The Snowden Conundrum

Recent disclosures by Edward Snowden have focused attention on National Security Agency collection of noncontent phone data—call dates, times, and phone numbers—covering virtually everyone. Proponents claim authorization under the business records provision (Section 215) of the Patriot Act. Opponents counter that Congress never envisioned a program of such massive scope; and, in any event, dragnet surveillance violates the Fourth Amendment.

In Smith v. Maryland (1979), the Supreme Court held that we have no privacy right in noncontent data gathered by telephone companies. But this past December, U.S. District Judge Richard Leon pointed out that Smith involved a “one-time, targeted request for data regarding an individual suspect in a criminal investigation.” By contrast, the NSA program is a “daily, all-encompassing, indiscriminate dump” of data from people not suspected of any wrongdoing. Moreover, wrote Judge Leon, the government “does not cite a single instance” in which the data “actually stopped an imminent attack.”

That conclusion contrasted sharply with a second December opinion from U.S. District Judge William Pauley. He wrote that the “effectiveness of bulk telephony metadata collection cannot be seriously disputed.” Not only did Judge Pauley disagree with Judge Leon, but he also contradicted President Obama’s appointed panel of experts, who found that the NSA program “was not essential to preventing attacks.”

The Supreme Court will likely have the final word, but Snowden has sparked a long overdue debate about secret programs not fully known even to members of Congress. Meanwhile, Americans need a few answers: What’s the actual scope of the surveillance? What can be done with the data? What triggers a further look at content? Who has access? What oversight procedures are in place? And what are the remedies for abuse? Thanks to Snowden, more transparency and legal constraints are imminent.

That’s why The New York Times editorialized that Snowden should be offered a plea bargain by which he could return and face substantially reduced punishment. The administration demurred, however. Instead, President Obama declared that Snowden should have informed higher-ups, and would have been protected by an executive order covering whistle-blowers. Yet the executive order applied to employees, not contractors; and Snowden contends that he did report to two superiors—who did nothing. Although the NSA denies Snowden’s claim, it rings true in light of agency insistence that metadata surveillance is not abusive.

The main argument against treating Snowden as a hero is that he may have disclosed crucial information to such bastions of liberty as Russia, China, Venezuela, Ecuador, Bolivia, Nicaragua, or Cuba—countries where (according to WikiLeaks) he applied for asylum. Snowden supporters offer two counterarguments:

First, they maintain that Snowden had no real choice regarding asylum in Russia, where he was trapped after the U.S. State Department revoked his passport. He would have preferred Iceland, which rejected his bid for citizenship. Snowden’s remaining options were unacceptable: keep quiet about the NSA’s snooping, stay here and be exposed to 30 years or more in prison, or go to an allied country and face extradition.

Second, in a September NPR interview, reporter Barton Gellman (a Snowden confidant) stated that Snowden “is exceptionally skilled at digital self-defense.” He taught courses on avoiding surveillance at the NSA and CIA. Gellman believes Snowden “rendered himself incapable of opening the [NSA database] while he was in Russia.” He no longer had the key to the encrypted data; and, more importantly, there was “nothing for the key to open any more.” Snowden buttressed that assertion in a letter to former U.S. Senator Gordon Humphrey (R-NH): “You may rest easy knowing that I cannot be coerced into revealing that information, even under torture.”

Therein lies the crux of the matter for some libertarians. Snowden deserves our enduring gratitude for uncovering government abuse at great personal risk. On the other hand, Mike Rogers (R-MI), chair of the House Intelligence Committee, alleges that Snowden probably had help from Russia and may have compromised vital national security interests, a charge that Snowden denies.

Perhaps that suggests this outline for a deal: first, Snowden can come home if he will cooperate with investigators. Second, he will not be prosecuted for actions already disclosed to the public. But third, he can be held accountable for other actions, not yet disclosed, that amount to espionage—traditionally defined as transmitting national defense information with intent or reason to believe that it will be used to the injury of the United States or the advantage of a foreign nation. And fourth, as constitutionally required, the government would have the burden of presenting evidence to a grand jury, obtaining an indictment, and prevailing in a criminal trial.

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