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GUEST COLUMN

Whack-a-mole with the NSA

By Alan Butler

Civil rights litigation can, at times, feel like a long game of whack-a-mole. Successfully challenging an unconstitutional government program requires good timing and persistence because even small changes can send a case back to square one. That process is apparent in recent challenges to the National Security Agency's Metadata Program, which involved the ongoing collection of all call records from major U.S. telephone providers. Congress has since put in place new privacy protections, but the core 4th Amendment ques-

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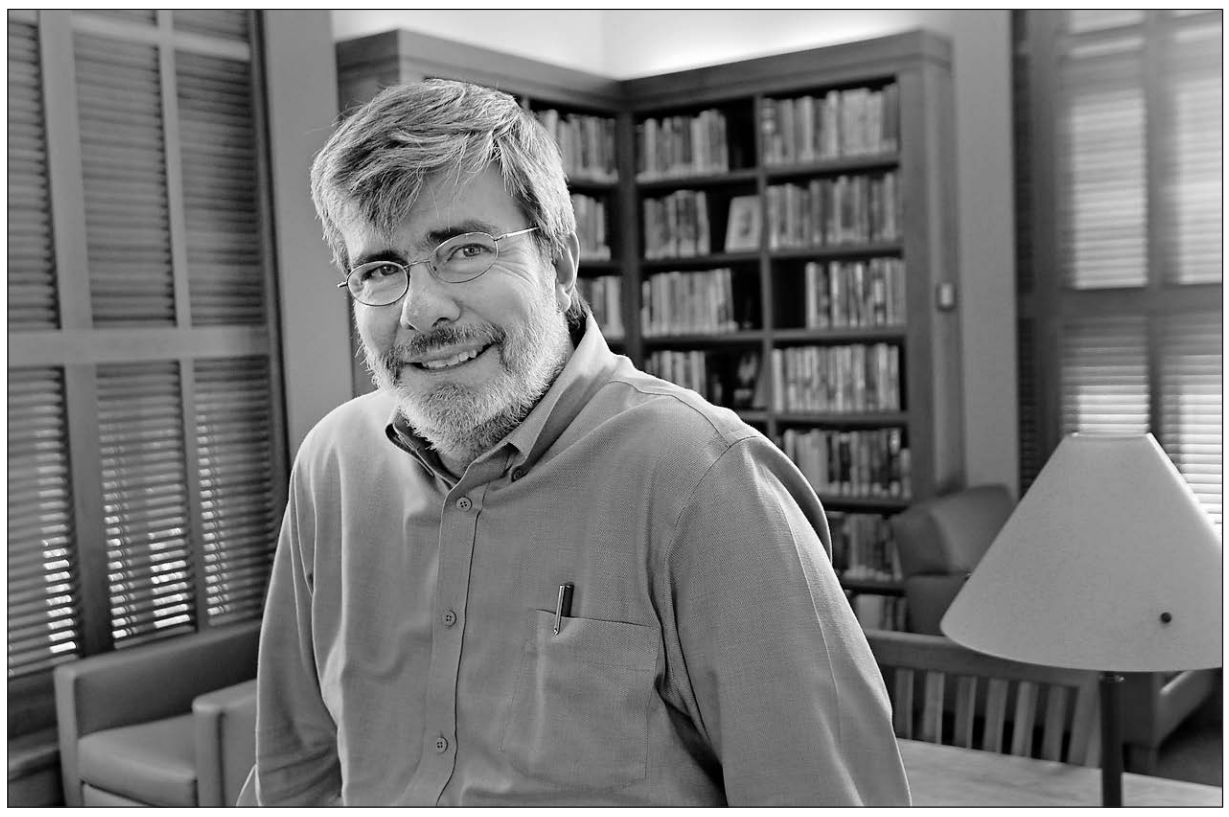

Daily Journal photo

Professor Richard Sander of the UCLA School of Law, who has sought data about California bar applicants from the State Bar, argues that the bar is trying to 'do an end-run around the judicial process.'

State Bar lobbied for bill it invokes to block suit

By Lyle Moran
Daily Journal Staff Writer

The State Bar lobbied for language in its annual fee bill last fall that would prevent it from having to publicly disclose demographic and other information about bar applicants sought in a long-running lawsuit, and the agency has pointed to the approved law in seeking dismissal of the case.

However, the bar also expressed some concerns to legislative staff about whether a section added to SB 387 would indeed preclude the agency from providing UCLA School of Law Professor Richard Sander and the First Amendment Coalition with the data they requested, according to emails obtained by The Daily Journal.

Sander has sought data about California bar applicants to evaluate it in light of his belief in the so-called "mismatch theory" that minorities who receive admissions preference at elite law schools do not fare as well in their studies and on the bar exam.

The bar's lobbying came almost two years after the state Supreme Court ruled the agency should disclose the requested data if it could be provided in a way that protects an individual applicant's privacy. The case was remanded to the trial court to make that determination and consider whether other interests outweighed the public's interest in favor of disclosure.

Emails sent by Jennifer Wada, the bar's Sacramento lobbyist, to legislative staff indicate the bar grew worried about the impact of the bill allowing it to collect annual fees from lawyers on the Sander case last August 28 after an Assembly committee amended SB 387.

"I'll send you a more substantive memo, but the new amendment would require disclosure of minority law student data to prove Sander's mismatch theory (affirmative action negatively impacts minorities)," Wada wrote to two state Senate staffers.

On Sept. 3, Wada forwarded to Assembly and Senate staff an email from Larry Yee, the bar's acting general counsel.

Yee had written that "categories of personal identifying info that Sander sought would include: applicants' bar exam scores, law school attended, grade point averages …"

Fredericka McGee, the general counsel to then-Assembly Speaker Toni Atkins, wrote an email to Wada and others early on Sept. 4 with proposed amendments to the fee bill from the Office of Legislative Counsel.

A new section was added that said information submitted by an applicant for bar admission — including, but not limited to, bar exam scores, race or ethnicity, and law school grade point average — that "may identify an individual applicant, shall be confidential and shall not be disclosed pursuant to any state law, including, but not limited to, the California Public Records Act..."

Wada replied soon after with a concern from Yee, the general counsel.

"But Larry just said the identifying information piece doesn't solve the Sander issue because it still refers to identifying info and that is the subject of the disagreement — what is identifying and what can be de-identified," Wada wrote to McGee.

Later on Sept. 4, an Assembly committee amended the bill, including adding the language relative to bar applicant data from Legislative Counsel. The phrasing in question was ultimately included in the bill Gov. Jerry Brown signed into law in October.

Earlier this year, the bar filed a motion for judgment on the pleadings, arguing SB 387 should put an end to the Sander case because the agency cannot legally provide the requested data. *Sander et al. v. State Bar of California et al.*, 508880 (S.F. Co. Super. Ct., filed Oct. 3, 2008).

Sander and The First Amendment Coalition wrote in their opposition brief that the bar "admitted in their communications to the Legislature that SB 387 would not resolve this case."

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Judge voids death sentence

Former LA city attorney blamed for misconduct

By Amanda Schallert
Daily Journal Staff Writer

Following arguments that the Los Angeles County district attorney's office jailhouse informant scandal and former City Attorney Carmen A. Trutanich's prosecutorial misconduct tainted a gang murder trial, a federal judge vacated not only a death sentence but a conviction in the 34-year-old case.

Because prosecutors had allegedly tried to elicit confessions and hindered the defense's ability to contact an eyewitness to the 1982 murder of Crips member Jerome Dunn, U.S. District Judge David O. Carter granted habeas relief claims for Barry G. Williams in an order Tuesday. *Williams v. Davis*, 00-CV10637 (C.D. Cal., filed Oct. 4, 2000).

Carter, of the Central District, said the original verdict could not be upheld because of a "magnitude of the prosecution's combined substantial errors."

Williams had been a member of the 89th Street Family Bloods and went on trial for Dunn's murder in October 1985. Going into the trial, Williams had already been found guilty for a different murder.

The case came amid the backdrop of misuse of jailhouse informants in Los Angeles County, where investigators would put informants in the same cells as other prisoners to help get convictions by having them testify in court.

At the time, Trutanich, now a Tucker Ellis LLP attorney, was on the case. He was a former county prosecutor and was Los Angeles City Attorney from 2009 to 2013, according to his attorney profile online. Trutanich partially campaigned for city attorney by highlighting his career prosecuting gang crimes, touting in part the conviction he got for Williams in 1986.

Trutanich did not respond to requests for comment for this article. Deputy District Attorney Jim Jacobs also participated in the prosecution.

The federal public defender's office said in a statement that seeing Williams vindicated after many years is rewarding. Attorneys Tracy Casadio, Joseph A. Trigilio and Guy C. Iversen from the office litigated the case.

"This case was a long, hard battle fought for many years by many members of the federal public defender's office and, in state court, the ACLU-SC's Innocence Project, against great odds," the statement said.

Michael J. Proctor of Caldwell, Leslie & Proctor PC, said the opinion is important in part because of Trutanich's political positions.

"Judge Carter's opinion is really significant,

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Judge tosses approval of $500M LA port project

By Fiona Smith
Daily Journal Staff Writer

A judge threw out the city of Los Angeles' approval of a proposed $500 million truck-to-train transfer facility at its port Wednesday, ruling that the city conducted a flawed environmental review.

In a 200-page ruling, Contra Costa County Superior Court Judge Barry P. Goode sided with a coalition including the South Coast Air Quality Management District, Attorney General Kamala Harris and the city of Long Beach, which claimed Los Angeles failed to properly address how the project would worsen air pollution, traffic and noise in the area.

The Southern California International Gateway, or SCIG, is seen as a crucial project for the port to stay competitive and respond to the expected growth in port traffic in the coming decades.

BNSF Railway Co. plans to build the project about four miles from the port on a 185-acre site. It would bring trains closer to the port and calls for more than 5,500 trucks per day to ferry containers to and from trains seven days a week.

The city was hit with seven lawsuits alleging its review violated the California Environmental Quality Act, or CEQA, which requires public agencies to analyze and mitigate projects' significant environmental impacts. The cases were consolidated and moved to Contra Costa County.

In the coming months, Goode will hear claims by environmental groups that the project approval violates civil rights law by disproportionately affecting people of color. *Fastlane Transportation Inc. v. City of Los Angeles*, CIVMSN14-0300 (Contra Costa Super. Ct., filed June 5, 2013).

One of the major points of contention in the case was whether the project would increase or reduce air pollution. Supporters of SCIG assert it would be environmentally positive because it would largely eliminate the current practice of trucking port cargo 24 miles to BNSF's Hobart facility.

But if BNSF simply uses Hobart to increase its non-port related goods movement business, SCIG will not reduce truck pollution, critics argue.

CEQA reviews must look at any reasonably foreseeable indirect impacts of a project, Goode ruled.

"The potential for additional environmental impacts at Hobart is too great to escape analysis simply on the strength of two scant letters which assert that BNSF has 'no plans' to

See Page 4 — JUDGE

Blunders in haste to win wage race

By Iris R. Kokish

True to form, California stands ready to enact yet another great legal experiment by leading the charge into the realm of the $15 minimum wage. Currently, California's minimum wage is $10 per hour, which is already one of the highest statewide minimums in the country, second only to Washington, D.C.'s $10.50 per hour minimum wage.

California legislators and labor unions tentatively agreed on Saturday to raise the state's minimum wage to $15 per hour by 2022. Businesses with fewer than 25 employees would have until 2023 to comply. Specifically, the deal would raise the rate from $10 per hour to $10.50 on Jan. 1, 2017, with a 50-cent increase in 2018, followed by a $1 per year increase through 2022, and increasing annually for inflation after that.

The proposal is a swift response to two ballot initiatives supported by the Service Employees International Union (SEIU), one of which — the Fair Wage Act of 2016 — was recently green-lighted for the November ballot. If approved, the proposal would render meaningless the Fair Wage Act of 2016. Approval would also spare the SEIU the cost of running a political campaign, which it was likely to win, for recent polls indicate that 65 percent of Californians approve a statewide $15 minimum wage.

Despite its public approval, California's new minimum wage proposal is still a matter of "only time will tell," since most economic studies have not focused on an increase as high as $15 and as broad in geographic scale. As well intentioned as increasing the minimum wage may be, its deliverance in the form of a rushed agreement preceding a coming primary election has created risks for both employers and employees.

A threshold question facing all California employers is whether they will be able to afford to continue operating under the new minimum wage standard. Employers should factor into their assessment not only the increase of the minimum wage, but also the increase of the output value of all California formulas that use the state minimum wage as a variable. For example, salaries for employees exempt from overtime laws will increase because exempt employees in California must earn a minimum monthly salary of no less than two times the state minimum wage for full-time employment. For nonexempt workers, overtime costs will increase because employers must pay overtime at a rate of one and one-half times the employee's regular rate of pay, double-time for hours worked over 12 in a day. Moreover, workers' compensation costs are also sure to increase because an employee's benefit rate is based on the state average weekly wage (SAWW); if the minimum wage increases, so too does the SAWW.

Next, if an employer concludes that they must cut costs, employers will weigh the options. Do they have the ability to leave California for a location where it may be cheaper to operate? Are they able to operate with fewer employees? Will they lose customers if they raise consumer prices? Whichever cost-saving strategy employers choose to implement, it is employees who will be harmed, for these cost-saving strategies create the risk of fewer in-state jobs, sudden layoffs, and a higher cost of living.

These are risks that many believe are well worth undertaking to improve the quality of life for approximately 2.2 million California workers who are currently paid minimum wage. There is no denying that the federal minimum wage has not risen in step with inflation since the 1960s. If it had, our federal minimum wage would be closer to $10.68. However, bringing the state minimum wage closer to what it ought to be calls for cautious, surgical precision to avoid further harming an already suffering working poor.

Granted, the proposed minimum wage agreement does contain two provisions empowering the governor to postpone a scheduled annual increase if certain economic or budgetary conditions are met. However, these provisions do not do enough to lessen the risks that employers and employees will face, which begs the question: what more could California legislators have done to lower the risk of employers' need to implement cost-saving measures?

Perhaps in their rush to reach an agreement with labor unions, California legislators overlooked Oregon's nuanced, three-tiered minimum wage structure. Oregon does not have a uniform statewide minimum wage; rather it has three separate minimum wages, and a county's population density determines which minimum wage tier applies. High density counties will reach a minimum wage of $14.75 by 2023. Medium density counties will reach $13.50, and low density counties will reach $12.50. In other words, Oregon's minimum wage law requires that employers in metropolitan areas pay a higher minimum wage than employers in rural areas, and this approach makes sense because $14.75 has an inherently different economic impact on employers in Portland, for example, than it does on employers in low-cost, rural counties.

By not incorporating a tiered structure, California legislators overlooked an opportunity to lessen the risks facing employers and employees in lower-wage areas by failing to provide them with costs such employers could afford. Like Oregon, California is sharply divided between its metropolitan and rural communities, since the cost of living drastically varies from county to county.

The Legislature has yet to approve the new minimum wage proposal, so California may yet look to Oregon's three-tiered minimum wage model. However, given the hasty manner in which the proposal was reached, it is doubtful that legislators will likely take a moment to pause and rethink.

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IRIS KOKISH
Jackson Lewis

MINIMUM WAGE DEAL RUNDOWN

- Minimum wage will raise to $15 per hour by 2022
- Businesses with fewer than 25 employees have by 2023 to comply
- The deal raises the rate from $10 to $10.50 per hour in 2017; to $11 per hour in 2018; followed by a $1 per year increase through 2022.
- After 2022, minimum wage will increase annually for inflation

New York Times.

Union members attend a city council meeting in Los Angeles last year to discuss the minimum wage.

> As well intentioned as increasing the minimum wage may be, its deliverance in the form of a rushed agreement preceding a coming primary election has created risks for both employers and employees.

Quest for a ruling on NSA surveillance

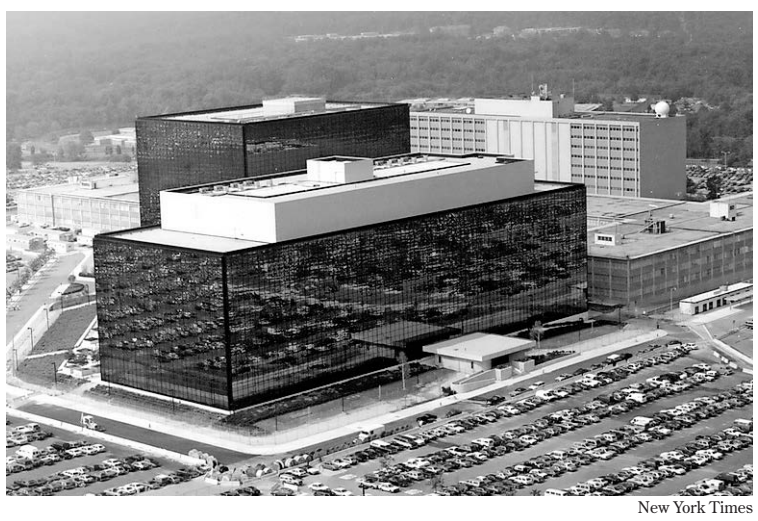
Continued from page 1

tions remain unanswered.

The courts involved in these cases should recall that actions "capable of repetition, yet evading review" that can leave individuals "without a chance of redress" should be closely scrutinized. First established by the U.S. Supreme Court in a 1911 case concerning a temporary order against a Texas railroad company, many courts have since relied on this principle to reach important legal questions in cases that are otherwise fleeting. That same principle weighs in favor of moving forward with cases challenging the NSA Metadata Program, despite the government's arguments that the change in law has mooted the plaintiffs' claims.

Last week the 9th U.S. Circuit Court of Appeals issued a short order remanding one of the three main challenges to the NSA's Metadata Program in *Smith v Obama*, 2016 DJDAR 2761 (March 22, 2016). The case, like *ACLU v. Clapper* in the 2nd Circuit (No. 14-42) and *Klayman v. Obama* in the D.C. Circuit (No. 15-5307), was brought in response to the NSA revelations in 2013. Specifically, the plaintiffs challenged the warrantless collection of all telephone call records under Section 215 of the USA PATRIOT Act. The plaintiffs argued that the program violated both federal law and the 4th Amendment of the U.S. Constitution.

So far, the 2nd Circuit is the only appellate court to rule on the legality of the NSA Metadata Program, finding last year that the government violated the law by obtaining bulk telephone call records that were not "relevant" to an ongoing terrorism investigation. The lower court in the *Klayman* case has also twice ruled that the program violated the 4th Amendment. The lower court in *Smith* previously upheld the program, relying on the Supreme Court's holding in the 1979 U.S. Supreme Court case *Smith v. Maryland*.



New York Times

The National Security Agency campus in Fort Meade, Md.

In all three cases the courts must now decide whether changes made by Congress in the USA FREEDOM Act have mooted the plaintiffs' claims. The new law, which went into effect in late 2015, prohibits the government from collecting telephone metadata in bulk. Now the government must first seek an order for records related to a specific phone number based on a "reasonable articulable suspicion" that the number is associated with a terrorist organization. So far two appellate courts have held that this new rule moots the plaintiffs' claims for injunctive relief — since the program no longer involves bulk collection.

But because the plaintiffs in these NSA cases are asking for more than just prospective injunctive relief, the courts can still decide whether the program violated these individuals' constitutional rights. After all, courts are well equipped to address even complex and politically charged issues through retrospective relief. The NSA cases should be no different. Not only are the plaintiffs seeking expungement of the unlawfully collected records, they could also be awarded a judgment and nominal damages, recognizing the government's violation. In order to resolve these claims, the court would necessarily have to determine whether the NSA's warrantless collection of all telephone records ran afoul of the 4th Amendment.

The same issue at the heart of these NSA cases — whether call records and other metadata are protected under the 4th Amendment — is relevant to debates in Congress and within the executive branch over the need for greater privacy protections. Despite several different bipartisan proposals over the last five years, Congress has not been able to move forward on comprehensive surveillance reform efforts or to bolster consumer privacy rights. The Federal Trade Commission and the Securities and Exchange Commission have openly disagreed about the need for stronger email protections. And courts are increasingly divided over 4th Amendment protections for cell phone location records and other metadata.

The lower court in *Smith v. Obama* should seize the opportunity to address some of these fundamental questions. But no matter what the outcome in this case, you can be sure that these issues will not go away any time soon. As my organization, the Electronic Privacy Information Center (EPIC), explained in a "friend of the court" brief filed with the 9th Circuit in the *Smith* case, modern communications systems are "entirely unlike the telephone networks of the 1970s" and courts should not mechanically apply precedents from another era to issues presented in 2016.

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