

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R McVEIGH,

Plaintiff,

V.

THE HONORABLE WILLIAM COHEN, et al,

Defendants,

CIV. ACTION NO. 1:98CV00116

**PLAINTIFF'S REPLY MEMORANDUM
IN SUPPORT OF HIS MOTION FOR A
TEMPORARY RESTRAINING ORDER**

The Government's position in this case is not only without merit but chilling in its implications for all users of online services (regardless of whether they are in the military) and for servicemembers subject to the "Don't Ask, Don't Tell, Don't Pursue" policy. Defendants would have this Court rule that the Government is free to obtain information from online service providers ("OSPs") without first obtaining the warrant, court order or user consent required by the Electronic Communications Privacy Act ("ECPA") and use that information against the user - the very person ECPA is designed to protect -with impunity. Defendants would also have this Court rule that the military can, with impunity, casually violate its own regulations concerning how investigations under the "Don't Ask, Don't Tell, Don't Pursue" policy are to be initiated and conducted. Condoning the Navy's conduct in this case would dramatically undermine the right to privacy in online communications guaranteed by ECPA and the confidence of military servicemen in the "Don't Ask, Don't Tell Policy." ¹

¹ Indeed, Professor Charles Moskos, author of the "Don't Ask, Don't Tell, Don't Pursue" policy, has opined in a Declaration in support of Mr. McVeigh's Motion for Temporary
(continued...)

Fortunately, however, Defendants misstate the law. Despite its inordinate length, the Government's Opposition to Senior Chief McVeigh's Motion for Temporary Restraining Order contains no meritorious argument why a TRO should not issue.² As Plaintiff is substantially likely to succeed on the merits and the "balance of hardships" favors delaying Senior Chief McVeigh's discharge from the Navy, the motion should be granted.

A R G U M E N T

I. **SENIOR CHIEF McVEIGH IS SUBSTANTIALLY LIKELY TO SUCCEED ON HIS CLAIMS UNDER ECPA**

Senior Chief McVeigh is likely to succeed on his direct cause of action under ECPA and none of Defendants arguments to the contrary have merit:

A. ***Tucker***: *Tucker v. Waddell*, 83 F.3d 688 (4th Cir. 1996) misapprehends Congress' purpose in enacting 18 U.S.C. sec. 2703(c)(1)(B). That provision specifies the reciprocal obligations of the Government and online services providers to protect subscribers' privacy rights. The Fourth Circuit's hypertechnical reading of sec. 2703(c)(1)(B) in *Tucker* cannot be squared with the clear Congressional intent to define firm limitations on government access to the private information of subscribers to online services. Congress cannot have intended to prohibit online service providers from turning protected subscriber records over to the Government without a warrant, court order or consent and not also prohibit the Government from seeking that information illegally.

¹(...continued)

Restraining Order, which is attached as Exhibit A, that the Navy violated the policy in this case and that such wrongful enforcement by the military constitutes the single biggest threat to the efficacy of the policy.

² The length of Defendants' brief precludes a rebuttal here of each point the Government makes. Plaintiff has addressed here only Defendants' principal contentions concerning the merits and will stand on the points and authorities cited in its original memorandum and at oral argument for the remaining issues.

B. Aiding And Abetting: Even if *Tucker* were correct, Senior Chief McVeigh has filed an Amended Complaint alleging that the Government aided and abetted the ECPA violation of America Online ("AOL"). *Tucker* concedes that a claim for aiding and abetting an online service provider's violation of 18 U.S.C. sec. 2703(c)(1)(B) could state a cause of action. 83 F.3d at 693 n. 6.

C. Additional ECPA Violations: The Amended Complaint also alleges violations of two other provisions of ECPA, 18 U.S.C. sec. 2703(a) and (b). These provisions were violated because the Government required AOL to disclose the contents of electronic communications—in this case, the e-mail. Senior Chief McVeigh sent to AOL when he subscribed to America Onliue informing them of his full name and billing information without first obtaining a warrant, court order or Senior Chief McVeigh's consent. (Amended Complaint, sec. 43). Again, even *Tucker* concedes that a direct cause of action under 18 U.S.C. sec. 2707 lies against the Government under these provisions.

D. There Was A "Knowing Violation": The Government's contention that there was no "knowing" violation of ECPA because Lt. Morean and Legalman Kaiser allegedly were unaware that seeking information from AOL without a warrant was illegal is specious. It is beyond cavil that the Navy cannot elevate its legal officers' ignorance of ECPA to a defense. See, e.g., *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991) (good faith reliance on a mistake of law is not a defense under wiretapping statute). Lt. Morean and Legalman Kaiser knowingly contacted AOL and got them to divulge confidential information without a warrant, court order or consent. This is all ECPA requires for there to be a violation.

E. The Relief Sought Is Authorized: The Government's contention that ECPA does not authorize the injunctive relief sought here is similarly baseless. Both ECPA and the Fourth and Fifth Amendments authorize the equitable relief sought by Senior Chief McVeigh. The "Relief" provisions of ECPA in 18 U.S.C. sec. 2707(b) are quite broad and specifically authorize

“such preliminary and other equitable or declaratory relief as may be appropriate.” 18 U.S.C. sec. 2707(b). The Government cites no authority for its argument that this broad relief provision does not authorize the suppression of unlawfully-obtained evidence in a military proceeding. Moreover, the fact that the statute does not specifically mention ‘suppression’ and ‘reinstatement’ is irrelevant; the Court is specifically authorized to fashion whatever equitable remedy it deems appropriate. Indeed, the Fourth Amendment exclusionary rule itself was judicially-crafted and there is no legislative history to indicate that a injunction excluding the consideration of illegally obtained evidence is forbidden under ECPA.³

F. The Error Was Not Harmless By the Government’s Own Admission:

Defendants’ repeated contentions that the use of the illegally obtained information in Senior Chief McVeigh’s administrative hearing did not constitute prejudicial error are groundless on the very face of Defendants’ brief and the administrative record. As the Navy admits, Lt. Morean testified that she instructed Legalman Kaiser to “call AOL and find out could we connect this screen name and member name Tim living in Hawaii with a birth date December 31 to Senior Chief McVeigh.” (Def. Mem. 7) (emphasis added). Thus, by

³ Moreover, suppression of the illegally obtained evidence is available as a remedy for the violation of Senior Chief McVeigh’s Fourth Amendment rights. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court held that Fourth Amendment violations do not automatically result in suppression of evidence in such civil proceedings as deportation proceedings. See also *Garret v. Lehman*, 751 F.2d 997 (1985) (applying *Lopez-Mendoza* to military discharge proceedings for use of marijuana). However, where the balance of competing considerations favors application of the suppression rule, or where the violation is egregious, the evidence will be suppressed. *Lopez-Mendoza*, 468 U.S. at 1041 & 1050-51. In *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994), the Ninth Circuit defined the scope of egregious conduct sufficient to invoke the suppression doctrine in civil proceedings to encompass “bad-faith” violations, which it said occur whenever “evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the Constitution.” 22 F.3d at 1449-52. Accord *Orhorhahe v. INS*, 38 F.3d 488 (9th Cir. 1994) (targeting an individual for investigation based solely on a Nigerian-sounding name sufficiently-egregious to warrant application of exclusionary rule to civil proceeding). Senior Chief McVeigh alleges a deliberate violation of his Fourth Amendment privacy rights and thus fits within the exception to the *Lopez-Mendoza* rule.

Defendants' own admission, without the illegally obtained information, Lt. Morean could not make that connection and Senior Chief McVeigh's discharge could not have gone forward.

II. SENIOR CHIEF McVEIGH IS SUBSTANTIALLY LIKELY TO SUCCEED ON HIS CLAIMS UNDER THE PROCEDURAL DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE ADMINISTRATIVE PROCEDURE ACT

The Government's Opposition fails to answer Senior Chief McVeigh's claims that the Navy's violation of ECPA and its own regulations under the "Don't Ask, Don't Tell, Don't Pursue Policy" deprived him of due process under the Fifth Amendment and constituted arbitrary and capricious agency action in violation of the APA.

A. The Navy Must Abide By Its Own Regulations: The Navy's violation of its own regulations in initiating its investigation of Senior Chief McVeigh rendered its decision to investigate and discharge him "arbitrary and capricious" in violation of the APA. "It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawfull . . . The military departments enjoy no immunity from this proscription . . . The logic of [the cases supporting this principle] derives from the self-evident proposition that the Government must obey its own laws." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). See also *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) ("In cases in which procedural violations are alleged, the test or standards against which this court measures the military's conduct are inherent: they are the applicable statutes and regulations."). Having promulgated the particular regulations and guidelines at issue in this case, Defendants are bound to act in accordance with them or their actions are in violation of the APA. Defendants cite no authority to the contrary.

Moreover, Defendants' failure to abide by their own regulations in connection with a military discharge constitutes a violation of procedural due process. See *Kohn v. Laird*, 460 F.2d

1318, 1319 (7th Cir. 1992) (where Army suspended reservist from active duty without following procedural requirements set forth in Army's own administrative rules, Army violated reservist's due process rights, even though it granted a hearing); *Suro v. Llenz*, 551 F. Supp. 1094, 1101 (D.P.R. 1982) ("the military department enjoys no immunity to ignore its own land and regulations" and violation of these laws and regulations will be a violation of due process).

B. Defendants' Irrelevant Contentions Concerning "Procedural Or Substantive Rights" Under The Guidelines: Defendants cite no authority for the proposition that the mere statement in the Guidelines that the regulations at issue create no "procedural or substantive rights" is of any significance in the context of a Fifth Amendment procedural due process or APA claim. Regardless of whether some sort of direct civil action is created by the Guidelines, the Navy cannot exempt itself from judicial review under the APA or the Fifth Amendment and promulgate Guidelines for implementing a Congressionally mandated policy without being required to follow them.

C. The Navy Does Not Substantively Challenge Plaintiffs' Fifth Amendment Claim: The Navy does not (because it cannot) contest the following elements of Senior Chief McVeigh's Due Process claim under The Fifth Amendment: (1) Senior Chief McVeigh has a property interest in his continued service in the Navy sufficient to warrant protection under Due Process. Complaint sec. 66, and (2) the Navy solicited and obtained personal information concerning Senior Chief McVeigh from an online service provider without first obtaining a warrant, a court order or Mr. McVeigh's consent, as specified in the Electronic Communications Privacy Act ("ECPA"). Complaint secs. 55-56, 58, 64(E), 68(E). Irrespective of whether this suffices to state direct causes of action under ECPA or the "Don't Ask, Don't Tell, Don't Pursue Policy," this admitted violation of the rules established by Congress regarding Government access to personal information held by online services providers unquestionably suffices to state a straightforward claim for violation of Senior Chief McVeigh's Due Process rights under the Fifth Amendment.

See Plaintiff's Memorandum at 6. These facts likewise establish a claim under the Administrative Procedure Act ("APA") for abuse of discretion and arbitrary and capricious behavior. The Government's Opposition does not challenge either of these arguments.

III. SENIOR CHIEF McVEIGH IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF HIS FOURTH AMENDMENT CLAIM

The Government raises two main arguments with respect to Senior Chief McVeigh's Fourth Amendment claim, neither of which presents an obstacle to relief;

A. There Is No Presumption Of Plaintiffs' Fourth Amendment Claim: First the Government argues that ECPA is a comprehensive regulatory scheme which displaces the Fourth Amendment (Def. Mem at pp. 17-20). The nub of this argument is that the Court should not second-guess the decisions Congress made in ECPA regarding the government's obligation to respect individual subscribers' privacy rights. In addition to the obvious point that no statute can preempt the Constitution, this argument makes no sense in the present context. Unlike the plaintiff *In re Askin*, 47 F.3d 100 (4th Cir.), cert. denied, 116 S. Ct. 382 (1995), Senior Chief McVeigh is not asking the Court to disregard the balance that Congress struck between privacy rights and government security, but rather to enforce it. Surely the Government is not serious in its implication (Def. Mem. p. 19) that ECPA authorizes the Government to obtain personal information from an online services provider without a warrant, court order, or subscriber consent.

B. There Was A Reasonable Expectation of Privacy: Second, the Government erroneously argues that ECPA does not create a reasonable expectation of privacy in the material seized here. (Def. Mem. at pp. 19-21). The short answer to this argument is that the Senate Judiciary Committee Report on the Electronic Communications Privacy Act of 1986 (p. 5), attached at Exhibit B, explicitly states that it is intended to set the balance between the "privacy expectations of American citizens" and "the legitimate needs of law enforcement agencies." That

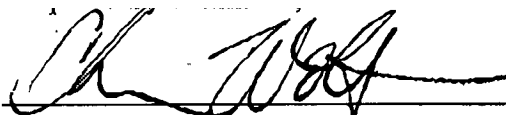
the obligation to obtain a warrant or court order applies only to government access does not undermine the legitimate expectation of privacy from unauthorized government access created by ECPA. Moreover, Defendant McVeigh's services contract with AOL created a reasonable expectation of privacy by providing that AOL would not divulge this information to anyone, government or otherwise, without a warrant, other court order or consent. (Amended Complaint, secs. 41-43). Defendants' suggestion that this information was "freely accessible" without an illegal act by the Government and AOL is therefore without basis. But-for the Government's violations of ECPA and the Fourth and Fifth Amendments, there never would have been a hearing and there never would have been an admission of any kind that McVeigh was the author of the E-mail.

CONCLUSION

For the reasons stated above and in his moving memorandum, Senior Chief Petty Officer McVeigh respectfully requests the issuance of a 'Temporary Restraining Order.

Respectfully submitted,

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Dated: January 21, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished via hand delivery this 21st day of January, 1998 to:

The Honorable John Dalton
Secretary of the Navy
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Washington, D.C. 20350

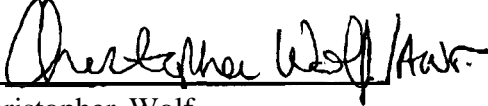
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