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Edward Snowden Has Done the Senate Judiciary Committee's Work for Them

By: Philip Bump - July 31, 2013

Despite the laudatory title of the Senate Judiciary Committee's hearing on NSA surveillance Wednesday morning ("Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs"), the last 24 hours have made one thing clear. A blizzard of new details and official documents released by the government stem not from the much-ballyhooed oversight of the three branches of government, but out of necessity, following the leaks from Edward Snowden.

As the committee gets set to meet, at least three substantial new sets of information have been made public thanks to what journalism professor Jay Rosen calls the "Snowden Effect."

According to *The Washington Post*, the Obama administration has declassified and will shortly release the full court order that compels Verizon to share metadata from its customers calls. The existence of that program was confirmed in June after Snowden released a "secondary" order approved by the Foreign Intelligence Surveillance Act Court. What the government will provide today is, apparently, the full order.

The rationale for doing so is unquestionably the scrutiny that the collection of that metadata — information about the numbers involved in a call and its duration — has been under since the Snowden leak. Last week, the House narrowly defeated a measure that would have defunded the program. Rep. James Sensenbrenner, chief sponsor of the Patriot Act under which the data is collected, has suggested that the law's interpretation has been skewed to allow the bulk data collection.

The Justice Department also revealed in a court filing that it must inform suspects when the NSA's surveillance tools have been used to build the criminal cases against them, according to *The Wall Street Journal*. By doing so, the government opens itself up to new legal challenges to the programs.

> *For years, privacy advocates and private citizens have filed lawsuits seeking to challenge NSA surveillance. Many of those cases failed to gain traction because courts ruled the plaintiffs had no ability to prove they had been subjected to such surveillance.*
>
> *Now at least one group of individuals might have standing to challenge such a*

> *law—any defendants accused of terrorism who can produce confirmation that the accusations were based in part on mass NSA data-gathering.*

When the Supreme Court last year decided not to halt the NSA's surveillance, the primary rationale for doing so was that the plaintiffs in the suit couldn't demonstrate standing — that is, that they'd been affected by the surveillance. In the wake of the Snowden revelations, that decision received additional scrutiny, including statements from Solicitor General Donald Verrilli that the government informed suspects when that surveillance had been used in their prosecutions. In other words, Verrilli implied that there were more people who understood they had standing to challenge the surveillance than actually existed. Now, that will actually happen.

The third new set of revelations were ones we reported on yesterday. In a letter to the leadership of the Judiciary Committee, the FISA Court explained more about how it decides how and when to issue warrants on behalf of the NSA. In a separate letter, James Clapper, the Director of National Intelligence, offered some small new details on the metadata collection program.

That second letter, however, also prompted new questions. As national security reporter Julian Sanchez noted in his blog at the Cato Institute and on Twitter, Clapper didn't concretely answer questions about whether or not the government had ever or was currently collecting data on people's location using cell phone data. (Update: The Director of National Intelligence has released the order.)

In an apparently unrelated decision, the Fifth Circuit Court on Tuesday ruled that law enforcement agencies could do just that. *The Times* reports:

> *[T]he ruling sets an important precedent: It allows law enforcement officials in the Fifth Circuit to chronicle the whereabouts of an American with a court order that falls short of a search warrant based on probable cause.*
>
> *"This decision is a big deal," said Catherine Crump, a lawyer with the American Civil Liberties Union. "It's a big deal and a big blow to Americans' privacy rights."*

As Sanchez writes, the recipient of Clapper's letter, Sen. Ron Wyden of Oregon, seems to suggest that the federal government is already or had already done so.

> *Wyden's constant references to location tracking in this context would be nothing short of bizarre unless he had reason to believe that the governments assurances on this score are misleading, and that there either is or has been some program involving bulk collection of phone records. Wyden, of course, would know full well whether there is or is not any such program via his role on the Intelligence Committee—and his focus on location tracking over the activities we know NSA is engaged in, such as monitroing of Internet communications and bulk collection of phone records, would be an inexplicable obsession if he knew that no such program existed.*

Perhaps today's hearing from the Judiciary Committee — of which Wyden is not a member — will clarify that question. Or perhaps we'll need to wait until the slow and steady revelations spurred by Snowden's leak brings us to that point. Either way, it seems, we'll get our answer.