

No. 14-42

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES
UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, and
NEW YORK CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellants,

v.

JAMES R. CLAPPER, in his official capacity as
Director of National Intelligence, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York, Case No. 13-cv-3994

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* The Rutherford Institute is a nonprofit, non-stock corporation. There are no parent corporations and no publicly-held corporation which owns 10% or more of the stock in the corporation.

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IDENTITY AND INTERESTS OF AMICUS CURIAE

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ARGUMENT

THE ORDER ALLOWING THE BULK COLLECTION OF TELEPHONE METADATA IS A MODERN-DAY GENERAL WARRANT AND VIOLATES THE FUNDAMENTAL PROTECTIONS THE FRAMERS ESTABLISHED WITH THE FOURTH AMENDMENT

The District Court below determined that no violation of the Fourth Amendment is set forth by the allegations of the Appellants' Complaint. Still, it is plain that the order challenged in this case, runs headlong against the principles and purposes that were the foundation for the adoption of Bill of Rights prohibition on unreasonable searches and seizures. It is undisputed that the bulk telephony metadata collection order, initially approved by the Foreign Intelligence Surveillance Court in 2006, *In re Application of the FBI for an Order Requiring Production of Tangible Things from [Redacted]*, No. BR06-05 (FISC May 24, 2006), <http://1.usa.gov/1f28pHg>, and reauthorized since, allows the government to collect information on substantially every telephone call in the United States, whether or not the call involves a foreign country, a person associated with a foreign country, or is entirely within the United States (SPA006, SPA 010). This unprecedented intrusion into the activities that citizens heretofore considered private and personal is effected without any suspicion and without any limitation to information related to some known threat from a foreign actor considered

dangerous to the United States. See John W. Whitehead, *A Government of Wolves: The Emerging American Police State* (New York: SelectBooks, 2013), pp. 120-22.

As such, the bulk metadata collection order is no different from the abusive general warrants colonies suffered under and which were intended to be outlawed with the adoption of the Bill of Rights. It is well-established that the Fourth Amendment's guarantees to privacy and security were born of the American colonists experience with general warrants known as writs of assistance. Under these general warrants, the British Crown's officials were given blanket authority to conduct general searches in order to discover if any goods had been imported into the Colonies in violation of the tax laws. *Berger v. State of New York*, 388 U.S. 41, 58 (1967). They "allowed the king to break into the homes of any number of citizens in search of suspicious information without particularized suspicion and without limitation on its use." Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 Ariz. L. Rev. 607, 611 (Winter 2004). Writs of assistance not only authorized these invasions of privacy, but allowed British agents to enlist the assistance of other government officials and private citizens to assist with the searches and seizures. These writs were nothing less than open-ended royal documents which British soldiers used as a justification for barging into the homes of colonists and rifling through their belongings.

fighting against writs of assistance. In an effort to suppress “libelous” publications that opposed the government and to apprehend the authors of these publications, the English Secretary of State resorted to the issuance of general warrants to ransack unnamed places in an effort to determine and find those critical of the government. Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 876-77 (1985). In a series of cases, the English judiciary found in favor of those injured by the intrusions under general warrants, asserting that reliance upon the legality of general warrants is an attempt “to destroy the liberty of the kingdom[.]” *Id.* at 879 (quoting *Huckle v. Money*, 19 How. Str. Tr. 1404, 95 Eng Rep. 768, 769 (C.P. 1763)).

The most famous of these cases, *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (CP 1763), are cited by the U.S. Supreme Court as “the wellspring of rights now protected by the Fourth Amendment.” *Stanford*, 379 U.S. at 483. In *Wilkes*, a trespass action arising from the execution of a general warrant was upheld, and the presiding justice commented as follows on the crown’s position in the case:

The defendants claim a right, under precedents, to force persons houses, break open escutores, seize their paper &c. upon a general warrant, where no inventory is made of the things thus take away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may

affect the person and property of every man in his kingdom, and is totally subversive of the liberty of the subject.

Wilkes, 98 Eng. Rep. at 498. *Entick* similarly upheld a claim for trespass liability arising from the execution of a warrant allowing the wholesale examination and seizure, in the discretion of the officer, of Entick's books and papers in search of evidence that Entick was the author of libelous matters. Rejecting the defendants' attempts to justify the search and seizure, Lord Camden wrote "if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." *Entick*, 19 How. St. Tr. at 1063.

Out of this experience, the Fourth Amendment was adopted as a fundamental bulwark against government invasion of the privacy of citizens. The provisions of the Fourth Amendment

are precise and clear they reflect the determination of those who wrote the Bill of Rights that the people of this new Nations should forever "be secure in their persons, houses, papers, and effects" from intrusion and seizure by officers acting under the unbridled authority of a general warrant.

Stanford, 379 U.S. at 481. The commitment to prevent any resurrections of the Bill of Rights p1.0021 Tw

conception of the protection of privacy afforded to persons by the Constitution. *See Steagald v. United States*, 451 U.S. 204, 220 (1982) (the Fourth Amendment’s roots in the outlawing of general warrants requires a ruling that a warrant to arrest an individual does not authorize the search of a third-party’s residence) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979) (warrant allowing executing officers to seize “obscene materials” was tantamount to a general warrant and violated the Fourth Amendment).

The order at issue in this case is a modern-day incarnation of a general warrant. By authorizing the government to force telecommunications providers to divulge telephony metadata in bulk, without any limitation relating to suspicion or particularity, the order violates the most fundamental safeguards against intrusion that the Fourth Amendment was intended to make impossible:

A. Absence of Suspicion: General warrants and writs of assistance gave the Crown’s officers blanket authority to search where they pleased for goods imported in violation of the customs law. They allowed the king to invade the security of any number of citizens and search for information without particularized suspicion. *Rosen, supra*, 46 *Ariz. L. Rev.* at 611. The power to intrude was untethered to any modicum of suspicion, much less probable cause. *Stanford*, 379 U.S. at 481. “The purpose of the probable cause requirement of the Fourth Amendment [is] to keep the state out of constitutionally protected areas

Donald A. Dripps, “Dearest Property”: *Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 70 (2013) (quoting Candor, *A Letter from Candor to the Public Advertiser* (London, J. Almon 1764)).

With this history in mind, the Supreme Court has established that the Fourth Amendment’s search and seizure clause does not permit an “indiscriminate rummaging”, *California Bankers Assoc. v. Shultz*, 416 U.S. 21, 62 (1974), or “a general exploratory rummaging”, *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), through the records or belongings of individuals.

Yet this is precisely what is at issue in this case. The mass seizure of telephony metadata under the order is indistinguishable from the supposedly forbidden general warrants of yore. “As with general warrants, blanket seizure programs subject the private papers of innocent people to the risk of search and exposure, without their knowledge and with no realistic

government is allowed to commit intrusions “in search of suspicious information without particularized suspicion and without limitations on its use.” Rosen, *supra*, 46 Ariz. L. Rev. at 611.

CONCLUSION

The decision of the District Court here cannot be squared with the fundamental protections the Fourth Amendment was meant to establish. At its core, the Fourth Amendment was adopted to eliminate the danger to liberty posed by general warrants. The bulk telephony metadata collection order is a modern-day general warrant and precisely the kind of intrusion into the privacy of citizens the Framers meant to eliminate. Therefore, for the aforementioned reasons and those set forth by the Appellants, amicus curiae respectfully requests that this Court reverse the decision of the District Court.

Respectfully submitted,

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Dated: March 13, 2014

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 2,309 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This Brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s Daniel L. Ackman

Daniel L. Ackman

CERTIFICATE OF SERVICE

I certify that on March 13, 2014, I caused the foregoing Brief of Amicus Curiae The Rutherford Institute in Support of Appellees with the Clerk of Court to be electronically filed via the Court's CM/ECF System; all of the parties listed on the attorney service preference report have been served via the Court's CM/ECF system.

I further certify that on March 13, 2014, I caused six (6) copies of the foregoing Brief of Amicus Curiae to be delivered next day by a third-party commercial carrier to the Clerk of the United States Court of Appeals for the Second Circuit.

I further certify that on March 13, 2014, I caused two (2) copies of the foregoing Brief of Amicus Curiae to be delivered next day by a third-party commercial carrier to the following counsel of record for the parties:

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