

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
3 ALEXANDRIA DIVISION

4 IN THE MATTER OF THE)
5 APPLICATION OF THE UNITED) 1:13 EC 297 COPY
6 STATES OF AMERICA FOR AN)
7 ORDER AUTHORIZING THE) UNDER SEAL
8 INSTALLATION AND USE OF A)
9 PEN REGISTER/TRAP AND TRACE) Alexandria, Virginia
10 DEVICE ON AN ELECTRONIC) July 16, 2013
11 MAIL ACCOUNT) 10:41 a.m.

12 TRANSCRIPT OF HEARING

13 BEFORE THE HONORABLE CLAUDE M. HILTON

14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

16 For the United States: James Trump, Esq.
17 Andrew Peterson, Esq.
18 Brandon Van Grack, Esq.
19 Michael Ben'Ary, Esq.

20 For the Respondent: Ladar Levison, Respondent

21 Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR

22 Proceedings reported by machine shorthand, transcript produced
23 by computer-aided transcription.
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P R O C E E D I N G S

THE CLERK: In Re: Case No. 1:13 EC 297.

MR. TRUMP: Good morning, Judge. Jim Trump on behalf of the United States. With me is Andy Peterson, Brandon Van Grack from the United States Department of Justice, Mr. Ben'Ary behind me, and Matt Braverman, special agent for the FBI.

THE COURT: All right.

MR. LEVISON: Ladar Levison, the subject of the summons.

THE COURT: All right. Mr. Trump.

MR. TRUMP: Your Honor, we submitted our supplemental paper this morning describing the communication we've had with Lavabit, LLC, through Mr. Levison. And I think, very simply, we would like this Court to inquire of Mr. Levison whether he intends to comply with the pen register order which would require him to allow the FBI access to his server to install a device which will extract data, filter that data, and provide that data to the FBI, and to provide the FBI with the encryption keys to the extent there is encrypted information, included among within the body of information called for by the pen register order.

As the Court is aware, and as we will provide with Mr. Levison, we obtained a search warrant this morning from Your Honor for the same encryption keys. Thus, to the extent there's

1 any question as to whether Mr. Levison would be required to
2 provide these keys, it's now subject both to the pen register
3 order and the search warrant, the seizure warrant.

4 That's where we stand, Your Honor. If Mr. Levison
5 agrees to comply with the order, we would not seek any
6 sanctions. We would ask that he be directed to forthwith make
7 his servers available so the FBI can install that device and to
8 extract the encryption keys.

9 If, however, he informs the Court he is not willing to
10 comply with the order, we would ask the Court to impose
11 sanctions. We suggested in our pleading a thousand dollars a
12 day to be paid to the United States government until he
13 complies. If he doesn't comply with that sanction, then we
14 would be back in court seeking additional sanctions or charging
15 additional offenses.

16 THE COURT: All right. Mr. Levison.

17 MR. LEVISON: Good morning, Your Honor. I'm not sure
18 what order I should make these in, but I would like to request a
19 couple of things by motion.

20 I'd like to move that all of the nonsensitive portions
21 of the documents that were provided, i.e., everything except the
22 account in question, be unsealed. I believe it's important for
23 the industry and the people to understand what the government is
24 requesting by demanding that I turn over these encryption keys
25 for the entire service.

1 THE COURT: All right. What do you say to that,
2 Mr. Trump? Deal with the motions before I --

3 MR. TRUMP: What Mr. Levison is trying to do, Your
4 Honor, is invite industry to come in and litigate as a surrogate
5 for him the issue of whether the encryption keys are part and
6 parcel of the pen register order. And that's one of the reasons
7 we sought the search warrant, to make it clear, whether through
8 the search warrant or pen register order, he is required to
9 provide these keys.

10 We know he's been in contact with attorneys who also
11 represent industry groups and others who have litigated issues
12 like this in the WikiLeaks context and others. But we would
13 object to unsealing this matter because it's just Mr. --

14 THE COURT: And they've done that in connection with
15 the issuance of a pen register?

16 MR. TRUMP: They have litigated privacy-related issues
17 in the context of process under 2703. I'm not sure -- not a pen
18 register, but with respect to 2703.

19 But we discussed this issue with Mr. Levison and his
20 counsel by conference call. We indicated that the only data
21 that the government seeks is that which is required by the pen
22 register order. That it's just the basic header to e-mail
23 traffic, sender, recipient, time, duration, that sort of thing.

24 If Mr. Levison wants to object to providing the keys,
25 he can certainly object to doing that and then we can proceed

1 from there, but I don't think he's entitled to try to make this
2 a public proceeding to invite others in to litigate those issues
3 on his behalf.

4 THE COURT: All right. Well, I believe that to be
5 correct. I mean, this is a criminal investigation. A pen
6 register has been ordered and is here at issue, and any motion
7 to unseal that will be denied.

8 You said you had another motion, I believe?

9 MR. LEVISON: Yeah. My issue is only with the SSL
10 keys. So if that is litigated separately and that portion of
11 the proceeding is unsealed, I'm comfortable with that.

12 THE COURT: I don't understand what you're saying,
13 separate proceedings.

14 MR. LEVISON: Sorry. I have always agreed to the
15 installation of the pen register device. I have only ever
16 objected to turning over the SSL keys because that would
17 compromise all of the secure communications in and out of my
18 network, including my own administrative traffic.

19 THE COURT: Well, didn't my order already include that?

20 MR. LEVISON: I do not believe so, sir.

21 THE COURT: Did my initial order -- I don't recall at
22 the moment. Did my initial order recall the encrypted devices
23 with the installation of a pen register?

24 MR. TRUMP: The pen register, as issued, just required
25 all assistance, technical assistance, facilities, and

1 information, to facilitate the pen register.

2 This morning the search warrant required --

3 THE COURT: Yeah, but the search warrant's a different
4 matter now. That's not before me this morning. The only thing
5 that's before me this morning is the pen register.

6 MR. TRUMP: Correct.

7 THE COURT: So as I understand it, my initial order
8 ordered nothing but that the pen register be put in place.

9 MR. TRUMP: And all technical assistance, information,
10 and facilities necessary to implement the pen register. And
11 it's our position that without the encryption keys, the data
12 from the pen register will be meaningless. So to facilitate the
13 actual monitoring required by the pen register, the FBI also
14 requires the encryption keys.

15 THE COURT: Well, that could be, but I don't know that
16 I need -- I don't know that I need to reach that because I've
17 issued a search warrant for that.

18 MR. TRUMP: Correct, Your Honor. That the -- to avoid
19 litigating this issue, we asked the Court to enter the seizure
20 warrant.

21 THE COURT: Well, what I'm saying is if he agrees that
22 the pen register be established, and that the only thing he
23 doesn't want to do in connection with the pen register is to
24 give up the encryption device or code --

25 MR. LEVISON: I've always maintained that.

1 THE COURT: -- so we've got no issue here. You're
2 ready to do that?

3 MR. LEVISON: I've been ready to do that since Agent
4 Howard spoke to me the first time.

5 THE COURT: All right. So that ends our --

6 MR. TRUMP: Well, then we have to inquire of
7 Mr. Levison whether he will produce the encryption keys pursuant
8 to the search warrant that Your Honor just signed.

9 THE COURT: But I can't deal with that this morning,
10 can I?

11 MR. TRUMP: Well, it's the same issue. You could ask
12 him, Your Honor. We can serve him with the warrant and ask him
13 if he's going to comply rather than --

14 MR. LEVISON: Your Honor, I've also been issued a
15 subpoena demanding those same keys, which I brought with me in
16 the event that we would have to address that subpoena.

17 THE COURT: I don't know, Mr. Trump. I don't think I
18 want to get involved in asking him. You can talk with him and
19 see whether he's going to produce them or not and let him tell
20 you. But I don't think I ought to go asking what he's going to
21 do and what he's not going to do because I can't take any action
22 about it anyway.

23 If he does not comply with the subpoena, there are
24 remedies for that one way or another.

25 MR. TRUMP: Well, the original pen register order was

1 followed by a compulsion order from Judge Buchanan. The
2 compulsion order required the encryption keys to be produced.

3 So, yes, part of the show cause order is to require
4 compliance both with the pen register order and the compulsion
5 order issued by Judge Buchanan.

6 And that order, which was attached to the show cause
7 order, states, "To the extent any information, facilities, or
8 technical assistance are under the control of Lavabit are needed
9 to provide the FBI with the encrypted data, Lavabit shall
10 provide such information, facilities, or technical assistance
11 forthwith."

12 MR. LEVISON: I would object to that statement. I
13 don't know if I'm wording this correctly, but what was in that
14 order to compel was a statement that was incorrect.

15 Agent Howard seemed to believe that I had the ability
16 to encrypt the e-mail content stored on our servers, which is
17 not the case. I only have the keys that govern communications
18 into and out of the network, and those keys are used to secure
19 the traffic for all users, not just the user in question.

20 So the statement in that order compelling me to decrypt
21 stuff and Agent Howard stating that I have the ability to do
22 that is technically false or incorrect. There was never an
23 explicit demand that I turn over these keys.

24 THE COURT: I don't know what bearing that would have,
25 would it? I mean, I don't have a problem -- Judge Buchanan

1 issued an order in addition to mine, and I'm not sure I ought to
2 be enforcing Judge Buchanan's order.

3 My order, if he says that he will produce or allow the
4 installation of the pen register, and in addition I have issued
5 a search warrant for the codes that you want, which I did this
6 morning, that's been entered, it seems that this issue is over
7 as far as I'm concerned except I need to see that he allows the
8 pen register and complies with the subpoena.

9 MR. TRUMP: Correct.

10 THE COURT: If he doesn't comply -- if he doesn't
11 comply with the subpoena, then that has -- I have to address
12 that.

13 MR. TRUMP: Right.

14 THE COURT: But right now there's nothing for me to
15 address here unless he is not telling me correctly about the pen
16 register.

17 MR. TRUMP: Well, we can -- Your Honor, if we can talk
18 to Mr. Levison for five minutes, we can ask him whether he will
19 honor the warrant that you just issued.

20 MR. LEVISON: Before we do that, can I --

21 THE COURT: Well, what can I do about it if he doesn't,
22 if he tells you he's not going to? You've got the right to go
23 out and search and get it.

24 MR. TRUMP: Well, we can't get the information without
25 his assistance. He's the only who knows and has possession of

1 it. We can't take it from him involuntarily.

2 MR. LEVISON: If I may, sir, my other --

3 THE COURT: Wait just a second.

4 You're trying to get me ahead. You're trying to get me
5 to deal with a contempt before there's any contempt, and I have
6 a problem with that.

7 MR. TRUMP: I'm trying to avoid contempt altogether,
8 Your Honor.

9 THE COURT: I know you are. And I'd love for you-all
10 to get together and do that. I don't want to deal with it
11 either. But I don't think we can sit around and agree that
12 there's going to be a default and I will address it before it
13 occurs.

14 MR. TRUMP: I'm just trying to figure out whether
15 there's going to be a default. We'll take care of that, Judge.

16 THE COURT: You can. I think the way we've got to do
17 this -- and I'll listen to you. I'm cutting you off, I know,
18 but I'll listen to you in a minute.

19 The way we have to do this, the hearing that's before
20 me this morning on this issue of the pen register, that's been
21 resolved, or so he's told me. I don't know whether you want to
22 continue this one week and see if he complies with that, which I
23 guess would be prudent to do, or a few days for him to comply
24 with the pen register. Then we will wait and see what happens
25 with the subpoena.

1 Because as far as my pen register order is concerned,
2 he says he's going to comply with it. So that issue's over and
3 done with. The next issue will be whether or not he complies
4 with the subpoena. And I don't know and I don't want to
5 presume, and I don't want him to represent to me what he intends
6 to do when he can very well go home and decide he's going to do
7 something different.

8 When that warrant is served, we'll know what he's going
9 to do. I think we've got -- I don't see another way to do it.

10 MR. TRUMP: That's fine, Your Honor. We will serve the
11 warrant on him as soon as we conclude this hearing, and we'll
12 find out whether he will provide the keys or not.

13 THE COURT: Okay. Now, did you want to say anything
14 else?

15 MR. LEVISON: Well, I mean, I've always maintained that
16 all the government needs to do is contact me and set up an
17 appointment to install that pen register. So I don't know why
18 there has never been any confusion about my willingness to
19 install it. I've only ever objected to the providing of those
20 keys which secure any sensitive information going back and
21 forth.

22 But my motion, and I'm not sure if it's relevant or not
23 because it deals more with the issue of the subpoena demanding
24 the keys and for what will be the forthcoming search warrant,
25 would be a continuance so that I can retain counsel to address

1 that particular issue.

2 THE COURT: Well, I mean, there's nothing before me
3 with that. I've issued the subpoena. Whatever happens with
4 that, that's -- you're trying to get me to do what Mr. Trump
5 wanted to do and to arrange this beforehand.

6 MR. LEVISON: Well, I don't know if I have to appear
7 before that grand jury right now and give the keys over or face
8 arrest. I'm not a lawyer so I don't understand the procedure.

9 THE COURT: I don't know either. You need to have --
10 it would be wise to have a lawyer.

11 MR. LEVISON: Okay.

12 THE COURT: I don't know what's going to happen. I
13 don't know. They haven't served the warrant yet. I have no
14 idea. Don't know what's going to happen with it. You'll just
15 have to figure that out, and it be wise to have a lawyer to do
16 it, I would think.

17 MR. LEVISON: I guess while I'm here in regards to the
18 pen register, would it be possible to request some sort of
19 external audit to ensure that your orders are followed to the
20 letter in terms of the information collected and preserved?

21 THE COURT: No. The law provides for those things, and
22 any other additional or extra monitoring you might want or think
23 is appropriate will be denied, if that's what you're requesting.

24 MR. LEVISON: Okay. I mean, it requests that the
25 government return to the Court records --

1 THE COURT: You need to talk to a lawyer about what the
2 law requires for the issuance of a pen register.

3 MR. LEVISON: They can handle that separately. That's
4 fine.

5 THE COURT: The law sets out what is done in that
6 regard. Your lawyer can fill you in if you want to know.

7 MR. LEVISON: I've always been willing to accept the
8 device. I just have some concern about ensuring that it's used
9 properly.

10 THE COURT: Should we continue this to some specific
11 date to see that he complies with the pen register?

12 MR. TRUMP: We can, Your Honor. It's a moot issue
13 without the encryption keys.

14 THE COURT: Well, that is a practical matter --

15 MR. TRUMP: That's a practical --

16 THE COURT: -- but I don't think it is a moot issue. I
17 mean, you-all have got the right to go in and put on that pen
18 register. He says that he will do it. That's all that I've
19 ordered.

20 Now, the other business about ordering that, Judge
21 Buchanan made an order that he's going to have to supply what
22 you say is the encryption codes to make the information useful.
23 I don't know. I didn't enter that order. I have trouble making
24 that connection.

25 If you're going to -- I don't know whether you want to

1 do something in front of Judge Buchanan or not.

2 MR. LEVISON: You see, Judge, though that I've always
3 been willing. They just didn't feel the need to set up an
4 appointment.

5 THE COURT: What do you want me to do with this case?
6 You want me to continue it? You want me to say it's moot right
7 now and just end it?

8 MR. TRUMP: No. I think we can continue it. I don't
9 know Mr. Levison's schedule. It can be done within hours of his
10 return to Dallas.

11 THE COURT: Of course he can. You want to continue it
12 till a week from Friday?

13 MR. TRUMP: Or a week from today.

14 MR. LEVISON: I'm not available within hours of my
15 return, but I can meet with you on Thursday.

16 THE COURT: Let's continue it a week from Friday.

17 MR. TRUMP: A week from Friday.

18 THE COURT: What date's that? The --

19 THE CLERK: 26th.

20 THE COURT: The 26th?

21 MR. LEVISON: Acceptable to me.

22 THE COURT: We'll continue it to the 26th, and that's
23 for determining whether or not that pen register has been
24 installed as you request.

25 We can make it 10 o'clock.

1 MR. LEVISON: I'll remember 10:00 instead of 10:30 this
2 time.

3 THE COURT: All right. Thank you.

4 All right. Thank you-all. We'll adjourn till tomorrow
5 morning at 9:30.

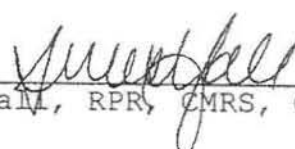
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7 (Proceedings concluded at 11:02 a.m.)
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CERTIFICATION

I certify, this 17th day of September 2013, that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

/s/



Tracy Westfall, RPR, CMRS, CCR