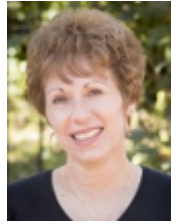


The NSA's mass surveillance program: illegal and opaque

*On May 7th a panel of judges of the U.S. Court of Appeals for the Second Circuit ruled that the National Security Agency's bulk collection of telephone metadata violated the law. **Toni Locy** writes that the decision is significant in that it would not have occurred but for Edward Snowden's revelations over this mass surveillance, and that it refutes the government's arguments that the mass collection of phone records is instrumental to its anti-terrorism efforts.*



In post-9/11 America, it is refreshing when judges write with reverence about the benefits of transparency, the importance of common sense interpretations of legal standards, and the wonders of the adversarial system's promise of airing at least two sides of an issue.

A three-judge panel of the U.S. Court of Appeals for the Second Circuit did all of that on May 7 when it ruled that the federal government is violating the law with the National Security Agency's (NSA) collection of telephone records of millions of Americans that show who they called, who called them, when, and how long they talked. The ruling focuses on Section 215 of the PATRIOT Act—the long-controversial provision the government uses as a basis for collecting in bulk telephone metadata and conducting other surveillance—set to expire June 1.

The House of Representatives has overwhelmingly passed the USA Freedom Act that would keep bulk telephone records out of the government's hands and with communications companies. President Obama supports the change. But Senate Majority Leader Mitch McConnell opposes the bill, and at last check, he was leaning toward a temporary extension of the current law. The Senate will need to move fast – on Wednesday the Department of Justice [warned](#) that the NSA would need to ensure no unauthorized data is collected if Congress fails to reach a consensus before Section 215 sunsets

The Second Circuit's unanimous opinion, written by Judge Gerard E. Lynch, and a concurrence by Judge Robert D. Sack are significant for two reasons:

This is the first time a higher-level federal court has reviewed the NSA's systematic collection of metadata. But it wouldn't have happened had it not been for former NSA contract employee Edward Snowden's disclosures of the government's most secret secrets in 2013. His revelations were instrumental in forcing the judges to address the legality of the massive surveillance program.

Second, the judges dismantled the legal theory that the government has relied on for years in terrorism investigations by insisting that agents get back to the basics of what's needed to obtain relevant information to a specific investigation.

Passed in a panic

After Congress passed the PATRIOT Act in the panic following the 9/11 and anthrax attacks, officials described it as a way of breaking down a wall that had kept the CIA and FBI from sharing information. They argued that international terrorism investigators needed the same powerful tools that a grand jury gives law enforcement agents to conduct broad criminal inquiries.

Section 215 was already law, but it was expanded by the PATRIOT Act to allow federal agents to obtain not only "business records," but also "any tangible things."

Librarians were among the first to sound the alarm, and they were ridiculed for it. Then-Attorney General John Ashcroft accused them of spreading "hysteria" that FBI agents were tracking what people were reading and "how far you have gotten on the latest Tom Clancy novel."

Since at least 2006, the NSA has been using Section 215 to collect Americans' telephone records in bulk.



Credit: [Ashleigh Nushawg](#) (Flickr, CC-BY-2.0)

Relevance is relevant

To some defense attorneys, a routine grand jury subpoena is already a license to fish. But in typical criminal matters, prosecutors and agents must show that the records sought are relevant to a particular investigation. Section 215 requires the government to show “reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation.” But the court said the section’s wording has been stretched so much that it’s barely recognizable.

“‘Relevance’ does not exist in the abstract,” Lynch wrote. “Something is ‘relevant’ or not in relation to a particular subject.”

The judges thumbed through the Oxford English Dictionary to define the concept of investigation, finding that to “investigate” means “to examine (a matter) systematically.”

But the panel said that’s not what happens with the collection of metadata. In seeking records from Verizon and other companies, the government doesn’t specify which terror group it’s investigating, but lists several. The records are then kept in storage until they are needed, if ever.

“Put another way, the government effectively argues that there is only one enormous ‘anti-terrorism’ investigation, and that any records that might ever be of use in developing any aspect of that investigation are relevant to the overall counterterrorism effort,” Lynch wrote. “Indeed, the government’s information-gathering ... is inconsistent with the very concept of ‘investigation.’”

The things a judge can learn

In his concurrence, Sack spoke fondly about transparency in government and marveled at what judges can learn from attorneys representing multiple points of view.

He also wrote affectionately about three cases that are among the U.S. Supreme Court’s greatest hits for ensuring public access to the courts and curbing abuse of presidential power.

Sack, who was a media lawyer before becoming a judge, cited *Richmond Newspapers, Inc. v. Virginia* and *Press-Enterprise Co. v. Superior Court of California*. He used the two cases from the 1980s to declare that American courts “operate under a strong presumption that their papers and proceedings are open to the public.”

But Sack lamented the limitations of the one-sided operations of the secret Foreign Intelligence Surveillance Court

which handles government requests for information and surveillance in terrorism investigations. The FISC only hears from government lawyers, unlike other courts where attorneys representing the other side get a say.

Sack cited the Pentagon Papers case as an example of where a judge benefited from hearing from the other side that cast doubt on government assertions that national security was in peril. In that 1971 case, *The New York Times* was permitted to resume publication after being temporarily banned from printing stories about a then-classified history of U.S. involvement in Vietnam.

He also took issue with use of the word “leak” to describe Snowden’s revelations, which made public the metadata order directed at Verizon. In a footnote, Sack quoted himself, from a 2006 dissent in another case, in which he wrote that it “may be unhelpful” to use the term to describe unauthorized disclosures.

“It misleadingly suggests a system that is broken. Some unauthorized disclosures may be harmful indeed. But others likely contribute to the general welfare,” Sack wrote. “Secretive bureaucratic agencies, like hermetically sealed houses, often benefit from a breath of fresh air.”

Refreshing, indeed.

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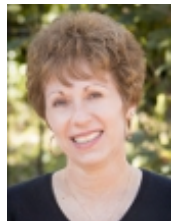
Note: This article gives the views of the author, and not the position of USApp– American Politics and Policy, nor of the London School of Economics.

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