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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MARY JOSEPHINE (JOSIE) VALDEZ, HOWARD STEPHENSON, DEEDA SEED, DANIEL DARGER, WILLIAM GRANT BAGLEY, and THOMAS NELSON HUCKIN, Plaintiffs, v. NATIONAL SECURITY AGENCY; GEORGE W. BUSH, in his individual capacity; MICHAEL HAYDEN, in his individual capacity; RICHARD B. CHENEY, in his individual capacity; DAVID ADDINGTON, in his individual capacity, DOES # 1-50, inclusive, Defendants.	**PLAINTIFFS' MOTION TO DISMISS WITHOUT PREJUDICE AND SUPPORTING MEMORANDUM** Case No.: 2:15-cv-00584-RJS Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

Plaintiffs respectfully move the Court to dismiss this matter without prejudice, the parties to bear their own costs and attorneys' fees, on the following grounds:

1. From October 2001 until December 2005, Defendant National Security Agency ("NSA"), without warrants or court orders, in violation of the Fourth Amendment and the Foreign Intelligence Surveillance Act ("FISA"), engaged in mass surveillance of communications involving people in the United States and U.S. citizens elsewhere. That surveillance included the collection of the *contents* of communications and the bulk collection of *metadata*[1] associated with communications. That NSA operation was code-named Stellar Wind and was also known as the President's Surveillance Program ("PSP").

2. The illegal surveillance by the NSA was pursuant to several unconstitutional Presidential Authorizations issued by Defendant George W. Bush when he was President of the United States, with the participation of Defendant Richard Cheney, when he was Vice-President, and his Chief of Staff, Defendant David Addington. The first Authorization was issued on October 4, 2001.[2]

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[1] The bulk collection of metadata from emails included the email addresses of the senders and recipients and the date and time when the email was sent. The bulk collection of metadata from telephone calls included the phone numbers of all communicants and the time and duration of the calls.

[2] The surveillance by the NSA, as well as the disregard by the NSA of constitutional and legislative restraints, changed drastically after the issuance of the first Presidential Authorization. Wayne Murphy, former Operations Director of the NSA, testified as follows:

> Q: Okay. **Before September 11, 2001, was the NSA actually obtaining access to the metadata of communications to and from the United States without a court order?**
> Mr. Patton [NSA's Attorney]: The question is vague in terms of how it's framed. It's wide open in terms of a timeframe. And when you characterize the type of data, I'm having trouble focusing on context.
> Q: Did you hear me preface it by saying: Before September 11, 2001?
> A: I did. I did.
> Q: Okay. Let's say from the enactment of FISA in 1978 –
> Mr. Patton: '78?

A: Right.

Q: -- until September 11, 2001, **did the NSA actually obtain access to the metadata of communications to and from the United States without a warrant or a court order?**

* * *

A: Based on my professional and personal knowledge and experience, and my understanding of – what I think is my understanding of your question, **no**.

Q: And **did the NSA obtain access to metadata of communications to and from the United States, without a warrant or court order, after October 4, 2001?**

Mr. Patton: Same objection, same instruction.

A: As I responded to you previously, there were three baskets of information that the President's authority, which was implemented on October 4th, 2001, allowed us access to, and that included both telephony and internet metadata as well as content from telephony and e-mail.

Q: Without a court order?

A: **Under the President's authority, yes**, that's correct.

Deposition of Wayne Murphy ("Murphy Depo.") 292:19–295:4 (emphasis added). (Copies of the pages of Wayne Murphy's deposition and exhibits to the deposition referenced here are attached as Exhibit "A" to the Declaration of Ross C. Anderson ("Anderson Decl."), attached hereto as Exhibit "1".

Q: **Was the NSA required, according to your understanding, to obtain a court order or warrant, prior to September 11, 2001, if the NSA was going to intercept or obtain any communication or metadata relating to a communication involving the [sic a] United States citizen?**

Mr. Patton [NSA Attorney]: Same objections as before.

A: If I understand your question correctly, in my professional and personal capacity, I would say **yes**.

Murphy Depo. 305:4–16 (emphasis added).

Q: **[I]f the NSA had desired to collect metadata on telephone calls placed by Qwest telephone customers in your view, did it have the legal authority to do that without obtaining a court order or a warrant?**

* * *

A: My professional and personal understanding, **under the terms of The Program we were authorized to require [sic acquire] all metadata from telecommunications service providers.**

Q: In the United States?

A: Correct.

Q: And **by bulk metadata that would include metadata on communications between people with respect to whom the NSA had no particularized suspicion of any wrongdoing?**

Mr. Patton: Object to the question, beyond the 30(b)(6), calls for a legal conclusion. You can answer.

A: Within the scope of my professional and personal responsibilities, **yes**.

Q: **After the Presidential Surveillance Program was in place, beginning October 4th, 2001, did you believe that the NSA was authorized, legally, without the [sic a] court order, to obtain telephony metadata if it was going through a telecommunications company in the United States?**
Mr. Patton: In bulk?
Q: **In bulk?**
A: **Yes.**
Mr. Patton: Same objections.
Q: And **did you believe, before October 4, 2001, that the NSA was legally authorized to do that without a court order?**
Mr. Patton: Same objections.
A: That being to require [sic acquire] –
Q: What we just talked about.
A: Required in [sic Acquiring] bulk telephony metadata?
Q: Yes, through a telecommunications company in the United States.
Mr. Patton: Same objections.
A: Without a court order?
Q: Yes.
A: **No.**
Q: All right. And **did the NSA collect bulk metadata on telephone calls through any telecommunications company in the United States after October 4th, 2001?**
Mr. Patton: Same objections, including asked and answered.
A: I feel like you're asking the same question again that I've already answered with regard to whether or not I felt that we had the authority to do it.
Q: I wasn't asking about authority.
A: If I could finish, please. If what I understand your current question to be is did we actually exercise the authority, is that your question, Mr. Anderson?
Q: Yes.
A: My answer to that is **yes**.

Murphy Depo., 334:13–18, 335:19–336:15, 339:7–341:16. (Emphasis added.)

A**: [T]here were three baskets of information that the President's authority, which was implemented on October 4th, 2001, allowed us access to, and that included both telephony and internet metadata as well as content from telephony and e-mail.**
Q: **Without a court order**?
A: Under the President's authority, **yes**, that's correct.

Murphy Depo., 294:17–295:4.

That radical change in policies and practices by the NSA following September 11, 2001, is summarized by Thomas Drake:

> Prior to September 11, 2001, the NSA managed the task of gathering foreign intelligence while instilling a respect for the Fourth Amendment to the United States Constitution and the Foreign Intelligence Surveillance Act ("FISA") among its employees. It was a prime directive. Everything changed after the attacks on September 11. **The NSA's new approach was that the President had the authority to override**

3. Contrary to the language of the Presidential Authorizations, the NSA interpreted the Authorizations to permit it to collect email and telephony metadata in bulk—even when associated with communications where all parties to the communications were in the United States.[3] That bulk collection of domestic calling records was in violation of FISA[4] and the Constitution.[5]

4. A *Wall Street Journal* article stated:

> For the 2002 Winter Olympics in Salt Lake City, officials say, the Federal Bureau of Investigation and NSA arranged with Qwest Communications International Inc. to use intercept equipment for a period of less than six months around the time of the event. **It monitored the content of all email and text communications in the Salt Lake City area.**[6]

> **FISA and the Fourth Amendment to the United States Constitution and that the NSA worked under the authority of the President.** The new commonly understood charge with respect to intercepting intelligence was "just get it," regardless of the law.

Declaration of Thomas Andrews Drake, Exhibit "2" to Plaintiff's Motion to Compel Discovery Responses and Deposition Testimony and Memorandum in Support, Dkt. 62–1 ("Drake Declaration"), page 2, ¶ 3).

[3] After it was pointed out to Mr. Murphy that the periodic Presidential Authorizations required that metadata collections by the NSA be limited to those where at least one party to the communication was outside of the United States (Murphy Depo., 550–571), Mr. Murphy refused to answer questions asking for an explanation as to how the NSA interpreted the presidential authorizations far beyond what was "authorized"—albeit illegally—in the Presidential Authorizations so that "bulk" collections could be engaged in by the NSA, even on wholly domestic communications. For instance, the following question and non-answer is reflected in the Murphy deposition:

> Q: **Do you know how to reconcile your testimony that the NSA was authorized to capture metadata on wholly domestic communications when the description under subsection B [of the first presidential authorization, dated October 4, 2001] appears to be limited to communications where at least one party to the communication is outside the United States** or no party is known to be a citizen of the United States?
>
> * * *
>
> A: **I don't have an answer** to that question.

Murphy Depo., 559:11–560:5 (emphasis added).

[4] *See, e.g., American Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015).

[5] *See, e.g.,* Robert Bloom & William J. Dunn, "The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment," 15 WILLIAM & MARY BILL RTS. J. 147 (2006).

[6] Siobhan Gorman and Jennifer Valentino-DeVries, "New Details Show Broader NSA Surveillance Reach," THE WALL STREET JOURNAL, August 20, 2013 (emphasis added).

5. Thomas Drake, a former senior executive of the NSA, widely known as a whistle-blower who exposed enormous waste and unconstitutional misconduct by the NSA, vividly described the blanket surveillance conducted by the NSA during the 2002 Salt Lake Winter Olympic Games.[7]

[7] The following statements are set forth in Drake Declaration, at ¶¶ 35–44:

- "As part of Stellar Wind, a special field operation was created in connection with the 2002 Salt Lake City Winter Olympic Games."
- As part of that operation, "for the first time in the United States, a surveillance 'cone' was essentially placed over entire geographical areas to collect and store virtually all electronic communications going into or out of that area."
- "The Salt Lake Olympics Field Op included geofencing to set up virtual boundaries around Salt Lake City and nearby Olympic venues for a time period before and during the 2002 Salt Lake City Winter Olympic Games. Virtually all electronic communication signals that went into or out of one of those designated areas were captured and stored by the NSA, including the contents of emails and text messages. The NSA stored the metadata for all those electronic signals. The text-based content of those signals, such as the text in emails and in SMS text messages, were all captured and stored."
- "The Salt Lake Olympics Field Op was . . . a program to subject private electronic communications of people in the United States to mass, indiscriminate, warrantless surveillance."
- "My personal knowledge is that [the] illegal program originated as part of the PSP, which is now widely acknowledged as having been illegal, both under the United States Constitution and the Foreign Intelligence Surveillance Act. My personal knowledge is also that authorization supporting Stellar Wind, including the subprogram of the Salt Lake Winter Olympics Field Op, would necessarily have flowed—and, in fact, did flow—from President George W. Bush, to Hayden, then to other members of the NSA who would implement the program."
- "The Salt Lake Olympics Field Op was intended to, and did, subject to massive, indiscriminate, warrantless surveillance the contents and metadata of text messages and emails, and the metadata of telephone calls, originating or received in Salt Lake City and in the vicinity of other Olympic venues during the 2002 Salt Lake Winter Olympic Games."
- "Under the PSP, the NSA operated with the understanding that its storage and collection of data was executed under the authority of the President and did not need to comply with FISC orders, FISA, or any other retention policies such as those mentioned in [a part of the declaration of Wayne Murphy, previously Director of Operations of the NSA and currently the Deputy Chief of Strategic Communications]. The NSA had a practice and philosophy of hoarding all captured data, both content and metadata, for future use, entirely consistent with the statement of the court in *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 816 (2d Cir. 2015), that '[t]he records [metadata of all telephone calls] are simply stored and kept in reserve until such time as some particular investigation . . . is undertaken. . . . The records

6. For his principled disclosure of the truth, through proper channels at the NSA and with congressional investigators, Thomas Drake was rewarded with a terrifying armed invasion of his home by F.B.I. agents, a revocation of his security classification, the termination of his job, and being charged with ten federal felonies, including three counts of espionage. The government dropped all charges, a few days before trial, in return for a guilty plea to one misdemeanor count of unauthorized use of a computer. Mr. Drake's persecution for disclosing the truth, and the tragedy experienced by his family, while high officials and an immensely powerful government agency had engaged in blatantly criminal and unconstitutional surveillance with impunity, has been broadly chronicled.[8] United States District Court Judge Richard D. Bennett called the government's conduct toward Mr. Drake "unconscionable," noting that the government unjustifiably put him through "four years of hell."[9]

7. Although there have been relentless prosecutions of whistle-blowers and those who have disclosed to the people of the United States some of what our government has been illegally doing, not one high-level official responsible for the illegal surveillance has been held accountable. For government officials who have ordered and authorized, or engaged in, criminal and unconstitutional misconduct, an extraordinary exception to the rule of law has been applied. The

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> sought are not even asserted to be relevant to any on-going 'systematic examination' of any particular suspect, incident, or group; they are relevant, in the government's view, because there might at some future point be a need or desire to search them in connection with a hypothetical future inquiry.'"

[8] *See, e.g.*, Jane Mayer, "The Secret Sharer," *The New Yorker* (May 23, 2011) and "A Deal in the N.S.A. Case," *The New Yorker* (June 9, 2011). *See also* CBS 60 Minutes, "U.S. v. Drake," https://www.youtube.com/watch?v=_mVpMp9QLPE; PBS The Frontline Interviews, "Thomas Drake," https://www.pbs.org/wgbh/pages/frontline/government-elections-politics/united-states-of-secrets/the-frontline-interview-thomas-drake/.

[9] Ellen Nakashima, "Judge blasts prosecution of alleged NSA leaker," *The Washington Post*, July 29, 2011.

most powerful criminals have escaped accountability, while the messengers—those who have disclosed criminal misconduct by our government—have suffered at the hands of those who cover up and ignore the massive crimes that undermine our constitutional rights and the rule of law.[10]

8. Plaintiffs sought some measure of accountability before the law and pursued this action vigorously, with the intent of disclosing to the people of this country some of the criminal and unconstitutional acts in which high-level government officials have engaged.

9. Plaintiffs have sought to ferret out the truth through discovery, including the nearly 13-hour deposition of the former NSA Operations Director, Wayne Murphy, only to be met with hundreds of objections, dozens of instructions by legal counsel for Mr. Murphy not to answer questions, and dozens of invocations of the court-made "state secrets doctrine."[11] The court-

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[10] *See* Glenn Greenwald, WITH LIBERTY AND JUSTICE FOR SOME – HOW THE LAW IS USED TO DESTROY EQUALITY AND PROTECT THE POWERFUL (2012).

[11] Following are a few examples of the dozens of invocations of the state secrets privilege in this matter:

> Q: Did the NSA seek to tap into the telecommunications equipment at Qwest to obtain metadata on telephone calls . . . in Utah?
>
> * * *
>
> Mr. Patton: Object to the question, beyond the scope of what we'd agreed upon for 30(b)(6), and the witness is instructed not to answer the question based on the **state secrets privilege** and the statutory privileges. The information you seek is classified.
>
> A: And I'm going to accept the advice of counsel and not respond to that question.

Murphy Depo., 332:7–333:6 (emphasis added).

> Q: Did the NSA attempt to collect metadata on telephone calls going through Qwest?
>
> Mr. Patton: Objection, calls for information subject to the **state secrets privilege** and to the statutory privileges, instruct the witness not to answer the question.
>
> A: Mr. Anderson, I'm going to take the advice of counsel and not respond to that question.

Murphy Depo., 349:8–20 (emphasis added).

> Q: And did the NSA request of Joe Nacchio, the CEO of Qwest, his cooperation in allowing the NSA to tap into Qwest's equipment to obtain either the contents of communications or the metadata relating to communications going through Qwest?
>
> Mr. Patton: **Same instructions**, same objections.

created state secrets doctrine allows the Executive Branch—even when it is charged with criminal misconduct, unconstitutional practices, and even violations of treaty obligations—to determine what evidence will be provided and, sometimes, whether a case can proceed on the merits at all. The doctrine—constituting an immense abdication by the judiciary in deference to the Executive Branch—is so subversive to justice and accountability of government officials for their crimes that even victims of torture have been deprived of access to the courts when government officials and employees have committed heinous violations of federal criminal law and international treaty obligations.[12] So too have people who have suffered as a result of an illegal government

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> A: And on the advice of counsel I'm going to decline to answer that question, Mr. Anderson.
> Q: And was there a period of time during which Qwest agreed to cooperate with the NSA in allowing the NSA to collect or in Qwest collecting and passing onto the NSA either metadata or the contents of the communications going through Qwest's facility?
> Mr. Patton: Objection, vague, compound, and same objections as to classified nature, **state secrets privilege** and statutory privileges, and instruct the witness not to answer.
> A: I'm going to follow the advice of counsel and not answer that question.

Murphy Depo., 352:4–353:12 (emphasis added).

> Q: Did the NSA, during the President's Surveillance Program, engage in the bulk collection of communications through any Qwest telecommunication's [sic] facility?
> Mr. Patton: Object to that question, calls for classified information, subject to the **state's [sic state] secret privilege**, and the other privileges, I would instruct him not to answer.
> A: I'm going to follow the advice of counsel and not answer that question.

Murphy Depo., 383:10–384:1 (emphasis added). *See also infra* n.14.

[12] *See, e.g., Khaled El-Masri*, 479 F.3d 296 (4th Cir. 2007). The denial of access to justice in the United States courts for torture victims is diametrically the opposite of what the United States promised to the International Committee Against Torture, which is charged with implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. United States Written Response to Questions Asked by the Committee Against Torture (April 28, 2006). Of course, the United States government did not disclose to the Committee Against Torture that the very branch of government responsible for the domestic and international crime of torture is empowered under the state secrets doctrine to make the determination that a torture victim who brings a lawsuit shall be denied access to evidence and that the Executive Branch could cause the lawsuit to be dismissed upon its unsubstantiated claim that the lawsuit would pose a danger to national security.

surveillance program been unable to challenge the legality of the program because (a) they could not demonstrate that their particular communications were subjected to surveillance, and (b) they were prevented from discovering if their communications were subjected to surveillance because of the state secrets doctrine.[13] Similarly, Plaintiffs in this action have been deprived of an answer as to whether *their* communications have been subjected to surveillance by the NSA.[14]

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[13] *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 412 n.4 (2013).

[14] Mr. Murphy testified—or, more accurately, refused to testify—as follows:

> Q: Do you know of or have you read or heard about any collection by the NSA of any e-mail or text message sent to or originating from any person in Salt Lake City or in or near any Olympic venue in Utah, in February 2002, during the 2002 winter Olympic games, without a warrant or a court order?
> Mr. Patton [NSA Attorney]: Object to the question, it calls for information that's protected by the **state's [sic] secret privilege** because it's classified, and to the statutory privileges previously mentioned. I instruct the witness not to answer that question.
> A: Based on advice of counsel I do not intend to answer that question.
> Q: Do you know of or do you have any understanding as to whether there has been any collection by the NSA of the contents of any email or text message sent to or originating from any of the plaintiffs in this matter during the 2002 winter Olympic games in February 2002?
> Mr. Patton: Object as beyond the scope of the 30(b)(6) that we'd agreed to provide Mr. Murphy's testimony on. The information is – that you're seeking is classified and, therefore, subject to the **state secrets privilege** and to the statutory privileges and I would instruct Mr. Murphy not to answer that question.
> A: Mr. Anderson, I intend to abide by the advice of counsel and I won't be responding to that question.
> * * *
> Q: All right. Do you know of or have you heard or read about the collection by the NSA, without a warrant or court order, of any metadata relating to communications during February 2002, where the sender or recipient of the communications was in Salt Lake City or near any Olympic venue in Utah?
> Mr. Patton: Object to the question, it calls for information protected by the **state secrets privilege** and prior statutory – previously enumerated statutory privileges, and instruct the witness not to answer. . . . .
> A: Mr. Anderson, I'm going to follow the advice of counsel and I won't be responding to that question.

Murphy Depo., 386:18–877:3, 387:17–389:6, 390:13–391:15 (emphasis added).

10. Plaintiffs do not know exactly where the truth lies. There appears to be compelling evidence, based on Thomas Drake's testimony and other unlawful misconduct of the NSA, that the NSA subjected the communications of people in the Salt Lake City area to illegal mass surveillance without a warrant or court order. However, because of the evisceration of the rule of law, the unseemly deference by the courts to the increasingly imperial Executive Branch, and the repeated obfuscations of a government and its agents who seek to hide the truth from the people of this nation, further pursuit of this case would be wasteful of judicial resources, it would be unduly burdensome to the Plaintiffs, and it would provide a dangerous and deceitful pretense that our government will disclose the truth in conformity with democratic ideals. Instead of abiding by the Louis Brandeis maxim that "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman," our government—through surveillance, torture, rampant denials of due process, and the submission by the Judicial and Legislative Branches to an out-of-control Executive Branch—is becoming more authoritarian, less responsive to the people, and more secretive about its operations. In this case, Plaintiffs, their counsel, and other advocates for accountability for illegal surveillance have concluded that further litigation of this matter will not lead to greater disclosures by the NSA. The battles against expanding authoritarianism, including challenges to the state secrets doctrine and illegal surveillance, must be fought elsewhere.

Dated this 25th day of September 2018:

/s/ Ross C. Anderson
Ross C. Anderson
Attorney for Plaintiffs