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Will Today's Court Ruling Kill NSA Phone Surveillance for Good?

By Chas Danner

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In today's landmark decision in favor of the ACLU, the Second Circuit Court of Appeals ruled that for the NSA's phone-data collection program to be legal, Congress would have to explicitly authorize it with legislation. They may get that chance as the 9/11-era Patriot Act expires in the beginning of June — though the leading replacement option in Congress, the bipartisan USA Freedom Act, drops the controversial program. (If the Patriot Act is not extended, it and the NSA's bulk data collection will end.)

Even setting aside the legislative questions, there is still a great deal to unpack from today's ruling. For instance, one of the most notable aspects of the decision was that the ACLU's standing to file the suit against the government in the first place was validated. Vice's Jason Koebler explains:

The Patriot Act's secrecy clauses have led the government to argue that any challenges to it would out national security secrets. The government also said that, because it's a secret program, it should be impossible for people to know they've been spied on or been harmed—meaning they shouldn't be allowed to challenge the government in court. The court disagreed.

Slate's Mark Joseph Stern elaborates on that distinction, and highlights how today marks a clear victory for Edward Snowden:

As the Second Circuit candidly admits, its decision on Thursday is entirely the result of Edward Snowden's decision to leak details of the bulk collection program two years ago. Before that leak, Americans hoping to challenge NSA surveillance were unable to establish standing — that is, legal authority to challenge a law — because they couldn't prove the surveillence targeted *them*. The documents Snowden leaked, however, proved that the NSA forced Verizon "to produce detail records, every day, on *all* telephone calls made through its systems or using its services where on or both ends of the call are located in the United States." Thanks to that leak, Verizon customers have standing to challenge that surveillance in court, since they can now be certain the government spied on their phone records.

In libertarian Jim Harper's mind, another key conclusion of the court was that data is private property, a decision that means the Constitution can be used to protect digital privacy:

"The Fourth Amendment protects against unreasonable searches *and seizures*," the court emphasized. Data is a thing that can be owned, and when the government takes someone's data, it is seized. In this situation, the data is owned jointly by telecommunications companies and their customers. The companies hold it subject to obligations they owe their customers limiting what they can do with it.

He adds that if data is property that can be siezed, "even tiny seizures are subject to the constitutional requirement of reasonableness and a warrant." This is of course great news to civil-liberty advocates like Rand Paul, who has made his opposition to NSA overreach one of the hallmarks of his presidential campaign. Elsewhere in the Republican party, the GOP-led House Judiciary Committee has already voted to end the bulk collection program via the USA Freedom Act, a move Obama supports. This leaves Senate Republicans as the only remaining obstacle to stopping the program, chief among them Senate Leader Mitch McConnell and presidential candidate Marco Rubio. Indeed, with Rand Paul and Ted Cruz looking to stop the NSA program, and Rubio aiming to continue it, BuzzFeed's Kate Nocera sees the coming dustup over surveillance as the kickoff debate of the Republican primaries. If that's true, John McCain may have been previewing the arguments of GOP hawks today when he lamented how the ruling meant that "people seem to have forgotten 9/11," though that line of thinking doesn't fly with the Cato Institute's Patrick G. Eddington:

[Congressional Joint Inquiry into the 9/11 attacks concluded] that managerial and analytical failures, not a lack of information, is what hampered our ability to foil the 9/11 attacks. That finding would be echoed and amplified by the 9/11 Commission two years later. And as the *New York Times* reported last month, a 750-page intelligence-community report prepared by multiple inspectors general in 2009 found that warrantless surveillance carried out under the STELLAR WIND program — an illegal companion program to the officially sanctioned PATRIOT Act programs — was also virtually useless in countering national-security threats.

What we also know about these surveillance programs — beyond Edward Snowden's revelations — is that they failed to stop the "shoe bomber," the "underwear bomber," the Ft. Hood shooter, the Boston Marathon bombers, and, most recently, the Garland, Texas, shooters.

Eddington also points out how the NSA program hasn't just been an intelligence bust, it's been an enormous waste of taxpayer money in that the NSA built a massive, $1.7 billion data center to store all the seemingly useless data, something fiscal conservatives may choose to focus in on. Stepping back, law professor David Cole believes the path to surveillance reform is clear:

Congress should be guided by the federal appeals court's careful reasoning. As the court found, the authority asserted and exercised by the NSA was entirely unprecedented. It goes far beyond any preexisting authority to obtain records in any other investigative context. Digital technology makes this possible; the government can now track us in ways that until very recently were simply impossible. But just because it can do so doesn't make it right to do so. If we are to

preserve our privacy in the digital age, we must confront that reality and insist that the government's new spying technologies be appropriately constrained.

Congress should pass the USA Freedom Act. But doing so will by no means be sufficient. Snowden revealed a wide range of NSA spy programs that intrude on the privacy rights of innocent Americans and non-Americans alike. The USA Freedom Act deals only with one such program. But the court of appeals, and the USA Freedom Act, point the way forward in a more general way. If we are to rein in the NSA, we must insist first that there be public debate before the government institutes sweeping new surveillance programs, and we must demand, second, that surveillance be targeted at individuals as to whom there is suspicion of wrongdoing, and not applied indiscriminately to us all.