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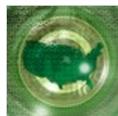
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1 of 12



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2 of 12



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3 of 12

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OPINION | June 6, 2013, 7:25 p.m. ET

The Spying on Americans Never Ended

Taking phone records didn't make us safer. Now we can have a debate on secret courts and surveillance.

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By ELIZABETH GOITEIN

Americans following the news this week may be experiencing an unsettling sense of déjà vu. In 2006, news reports revealed that the Defense Department's National Security Agency was collecting records of Americans' domestic telephone calls. The Bush administration never admitted it, and many assumed that the practice stopped under the Obama administration. But on Tuesday the Guardian newspaper in Britain reported on a secret court order showing that a subsidiary of Verizon was required to turn over all of its customers' records for a three-month period. Members of Congress soon confirmed this was part of a larger collection program dating back seven years.

Congressional Republicans, joined by the Democratic chairman of the Senate Intelligence Committee, Dianne Feinstein, have embarked on an aggressive "nothing to see here" campaign. They argue that the bulk collection is a lawful and useful tool for combating terrorism. Yet the controversy continues—and for good reason.

The most tangible problem is the invasion of Americans' privacy. The so-called metadata collected by the NSA includes information about our calls, such as the numbers we call, the numbers of those who call us, when the calls are made, and for how long.

This information may seem relatively trivial at first blush. Yet, pieced together, these details can paint a detailed and sensitive picture of our private lives and our associations. Calls to a therapist's office, Alcoholics Anonymous, repeated late-night calls to a friend's wife—the existence of these calls can reveal as much in some instances as the calls' actual content.



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Sen. Saxby Chambliss (R., Ga.) asserted that an individual's phone metadata, once collected, is not actually reviewed unless the government first establishes probable cause and gets a secret court order. But he did not say whether the government employs computer programs to probe the metadata and identify cases when "probable cause" may exist. That would

be the equivalent of sending a dog into someone's house to sniff for drugs and

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applying for a warrant if the dog barked. In any case, history teaches that the temptation for the government to use information, once gathered, is irresistible.

Another concern is legality. The program is taking place under Section 215 of the Patriot Act, which allows the government to obtain records and other "tangible things" only if they are relevant to an authorized foreign-intelligence or international-terrorism investigation. It is simply not possible that all of the phone records of every American are relevant to a specific authorized investigation. Such an interpretation of "relevance" (or of "investigation") would render Section 215's limitation utterly meaningless.

There may be a constitutional concern, as well. The secret court order obtained by the Guardian does not specify whether collectible metadata includes cellphone-location information, but the government believes it does. Although some courts have held that the government does not need a warrant to obtain cellphone-location data, others say warrantless collection violates the Fourth Amendment because the information is so sensitive—a comprehensive record of a person's movements.

To be sure, a court has signed off on the program. But that does not make it legal. Courts occasionally make mistakes. When that happens, the losing party has the right to appeal, and the erroneous decision is reversed. That process cannot happen when a secret court considers a case with only one party before it. It has taken seven years for the American public to learn about this interpretation—and since the government was the only party to the case, no one can appeal. The court's order illustrates the fundamental inadequacy of secret courts and secret law when it comes to protecting Americans' rights.

The program's defenders in Congress say it is necessary to identify people with whom known or suspected terrorists are associating. If the government is investigating a terrorist suspect, however, Section 215 allows the government to obtain that person's records and learn who his or her contacts are. There is no imaginable need to collect every American's phone records for this purpose. As for Sen. Chambliss's claim that this program has stopped a terrorist attack, he will surely refuse to disclose any further information on the ground that it is classified. There is no way to evaluate whether his claim is accurate, let alone whether the plot could have been thwarted using more targeted means.

Still, let's assume that the government's program has helped identify one or more terrorist plots. Its usefulness would not justify violating the law; the government should instead seek to change the law. Whether the program's usefulness would justify the incursion into Americans' privacy is a question of balancing competing policy priorities—a core question of public policy that is for the American people, not a handful of intelligence officials, to debate and decide.

Why were we not given that opportunity? For seven years, the government deemed that releasing its legal interpretation of the Patriot Act could cause grave harm to national security. Yet it is unclear how Americans would change their behavior if they knew the government could obtain their telephonic metadata. Would they stop using the telephone? If, indeed, publicizing the program would render it useless, then we should expect the government to abandon the program now that it has been disclosed. Yet it will surely continue.

The rule of law and our privacy are too important to be cast aside with the assertion that national security requires it. And they are too important to be manipulated in secret, whether by our government or by a secret court. A public debate on the government's surveillance authorities is long overdue. The silver lining to this week's revelations is that we may finally begin to have it.

Ms. Goitein is co-director of the Liberty and National Security Program at the Brennan Center for Justice in New York.

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5 Opinion: Noonan: The Humble Pope, and the Beltway Cats



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