

[What Does the Latest Court Ruling on NSA Telephone Metadata Program Mean?](#)

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On August 28, the U.S. Court of Appeals for the District of Columbia Circuit, in [Obama v. Klayman](#), ruled for the government in the ongoing litigation over the National Security Agency's (NSA's) [telephone metadata program](#). The *Klayman* ruling, while arising out of the context of the government's foreign intelligence gathering powers, did *not* opine on the constitutionality of the NSA's program. Instead, the decision focused on the *procedural* prerequisites necessary for a federal court to exercise jurisdiction over the case in the first place. Specifically, the appeals court ruled that the *Klayman* plaintiffs lacked standing to obtain a preliminary order barring the NSA from continuing the telephone metadata program.

Arising from the D.C. District Court's issuance of a preliminary injunction against the telephone metadata program in December of 2013, the recent ruling from the D.C. Circuit comes after the [short term lapse and subsequent 180-day reauthorization](#) of the statutory authority supporting the telephone metadata program. Central to the case is the issue of constitutional standing, embodied in [Article III of the Constitution](#), which provides that federal courts generally can act only in the context of a "case-or-controversy." That language that has been [interpreted by the Supreme Court](#) to require that a person seeking judicial relief from an Article III court have a genuine stake in a case (*i.e.*, an injury-in-fact that is caused by the illegal action and is redressable by the judicial relief sought). Pursuant to the 2013 Supreme Court's ruling in [Clapper v. Amnesty International](#), a plaintiff seeking injunctive relief to stop unlawful government conduct bears the burden of proving that a concrete and particularized injury is "certainly impending" as a result of the allegedly unlawful government action.

Amnesty International arose in the context of a challenge to a different foreign surveillance program – surveillance conducted pursuant to [section 702 of the FISA Amendments Act of 2008](#). The challenge in that case failed because the plaintiffs, a group of lawyers and human rights activists who had clients that could be subject to section 702 surveillance, had "no actual knowledge" that the government targeted their communications and could only speculate whether the government would imminently target their communications. The *Klayman* plaintiffs attempted to distinguish *Amnesty International* on the grounds that they—unlike the *Amnesty International* litigants—had proof that they were being subject to surveillance under the NSA metadata program. Namely, the *Klayman* plaintiffs argued that they had suffered an injury because (1) the nature of the bulk metadata program meant that *all* telephone records—including the plaintiffs'—needed to be a part of the program; and (2) the plaintiffs were customers of Verizon Wireless and a leaked 2013 production order from the FISA Court indicated that the government was collecting phone records from a sister company of Verizon Wireless, Verizon Business Networks.

The D.C. Circuit in *Klayman* disagreed with the plaintiffs and remanded the case to the district court. The *per curiam* ruling, while unanimous in concluding that the plaintiffs had failed to establish standing necessary to obtain a preliminary injunction against the government telephone metadata program, was [fairly splintered](#), with all three judges on the panel releasing separate opinions on the matter. Judge Janice Rogers Brown, had the [first concurring opinion](#) in the case and concluded that while she felt the evidence proffered by the *Klayman* plaintiffs made the case distinguishable from *Amnesty International*, the evidence proffered only made it "possible" that the government had collected the underlying records, short of the burden needed to obtain a preliminary injunction – a "substantial likelihood of success on the merits." The remaining two Judges—senior Judges Stephen Williams and David Sentelle—disagreed with Judge Brown's assessment of the standing question, finding the case indistinguishable from *Clapper*. Judge Williams [concluded](#) that while assertions had been made by the plaintiffs that the telephone metadata program obtained all metadata from every major carrier, the government has "consistently maintained" that the collection is not

so comprehensive. Judge Williams also noted that, unlike in the recent decision of the Second Circuit finding the telephone metadata program unlawful on statutory grounds, the plaintiffs in the instant case were not even customers of Verizon Business Networks, making the *Klayman* plaintiff's arguments about standing speculative and insufficient to meet the burden for establishing Article III standing.

Judge Sentelle [concurred in part and dissented in judgment](#), agreeing "with virtually everything in Judge Williams' opinion," save for one point—what to do with the case going forward. Because the appeal was centered on the district court's grant of a *preliminary* injunction and was not an appeal on the merits of the underlying complaint seeking monetary damages and a *permanent* injunction, the question remained as to whether the *Klayman* plaintiffs could continue to pursue their case despite their failure to meet their burden to prove the need for preliminary relief. Judge Sentelle, noting that standing is jurisdictional, would have ordered the case dismissed entirely.

Judges Brown and Williams, while disagreeing as to the strength of the plaintiffs' ability to demonstrate standing to pursue the underlying case, agreed that the plaintiffs should have the opportunity to seek jurisdictional discovery to determine whether their records were, in fact, subject to the NSA bulk metadata program. However, as Judge Brown noted in her concurring opinion, there could be roadblocks to the plaintiffs demonstrating standing, as the evidentiary privileges, like the [state secrets doctrine](#), may prevent the *Klayman* plaintiffs from unearthing evidence about whether they were targets in the metadata program.

While the results of limited discovery remain to be seen, it is also worth noting that recent amendments to the underlying authority of the telephone metadata program were recently enacted as part of the USA FREEDOM Act, and are scheduled to go into effect in [late November](#). Those amendments generally require the relevant collection activities to be limited "to the greatest extent reasonably practicable" by a "specific selection term." Insofar as these pending changes in law require narrowing of NSA's collection activities, those changes may further impede these and other plaintiffs' ability to demonstrate that collection of their telephone records is "certainly impending" to a degree sufficient for Article III standing.