2-27-2014

Of Relevance and Reform Under Section 215

Peter Margulies
Roger Williams University School of Law

LAWFARE

FISA: 215 COLLECTION

Of Relevance and Reform Under Section 215

By **Peter Margulies** Thursday, February 27, 2014, 11:47 AM

Privacy Paradox: Rethinking Solitude

Lawyers love a good fight on definitions, and debate about the § 215 metadata program has raged on the meaning of the statutory language, "relevant to an authorized investigation." Critics link compliance with § 215 to information on a discrete, ongoing investigation, while those favoring the government's view seek more flexibility. A distinguished and provocative group of speakers at a Federalist Society event on Monday featuring Ben, the ACLU's Anthony Romero, former DHS Secretary Michael Chertoff, and the Center for National Security Studies' Kate Martin showed that definitions of relevance are a Rorschach test on the adequacy of the formerly secret program's checks and balances. I develop this notion in a newly posted piece, *Evolving Relevance: The Metadata Program and the Delicate Balance of Secrecy, Deliberation, and National Security*, which like Monday's meeting also addresses reforms such as a public advocate.

For critics of the program, including Harley Geiger of the Center for Democracy and Technology, and the Cato Institute's Jim Harper and Julian Sanchez, current checks on the program don't work (see Sanchez's critique of the FISC here) and secrecy compounds the problem. Critics (see Laura Donohue's analysis and Marty Lederman's insightful post) question whether collecting millions of call records from ordinary Americans is "relevant" under the statute. They view the opinions of the Foreign Intelligence Surveillance Court (FISC) upholding this view as lacking in sufficient support.

Critics, including a 3-2 majority of the Privacy and Civil Liberties Oversight Board (PCLOB), also contend that the metadata program is ineffective because there is no clear evidence that it has assisted in thwarting planned terrorist attacks. Secretary Chertoff, in a luncheon throwdown with the ACLU's Romero expertly moderated by the Washington Post's Ellen Nakashima, offered a tempered account of the program's benefits. He noted that the program has supplied leads in an number of investigations, including the Zazi plot to bomb New York subways. Those leads might have been available from other, more traditional methods, as the PCLOB claimed, but useful information including the phone number of one of Zazi's accomplices actually came from the metadata program. Since interagency communication is always subject to breakdowns, having a fail-safe mechanism for sharing information is helpful. Moreover, Secretary Chertoff noted, the program helped to allocate law enforcement resources by ruling out external collaborators in the Boston Marathon bombing. Preventing the waste of time and effort after an attack may not trend on Twitter, but it does promote an effective counterterrorism strategy.

The statutory language that conditions FISC approval on a showing of "relevance to an authorized investigation… to protect against international terrorism" also triggered debate at Monday's program. Cato's Jim Harper cited Black's Law Dictionary, which lists as a primary definition of relevancy, "applicability to the issue joined." Perhaps because this definition raises more questions than it answers (How applicable must the information be? What exactly is the "issue to be joined?"), Jim stressed Black's secondary definition of relevancy: "that which conduces to the proof of a pertinent hypothesis." But this definition does not advance Jim's point. The term "pertinent" is notoriously amorphous (Pertinent to what, exactly?). Moreover, in defining the specific statutory term, "relevant," (not "relevancy"), Black's adds to the uncertainty with the resoundingly specific, "[a]pplying to the matter in question; affording something to the purpose." What is that special "something?" Perhaps the Beatles' George Harrison knows, having written the song, but he's not telling.

Because these definitions obscure more than they enlighten, we should look at relevance in a different light, as I suggest in *Evolving Relevance*. Section 215 is part of a democratic experiment in the integration of secrecy, deliberation, and strategic advantage that dates to the Constitution's framing. Evolving relevance has a fiduciary dimension, which stresses the government's duty to both safeguard national security and avoid methods that Madison, in Federalist No. 41, described as "inauspicious to… libert[y]." Applied to § 215, evolving relevance's premise is that Congress intended to keep the statutory relevance standard fluid to accommodate changes in technology and the terrorist threat while maintaining appropriate privacy safeguards.

To fulfill those purposes, Congress provided for the FISC's role and for limited but intensive congressional oversight. It also drafted § 215 to permit broad collection. After all, as David Kris and Monday speaker Steve Bradbury noted in valuable treatments of the subject, there is no *a priori* reason that "an investigation… to protect against international terrorism" should be narrow, given the far-flung and convoluted nature of terrorist organizations. In the debates on § 215, Senator Kyl and others noted the resourceful nature of terrorist groups and the "agility" demanded of U.S responses. It's plausible to view Congress as authorizing that agility in technological innovation, coupled with secrecy that would preclude terrorists from going to school on U.S. methods. However, to preserve privacy, the FISC's view of relevance also entails evolving technological safeguards, such as limiting metadata queries to identifiers for which NSA senior officials have a "reasonable and articulable suspicion" (RAS) of links to terrorists groups. Adding to this rigor, the FISC recently granted the government's request, announced in President Obama's January speech, that the court preapprove the identifiers used by the agency.

That said, evolving relevance recognizes the need for reform. As Ben noted at Monday's meeting, Congress will not reenact § 215 in 2015 unless it is sure that the program adequately balances privacy and security. Here, both the morning and afternoon panels, moderated with great balance by Vince Vitkowsky and Nathan Sales, respectively (see Nathan's paper on digital search protocols here), featured nuanced debate on the reform that has attracted greatest attention: a public advocate for the FISC (see Steve and Marty's post). Ken Wainstein, former Assistant Attorney General at DOJ's National Security Division, recognized the importance of legitimacy and accountability, although he cautioned that careful design of the public advocate's function and authority would be vital to avoid weighing down the FISC process. Steve Bradbury echoed this caveat. I agreed, noting that the FISC was not a "rubber stamp," as critics claim, but that a public advocate could press the court to elaborate on its reasoning.

Despite worries about inefficiency, the public advocate proposal is worth pursuing. If, as Alexander Hamilton famously acknowledged, the courts have no asset but their "judgment,"then surely the elaboration of reasons is essential. Some critics might still have grave doubts about the program. But even critics would agree that including the public advocate provisions of the Leahy-Sensenbrenner USA Freedom Act in future legislation is a step in the right direction. Perhaps, as the legislative debate evolves, some artful legislator can merge that proposal with elements of Senator Feinstein's reform bill, approved by the Senate Intelligence Committee. Common ground is often elusive--- and nowhere more so than in this Congress---but it might be closer at hand than many think.

Topics: FISA: 215 Collection, Surveillance, Surveillance: Snowden NSA Controversy, FISA

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of Law's Detour: Justice Displaced in the Bush Administration (New York: NYU Press, 2010).