

2014 QUESTION
The Dan O’Hanlon Essay Competition



First Prize ~ \$1,000

Second Prize ~ \$500

Edward Snowden, Counter-terrorism and the National Security Agency: Does the Government’s Collection of Telephone Metadata Violate Our Fourth Amendment Rights? The Courts Do Not Agree.

In June of 2013, *The Guardian* – a London newspaper –reported that the U.S. National Security Agency had secretly collected the records of telephone numbers dialed by all customers of Verizon. This was the first of many stories resulting from disclosures of top-secret material by a government contractor named Edward Snowden showing extensive intelligence gathering activity that arguably captures information related to every U.S. citizen.

Snowden had used his security clearance to illegally download a copious amount of top-secret information from the files of the National Security Agency (“NSA”) –a “serious security breach” that “damaged this country,” according to U.S. Secretary of Defense Chuck Hagel. *See* “Defense Chief says leaks were serious security breach,” *Reuters*, June 26, 2013. Snowden then traveled to Hong Kong to disclose the information to particular journalists and a filmmaker he had selected to be the recipients of his evidence. He later fled to Russia, where he remains.

Since Snowden’s disclosures became international news, the NSA’s data-gathering in the name of counter-terrorism has faced challenges to its constitutionality, including two court cases that resulted in rulings last December by federal judges in the U.S. District Court for the District of Columbia and the U.S. District Court for the Southern District of New York. Both rulings have been appealed, and it is widely expected that the issue in the cases will ultimately be ruled upon by the U.S. Supreme Court.

The two federal judges reached opposite conclusions regarding whether the NSA’s gathering of “telephony metadata” violates the Fourth Amendment. The Fourth Amendment, contained within the Bill of Rights to the U.S. Constitution, holds that “[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 Warrants 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.”

One of the district court judges (Judge Leon) held that the Supreme Court would likely find that the NSA’s gathering of “telephony metadata” has violated the Fourth Amendment, while the other (Judge Pauley) relied on Supreme Court precedent to find the program constitutional.

As pointed out by Andrew Cohen in *The Atlantic*, “I suspect the two rulings will soon be used side by side in law schools to illustrate how two reasonable jurists could come to completely different conclusions about the same facts and the same laws. . . . The judge who gets overturned on appeal here won’t necessarily be wrong – he’ll just not have the votes on appeal supporting his particular view of the law and the facts.” Cohen, “Is the NSA’s Spying Constitutional? It Depends Which Judge You Ask,” *The Atlantic*, December 2013.

Your job in this essay contest is to read and consider both decisions and discuss which district judge, in your opinion, made the right decision. In so doing, you should carefully consider and discuss the strongest arguments in each judge’s opinion, and, ultimately, explain why you believe one judge’s conclusion is stronger than the other.

Background Material:

The two district court decisions are below in PDF format. In addition, a PDF of the 1979 Supreme Court decision in *Smith v. Maryland*, considered by both district judges in reaching their opposite conclusions, is also below. Your essay should reflect that you have read and considered all three decisions.

Klayman v. Obama, Civil Action No. 13-0851, slip op. (D.D.C., Dec.16, 2013)



klaymanvobama215-
-dc.pdf

American Civil Liberties Union v. Clapper, Civil Action No. 13-3994, slip op. (S.D.N.Y. Dec. 27, 2013)



acluclappernydistrict.
pdf

Smith v. Maryland, 442 U.S. 735 (1979)



Smith v.
Maryland.pdf

In addition, while there are thousands of articles to be found on this topic, for general background purposes, you may wish to read the following articles:

Suzanna Andrews, Bryan Burrough, Sarah Ellison, "Special Report: The Snowden Saga: A Shadowland of Secrets and Light," *Vanity Fair*, May 2014. Available on-line at: <http://www.vanityfair.com/politics/2014/05/edward-snowden-politics-interview> . This tells Snowden's story from Snowden's perspective.

Andrew Cohen, "Is the NSA's Spying Constitutional? It Depends Which Judge You Ask." *The Atlantic*, December 2014. Available on-line at <http://www.theatlantic.com/national/archive/2013/12/is-the-nsas-spying-constitutional-it-depends-which-judge-you-ask/282672> .

Adam Liptak and Michael S. Schmidt, "Judge Upholds N.S.A.'s Bulk Collection of Data on Calls," *The New York Times*, December 27, 2013. Available on-line at <http://www.nytimes.com/2013/12/28/us/nsa-phone-surveillance-is-lawful-federal-judge-rules.html> .

You may also wish to consider the report of The President's Review Group on Intelligence and Communications Technologies. In the wake of Snowden's disclosures and the resulting controversy, President Obama appointed this group of experts to study and make recommendations regarding how to effectively address "Liberty and Security in a Changing World." The report can be found on-line at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

Of course, you can do additional research to support your arguments. You must be sure that all of your research is properly cited and can be located and verified by the contest judges. At all times, you should be cognizant of your Marshall "information literacy" learning outcome as you evaluate the appropriateness of source material.

Rules and Prizes

This contest is open to any Marshall University student who will be enrolled full-time and in good academic standing in September of 2014. A suggested length for a standard academic essay is 10-15 pages, but there is no required length or page limitation.

Winning entries should demonstrate a thorough understanding of the reasoning of each district court's decision – Judge Leon's and Judge Pauley's. All entries should be typewritten, double-spaced, and submitted on standard-size 8.5 x 11 inch paper. Your entry should be mailed to the address below, postmarked on or before July 30, 2014. **Deadline for submission for the 2014 contest is July 30, 2014 (postmarked).**

The winners will be recognized in a special awards ceremony dedicated to the Essay Competition as part of the celebration of Constitution Week in September.

Submit entries to:

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