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The Last Defenders of the NSA

As more information emerges about the bulk collection of phone records, the remaining arguments in its favor fall one by one.

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CONOR FRIEDERSDORF

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The NSA program that logs the phone records of innocent Americans has reached a turning point. A federal appeals court has ruled that it was never authorized by Congress. The Patriot Act provision wrongly said to authorize it is also about to expire. And the House of Representatives passed a bill that would shutter the program.

Its defenders are therefore pressed, as never before, to make their case.

One of their best efforts appeared last week in *National Review*. Its author, Fred Fleitz, is a retired 25-year veteran of the national-security bureaucracy. He is now the senior vice president for policy and programs at the Center for Security Policy.

And even his best-in-class effort fell well short.

To illustrate the ongoing threat of terrorism, he begins his article by referencing the Islamists killed while trying to attack Pamella Geller's cartoon contest, noting that while they were quickly shot dead, "There may not be heavy security in place the next time ISIS attacks." While true, what's more relevant is that the phone dragnet did nothing to help prevent the attack even though it was very much operational, just as it failed to stop the Tsarnaev brothers before they attacked Boston.

In both cases no more lives would've been lost without it.

"The pesky, rather inconvenient fact is that the government's mass surveillance programs operating under Section 215 of the Patriot Act have never stopped an act of terrorism," the ACLU notes. "That is not the opinion of the NSA's most ardent critics, but rather the findings of the president's own review board and the Privacy and Civil Liberties Oversight Board. This program has had over a decade to prove its value, and yet there is no evidence that it has helped identify a terrorism suspect or 'made a concrete different in the outcome of a counterterrorism investigation.'"

Yet Fred Fleitz's article disputes this, claiming that the Section 215 program "has been a successful tool in stopping terrorist attacks," pointing to Senator Dianne Feinstein's claim that "this program had helped stop terrorist plots to bomb the New York City subways, the New York stock exchange, and a Danish newspaper."

Let's take those cases one by one.

The New York City Subway

The Associated Press investigated Najibullah Zazi's failed attempt to bomb the New York City subway. The news organization concluded that "in the rush to defend the surveillance programs ... government officials have changed their stories and misstated key facts of the Zazi plot." For example, they left out this hugely important detail: "The email that disrupted the plan could easily have been intercepted without PRISM," an NSA program used to conduct mass surveillance on Internet communication. Notice that the phone-records program played no role at all here.

The New York Stock Exchange

The Kansas City Star pored over court records pertaining to the alleged plot to bomb the stock exchange. It reported that its extent was as follows: Sabirhan Hasanoff, a wannabe jihadist, sought to travel overseas and fight alongside Islamist radicals.

A contact in Yemen began correspondence, wanting Hasanoff's money more than his presence, saying he could arrange a suicide mission but that Hasanoff would have to wait to fight abroad. Hasanoff didn't want to die and kept getting strung along, sending occasional money to his Yemeni contact, who at one point asked for some research.

"Like a student pasting Wikipedia entries into a term paper, Hasanoff completely dogged his August 2008 assignment to study the New York Stock Exchange for a possible bombing attack," the newspaper reported, adding that when he turned over his findings, his contact in Yemen reportedly "tore up the report, threw it in the street, and never showed it to anyone," and that "it added nothing to his understanding of the stock exchange." Another Yemeni in contact with the American told the FBI that they "never had a real

plan to bomb the stock exchange," and that Hasanoff was useful only insofar as he kept sending money. There's no cause to think the stock exchange would've been hit but for the phone dragnet.

The Danish Newspaper

The plot to attack the Danish newspaper is a particularly absurd case to cite as justification for keeping the phone dragnet. The terrorist in this case is David Coleman Headley. Even a cursory look at his story suggests numerous ways that the U.S. government could've stopped him *years* before they did, and renders absurd the suggestion that he could only be identified through bulk collection of metadata.

As Pro Publica reports:

> The convicted drug smuggler radicalized and joined Lashkar in Pakistan in the late 1990s while spying on Pakistani heroin traffickers as a paid informant for the Drug Enforcement Administration. His associates first warned federal agencies about his Islamic extremism days after the Sept. 11 attacks. Investigators questioned him in front of his DEA handlers in New York, and he was cleared.
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> U.S. prosecutors then made the unusual decision to end Headley's probation for a drug conviction three years early. He then hurried to Pakistan and began training in Lashkar terror camps. Although the DEA insists he was deactivated in early 2002, some U.S., European and Indian officials suspect that he remained an informant in some capacity and that the DEA ... sent him to Pakistan to spy ... Those officials believe his status as an operative or former informant may have deflected subsequent FBI inquiries.

> The FBI received new tips in 2002 and in 2005 when Headley's wife in New York had him arrested for domestic violence and told counterterror investigators about his radicalism and training in Pakistan. Inquiries were conducted, but he was not interviewed or placed on a watch list, officials have said ...
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> In late 2007... another wife told U.S. embassy officials in Islamabad that Headley was a terrorist and a spy, describing his frequent trips to Mumbai and his stay at the Taj Mahal Palace Hotel. In fact, Headley was conducting meticulous surveillance on the Taj and other targets for an impending attack by a seaborne squad of gunmen. Once again, U.S. agencies say they did not question or monitor him because the information from the wife was not specific enough ...
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> The final tip to authorities about Headley came from a family friend days after the Mumbai attacks ... FBI agents in Philadelphia questioned a cousin of Headley's. The cousin lied, saying Headley was in Pakistan when he was actually at home in Chicago ... The cousin alerted Headley about the FBI inquiry, but Headley went to Denmark as planned. U.S. agencies did not find Headley or warn foreign counterparts about him in the first half of 2009 while he conducted surveillance in Denmark and India and met ... al-Qaida leaders.

After all that, the U.S. only caught up with Headley after a tip from British intelligence! "Supporters of sweeping U.S. surveillance say it's needed to build a haystack of information in which to find a needle," Pro Publica would conclude. "In Headley's case, it appears the U.S. was handed the needle—and then deployed surveillance that led to the arrest and prosecution of Headley and other plotters."

To sum up, Fleitz's national-security claim is unsubstantiated while skeptics of Section 215 are on solid ground. As Peter Bergen put it in his report for the New America Foundation, "Surveillance of American phone metadata has had no discernible impact on preventing acts of terrorism and only the most marginal of impacts on preventing terrorist-related activity, such as fundraising for a terrorist group."

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The *National Review* article next turns to a terrorist attack that preceded the phone dragnet, quoting a speculative claim by former deputy CIA director Michael Morell that "Had the [metadata] program been in place more than a decade ago, it would likely have prevented 9/11. And it has the potential to prevent the next 9/11."

A compelling reason to discount that claim was recently offered by Julian Sanchez, writing in the aftermath of the revelation that the Drug Enforcement Administration was running another international phone-metadata program as early as the 1990s.
He writes:

> ... the [NSA] program's defenders often suggest that had we only had some kind of bulk telephone database, the perpetrators of the 9/11 attacks could have been identified via their calls to a known safehouse in Yemen. Now, of course, we know that there *was* such a database—and indeed, a database that had already been employed in other counterterror investigations, including the 1995 Oklahoma City bombing.
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> It does not appear to have helped. Second, we now know that DEA was able to "find another solution" to monitor calls related to suspected narcotics traffickers when the program was ended in

> 2013, using targeted orders. It is, according to reports, somewhat more costly and time consuming—but it ultimately achieves the same ends without requiring the government to vacuum up millions of innocent people's international call records.

Turning to the legality of the metadata program, Fleitz correctly observes that federal judges and others are divided on whether the program violates the Bill of Rights. He goes on to note, "Opponents of the 215 program are now praising a decision on May 7 by a New York Court of Appeals panel that found that the program was not authorized by the Patriot Act. However, this decision fell far short of what the ACLU was seeking in the case, since the court did not order the 215 program halted, noting that the debate in Congress could render the issue moot."

Hold on, now.

A federal appeals court declared the program was illegal! *It was never authorized by Congress*. (Rulings in other federal courts have produced mixed results.) The significance of its unlawfulness is not undercut by the ACLU getting less than what it sought. If anything, the fact that the court didn't order an immediate shutdown makes it *more* scandalous that the illegal NSA program is still operating. And the court stayed its hand in large part *because* the program is set to expire at month's end.

All I'm urging is to let it expire.

Turning to politics, Fleitz writes that "much of the opposition from both sides of the political spectrum is a result of the deluge of Snowden leaks. The release of so much information out of context led to a media frenzy and wild claims that American intelligence is illegally spying on Americans. Both intelligence officials and the White House did a poor job at defending the

program, and conspiracy theories flourished."

But *Snowden leaked the truth*. The deluge of information he put forth on Section 215 was *totally accurate*. And national-security officials speaking in defense of the program have been by far the worst offenders when it comes to wild claims and misinformation, such as the lie that dozens of terror plots were stopped by the program.

As well, American intelligence *is* illegally spying on Americans.

Fleitz does grant that the Founding Fathers would be appalled by the Section 215 program, "if only because the Founding Fathers lived in the era of wooden ships and simple firearms and had no notion of modern warfare and weapons of mass destruction." This, too, is wrongheaded. To a man, the Founding Fathers were familiar with Guy Fawkes' 1605 attempt to blow up the House of Lords, a terrorist plot more significant than any that defenders of the metadata program claim it has helped to stop. The Founders deliberately put a ban on general warrants into the Fourth Amendment; the metadata program relies on them.

Addressing the possibility of abuses, Fleitz writes, "the 215 program is subject to intense oversight and has been an effective counterterrorism tool." In fact, oversight was so inadequate that it took *years* to properly adjudicate a question as basic as whether the program was even authorized by the statute cited to justify its existence. He writes, "Abuse of this program is purely theoretical." In fact, having one's phone records collected and stored under a statute that permits no such thing *is* an abuse. That's why the ACLU lawsuit objecting to the abuse succeeded in federal court.

Fleitz concludes by writing that "there is a real danger of an ISIS terrorist attack in the United States if Congress seriously weakens the metadata program." As he well knows, having cited the attack on the Texas cartoon

contest at the top of his article, there is also a real danger of an ISIS terrorist attack if Congress keeps the metadata program. Whether or not we cede our Fourth Amendment rights and permit warrantless surveillance on tens of millions of innocents, we will be at risk of terrorism. We can choose to cede liberty for safety, but we'll just end up with neither.

ABOUT THE AUTHOR

CONOR FRIEDERSDORF is a staff writer at *The Atlantic,* where he focuses on politics and national affairs. He lives in Venice, California, and is the founding editor of The Best of Journalism, a newsletter devoted to exceptional nonfiction.

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