GlobalResearch
Center for Research on Globalization

Fruits of Illegality: The NSA, Bulk Collection and Warrantless Surveillance

By Dr. Binoy Kampmark
Global Research, September 03, 2020
Region: USA
Theme: Intelligence, Law and Justice

*He has become part of the furniture when it comes to discussions about privacy rights and personal liberties, arguably an odd sort of thing for a man who also dealt in the shadows of intelligence secrets. But **Edward Snowden** has been doing his bit to reveal and chip away at the foundations of the national security state that continues to thrive. The advent of coronavirus and pandemic surveillance will merely serve to advance it, but in June 2013, Snowden's exposures of National Security Agency practices were raw and unsettling to the wonks of the establishment.*

The most troubling of the revelations was not that the NSA conducts surveillance, its natural bread and butter; it was how such grubbily enterprising efforts as the metadata collection program were allowed to flourish with feral abandon. The forests of paranoia after the 9/11 attacks on US soil proved rich for such legislative instruments as the USA PATRIOT Act. Section 215, in particular, authorised the bulk collection by agencies of telephony metadata, known in the trade as call detail records. It had been barely read by members of Congress in a hurry; patriotism can encourage a special sort of dedicated illiteracy.

The NSA program, at least in that form, was ended with the reforms passed by the USA FREEDOM Act of 2015. Critics were quick to note that section 215 was merely given a trim and a clean. The original provision permitted the NSA to store call detail records (time, duration, the numbers communicating in a call, excluding the content of the call) and search them as required. Since the changes, such records are held by telephone companies; the agency can only request them via an order of the Foreign Intelligence Service Court.

The provision, according to Human Rights Watch, "still permits the government to collect a staggering amount of data, in secret and without a warrant, on how people use their phones, chilling freedom of expression and association." Between 2015 and 2019, the program cost $10 million and could only boast one significant lead, a palpably poor return for even the most devout surveillance types.

The expiry of Section 215 powers in March 15, 2020 led to a merry legislative jig. The Senate passed the USA FREEDOM Reauthorization Act in May. The oversight measures proposed by **Senators Mike Lee** (R-UT) and **Patrick Leahy** (D-VT) made it through, expanding the role of independent advisers to the court established by the Foreign Intelligence Service Act of 1978. But in so doing, the Senate failed to adopt the amendment proposed by **Senators Ron Wyden** (D-OR) and **Steve Daines** (R-MT), which would have prevented the government conducting warrantless surveillance on internet browsing and search histories.

Wyden was more than a touch irritated at his colleagues.

> "The legislation," he outlined in a statement, "hands the government power for warrantless collection of Americans' web browsing and internet searches, as well as other private information, without having to demonstrate that those Americans have done anything wrong."

The Senate also refused to prohibit the use of the Foreign Intelligence Surveillance Act of 1978 and surveillance conducted under the Article II executive power against people in the United States or in proceedings against them, both ideas of **Senator Rand Paul** (R-KY).

Privacy advocates were feeling a touch deflated. It took a decision by a three-judge panel of the 9th Circuit Court of Appeals handed down on September 2 to add a spring to their steps, if only after the fact. The decision in *United States v Moalin* was not bound to make them break out into a canter. The facts of the case covered the previous incarnation of bulk surveillance exposed by Snowden. The outcome was also a tad troubling. The four appellants, Somali immigrants convicted in 2013 for transferring $10,900 in support of the terrorist group al-Shabaab, had their convictions upheld.

The judges "held that the government may have violated the Fourth Amendment [protecting against unreasonable searches and seizures] when it collected the telephony metadata of millions of Americans, including at least one of the defendants, pursuant to the Foreign Intelligence Surveillance Act". Unfortunately for the defendants, "the metadata collection, even if unconstitutional, did not taint the evidence introduced by the government at trial." The application for suppression of the evidence – what were described by the defendants as the "alleged 'fruits' of the unlawful metadata collection," failed. Additionally, the FISA wiretap evidence was not held to be "the fruit of the unlawful metadata collection."

Scattered through the judgment are a few sprinklings of hope for privacy advocates. Some of these are merely confirmations and recapitulations. Others are clarifications for the intelligence community. The government had, for instance, argued that "ordinary criminal investigations" should not be treated in the same context as those in a "foreign intelligence context". The Fourth Amendment protections should be applied differently.

Not so, claimed the panel. The judges acknowledged that the Fourth Amendment required notice to be given to a defendant "when the prosecution intends to enter into evidence or otherwise use or disclose information obtained or derived from the surveillance of that defendant conducted pursuant to the government's foreign intelligence authorities." As the Fourth Amendment *did* apply to foreign intelligence investigations, it followed that "US criminal defendants against whom the government uses evidence obtained or derived from foreign intelligence may have Fourth Amendment rights to protect." The problem for the defendants here was that failure to provide notice by the government did not prejudice them.

The American Civil Liberties Union's Patrick Toomey saw the ruling as vindicating "that the NSA's bulk collection of Americans' records violated the Constitution." The mandatory notice requirement for authorities constituted an essential "protection" in a field of "novel spying tools". The Snowden legacy continues to be harvested, if unevenly.

*

Note to readers: please click the share buttons above or below. Forward this article to your email lists. Crosspost on your blog site, internet forums. etc.

Dr. Binoy Kampmark *was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. He is a frequent contributor to Global Research and Asia-Pacific Research. Email: bkampmark@gmail.com*
