Making Sense from Snowden: What’s Significant in the NSA Surveillance Revelations

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Background: Edward Snowden

- disclosed classified details of top-secret US, UK, Israeli gov’t mass surveillance programs to press
  - employee of Booz Allen Hamilton (defense contractor); former CIA employee
  - living in Russia under temporary political asylum; considered a fugitive from justice by US gov’t
- "I don’t want to live in a society that does these sort of things [surveillance on its citizens]... I do not want to live in a world where everything I do and say is recorded... My sole motive is to inform the public as to that which is done in their name and that which is done against them.”

Snowden leaks: What NSA collects

- domestic telecommunication metadata (from Verizon customers)
- metadata from domestic Internet email, 2001-2011 (at least)
- NSA PRISM program: collects Internet communications and stored data of “non-US persons”
- “hacking into foreign computers” (e.g., at Tsinghua University in Beijing)
- Tapping cellphones of foreign leaders (e.g., Germany)

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Meta data

- The “envelope” but not the content of a communication session

- telephone: caller and callee phone numbers, duration, time-of-day, cell towers (but not GPS coordinate of phone)
- Internet: IP source and destination address, time of day, (duration? port numbers?)
The fourth amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- Wiretaps are searches

FISA and Title III

- FISA: Foreign Intelligence Service Act
  - probable cause that suspect is foreign power or agent of foreign power; purpose of tap is foreign intelligence
  - Sections 702, 215
- TITLE III
  - probable cause that target is committing, has committed or is about to commit a serious crime
  - when completed, info becomes public
Metadata: more

- Metadata is shared by communicating parties to a third party (the phone company)
  - It’s a business record, not subject to same constitutional protection as content
  - no requirement for probable cause for government to get business records
    - A wiretap (which is not a business record) would require a court order

In the wake of 9/11/2001

- Bush: expands NSA authority to warrantlessly wiretap international communications with one end outside of US
- FISAAA (FISA Ammendments Act): as long as no US person directly targeted, FISAA permits warrants for “classes” of taps
  - Warrantless access to communications and data of non-use person stored in US
  - Note: non-US versus terrorist
In the wake of 9/11/2001

- Sec 215 of 2001 Patriot Act: authorizes collection of business records
  - Snowden leak: government used this to justify request for domestic telephone metadata delivered in bulk.

Some pending bills

- US Senate (P. Leahy):
  - narrow scope of collection of telephone metadata
  - Formal reviews of FISA sections 702 and 215
- require warrants for cell phone location info
The question

Has anything “illegal” happened?
What should be legal?

“For over a decade, we’ve debated how best to protect America from terrorism while preserving the most basic constitutional rights … today’s revelation [NSA secretly obtaining Verizon’s domestic call metadata] is disturbing, but it should not be surprising. I have tried to reform this provision of the Patriot Act for years, introducing legislation and offering amendments to ensure that secret demands for sensitive personal information on Americans limited only to those with some connection to individuals suspected of being involved in plots against our country. As I said when I offered my amendment in 2009, ‘someday the cloak will be lifted and future generations will ask whether our actions today meet the test of a democratic society – transparency, accountability and fidelity to the rule of law and our Constitution.’ Today that cloak has been lifted and this important debate must begin again.”

Senator R. Durbin, D_IL, June 6, 2013