

We Still Don't Know What We Don't Know About the NSA

By: Elspeth Reeve - June 14, 2013

In order to figure out if we are striking the right balance between freedom and security, it helps to know what's on both sides of the scale. But when it comes to the National Security Agency's domestic and Internet surveillance program, even after all of Edward Snowden's leaks, we don't actually know very much at all. "Yes, I worry about potential government abuse of privacy from a program designed to prevent another 9/11 — abuse that, so far, does not appear to have happened.," *The New York Times'* Thomas Friedman writes. "But I worry even more about another 9/11." What would cause the balance to shift for Friedman? Surely cameras in every home would provide valuable counter-terrorism information, but no one thinks it's worth the cost. Likewise, we need to evaluate whether the NSA's programs are worth the cost. To do that, we need to know what they are. Here are some of the many things we don't know yet.

Is the U.S. conducting economic espionage? The government has defended the NSA's program to monitor the whole Internet as critical to tracking terrorists. But at *The Fiscal Times*, Bruce Barlett wonders what else we're looking at. In 2000, "There were strong suspicions in Europe that [intelligence gathering system] Echelon was being used to help American companies compete against those based in Europe." *The Guardian* reports that Snowden explained his evolution on American spying as starting with this fascinating incident:

He described as formative an incident in which he claimed CIA operatives were attempting to recruit a Swiss banker to obtain secret banking information. Snowden said they achieved this by purposely getting the banker drunk and encouraging him to drive home in his car. When the banker was arrested for drunk driving, the undercover agent seeking to befriend him offered to help, and a bond was formed that led to successful recruitment.

Was this banker helping funnel money to terrorists? Barlett is skeptical. "There are many illegal activities that secretive Swiss banks will happily accommodate, such as tax evasion, but they draw the line at facilitating terrorism," he writes. Maybe the banker was needed for help with companies using Swiss banks to avoid American taxes?

How much surveillance is really overseen by the courts? We've been assured that the NSA's surveillance has been checked by all three branches of government. The NSA's collection of all phone records is reauthorized every three months by the secret Foreign Intelligence Surveillance Court under the Patriot Act's Section 215, which allows the government to demand "tangible things" from businesses in terror investigations. But as the Cato Institute's Julian Sanchez points out, we don't know exactly why the Foreign Intelligence Surveillance Court started overseeing these programs around 2006. In 2003, as NBC News' Michael Isikoff reports, Attorney General John Ashcroft announced Section 215 had never been used as of September 2003. But it was used 21 times in 2009, 205 times in 2010, and 212 times in 2012. Why? The

FBI also uses national security letters for similar purposes — and those aren't subject to a court's review. Two years ago, FBI director Robert Mueller testified before Congress that the FBI had started getting resistance from telecoms asked to turn over records of "electronic communication transaction" in national security letters, because the Justice Department's Office of Legal Counsel ruled in 2008 that the telecoms didn't have to give over as much information. So the FBI switched to asking for the same info under Section 215.

Sanchez writes, "The obvious question these numbers provoke is, was the government previously using National Security Letters as well as §215 orders in connection with its bulk metadata collection program?" If so, he says, it would imply the FBI thought it could get bulk phone call records without even a court order. And what about the other kind of national security letters -- the ones that allow the FBI to demand "financial records" from businesses like credit card companies? How do we know the government is not collecting those records in bulk, too?

What does Congress know? Again, we've been told that all three branches of government provide oversight of those programs. But a few members of one branch of government disagrees. Sen. Jeff Merkley told MSNBC that he was not aware of the extent of the NSA's surveillance until he requested a briefing on the program. Rep. Loretta Sanchez said after getting a classified briefing on the programs, "I can't speak to what we learned in there, and I don't know if there are other leaks, if there's more information somewhere, if somebody else is going to step up, but I will tell you that I believe it's the tip of the iceberg." She added, "I think it's just broader than most people even realize, and I think that's, in one way, what astounded most of us, too." Here are some of the things we don't know so far. Rep. Jim Sensenbrenner wrote in *The Guardian*, "I authored the Patriot Act, and this is an abuse of that law... [B]ased on the scope of the released order, both the administration and the Fisa court are relying on an unbounded interpretation of the act that Congress never intended."

Does it work? The NSA did not catch the Tsarnaev brothers before they bombed the Boston marathon, despite their use of social media and comments on radical Islamist videos. Defenders of the program like NSA director Keith Alexander have pointed to the 2008 Mumbai attacks and the failed 2009 subway bomber Najibullah Zazi. But ProPublica's Sebastian Rotella explains that the Mumbai story doesn't quite hold up to scrutiny. Plotter David Coleman Headley was caught only "after the U.S. had been tipped by British intelligence." Further, the U.S. had been tracking Headley for seven years, and failed to catch him. In Zazi's case, British officials already had his email address from an earlier investigation, when they found it on a laptop.