

NATIONAL REVIEW

NSA Data Collection: Necessary, or Unconstitutional?

By Fred Fleitz — May 11, 2015

Although the Obama administration refuses to say that the attempted massacre by two heavily armed assailants at a “draw Mohammed” contest in Garland, Texas, was an act of terrorism directed by ISIS, there is little doubt this was the case. One of the heavily armed attackers had been in touch through Twitter with jihadists in Australia and Somalia who were associated with ISIS and who had called for attacks on the Garland event. ISIS also seemed to know about the attack in advance and immediately claimed responsibility for it.

Pamela Geller, the organizer of the “draw Mohammed” contest, wrote this week that whether ISIS leaders actually directed the attack or only had foreknowledge of it is a distinction without a difference, since ISIS has called for attacks on the United States and published manuals explaining how homegrown Islamist terrorists can construct bombs and kill infidels.

The Garland attack was stopped in a matter of seconds — but only because of a heavy police presence assigned to the event and a traffic cop who somehow killed both assailants with his service revolver even though they were wearing body armor. However, this will certainly not be the last attack in the United States by homegrown terrorists inspired or directed by ISIS and al-Qaeda. There may not be heavy security in place the next time ISIS attacks.

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This is why Senator Mitch McConnell recently introduced a “clean” — that is, with no changes at all — reauthorization of the Patriot Act, which extends three of its provisions on electronic-surveillance programs used to protect our country against terrorist attacks. The most controversial is the NSA metadata program enacted in Section 215 of the

Patriot Act.

Opponents of the 215 program claim it is an unconstitutional violation of privacy rights and say that it has played no role in protecting the United States from terrorist attacks. Both of these claims are untrue.

Under the metadata program, the NSA collects large numbers of phone records — not the contents of phone calls — and uses them to make connections between terror suspects. The program is subject to strong oversight by the executive branch, Congress, and the courts and is used only for national-security investigations. Only 22 people at the NSA are allowed access to these metadata, and they are barred from any data-mining, even in connection with an investigation.

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While its detractors refuse to admit it, the 215 program has been a successful tool in stopping terrorist attacks. It has been strongly defended by many intelligence officials and members of Congress, including Senator Dianne Feinstein (D., Calif.), vice chairman of the Senate Intelligence Committee, who said during a January 14, 2014, Judiciary Committee hearing that this program had helped stop terrorist plots to bomb the New York City subways, the New York stock exchange, and a Danish newspaper.

Former deputy CIA director Michael Morell said in a December 27, 2013, *Washington Post* op-ed: “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.”

Although 35 of 38 court decisions have found the 215 program to be constitutional, its opponents like to quote a December 2013 opinion by D.C. District Court Judge Richard Leon, which questioned its constitutionality. Instead of shutting down the program, however, Leon stayed his decision pending a government appeal. When this appeal was heard by a D.C. Circuit Court of Appeals panel last November, the judges did not accept the challengers’ contentions that the 215 program violated the Fourth Amendment’s protection against unreasonable searches.

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. The court also did not find the 215 program to be unconstitutional or a violation of privacy rights, although it said it could revisit these issues if Congress passes new legislation to reauthorize the program. Indeed, if the 215 program continues, legal challenges to it are likely to be eventually decided by the Supreme Court.

Despite the continuing need for the 215 program, it is in trouble because Republicans are sharply divided on it.

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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.

And, of course, there also is in America a venerable history of suspicion of government and government secrecy. Senator Rand Paul (R., Ky.) has said that America's Founding Fathers would be "appalled" at the 215 program. Actually, Senator Paul is probably right, 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. I suspect they would be appalled at many aspects of modern society.

In an April 25 NATIONAL REVIEW [article](#), Senator Mike Lee (R., Utah) made a similar argument when he expressed his concerns about the U.S. governments gathering data "to paint a fairly complete picture of the private lives of every person in this country." In fact, although there is no evidence that the NSA has ever done or ever intended to do such a thing, it *is* being done, and on a huge scale, by Google, Facebook, other social-media sites, and data brokers. According to a March 9, 2014, *60 Minutes* [report](#), Acxiom, a data broker, claims that it has on average 1,500 pieces of information each on more than 200 million Americans. If Senator Lee is really worried about privacy threats, he should focus on the unregulated gathering of such data on Americans by technology companies.

From what people have told me as I've traveled around the country giving talks on this topic, I know that a major factor driving Republicans to oppose the 215 program is

Obama-administration policies and scandals. These abuses include the effort by the IRS to discriminate against conservative groups, and the Justice Department's seizing the phone records and e-mails of Fox News correspondent James Rosen and his parents. Many Republicans complain that they have been repeatedly lied to by the Obama administration — about Obamacare, the 2012 attacks on the U.S. consulate in Benghazi, the Iran nuclear talks, and other issues.

As a result, some Republican members of Congress are loath to extend an intelligence program that they fear could be used by the Obama administration against its political enemies. Although I understand this concern, the realities are that the 215 program is subject to intense oversight and has been an effective counterterrorism tool. Abuse of this program is purely theoretical. Shutting it down because of the Obama administration's scandals and failings makes no sense.

At the other end of the political spectrum, the metadata program has been broadly opposed by the Left and by electronic-privacy advocates. However, this opposition goes beyond the metadata program: These groups are also pushing for granting privacy rights to foreign citizens on foreign soil (which President Obama tacitly supports), negotiating international treaties banning Internet spying, and preventing the NSA from exploiting software vulnerabilities.

President Obama has struggled to deal with controversy sparked by the Snowden leaks. In August 2013, he named a panel to look at reforming NSA collection, though he eventually ignored most of its recommendations, probably because they were so radical and naïve. These included recommendations similar to those by the Left mentioned above, such as extending the Privacy Act of 1974 to non-U.S. persons; calling for U.S. electronic surveillance to be guided by Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights; codes of conduct between intelligence agencies on electronic surveillance against foreign citizens, and barring U.S. intelligence agencies from cracking Internet encryption methods and penetrating computer software.

People who make such recommendations are oblivious to the reality that we need aggressive intelligence collection to keep our nation safe in a dangerous world. They also do not understand that adopting such standards would severely undermine or shut down many crucial intelligence-collection programs but would be completely ignored by

America's enemies and adversaries.

President Obama also instructed intelligence officials to defend the 215 program and work to block legislative language that would overly restrict it. This led Jeb Bush to remark last month, "I would say the best part of the Obama administration has been his continuance of the protections of the homeland using the big metadata programs, the NSA being enhanced." However, Bush may need to retract this statement. According to a House Intelligence Committee source, the White House gave up on defending the metadata program late last year in response to its supporters on the left, especially deep-pocketed Democratic contributors in Silicon Valley.

Congress also has struggled with NSA reform. Last May, the House passed the 2014 USA Freedom Act, which would put significant restrictions on the 215 program, including a mandate that metadata be retained by the phone companies, not the NSA. Although I viewed this as a bad bill, I endorsed it in a June 23, 2014, NATIONAL REVIEW [article](#) because I believed that, regardless of the merits and capabilities of the metadata program, it has been so damaged by fear-mongering attacks by the press and some politicians that it could not continue in its current form.

Unfortunately, the House version of the USA Freedom Act was made substantially worse by Patrick Leahy, then-chairman of the Senate Judiciary Committee, who added restrictions that would effectively kill the metadata program and interfere with the operation of the Foreign Intelligence Surveillance Court.

Because of Leahy's changes to the House version of the 2014 USA Freedom Act, it did not garner a filibuster-proof majority last November, and the Senate failed to pass it. The top members of the Senate Intelligence Committee – then-chairman Feinstein and Saxby Chambliss — said Leahy's bill went too far. Former CIA director Michael Hayden and former attorney general Michael Mukasey condemned the bill in a November 17, 2014, *Wall Street Journal* op-ed titled "[NSA Reform That Only ISIS Could Love](#)."

The challenge for Congress now is to pass legislation to extend the metadata program before it expires at the end of this month. Members of Congress and staff have been working over the past three months to devise a 2015 version of the USA Freedom Act. On April 30, the House Judiciary Committee approved this bill by a vote of 25 to 2. An identical version has been sponsored in the Senate by Senators Leahy and Lee.

The House's 2015 USA Freedom Act is slightly better than the 2014 Senate version. The metadata program would continue, although the data would be held by phone companies. NSA searches of metadata databases would be narrowed. The bill also would create a panel of experts to advise the Foreign Intelligence Surveillance Court on privacy, civil liberties, and technological matters. Significant FISC decisions would be declassified.

The bill includes concessions to the House Intelligence Committee, such as allowing the NSA authority to conduct surveillance for 72 hours without obtaining a warrant on foreign targets who enter the United States, and to monitor domestic targets on whom it has a probable-cause warrant when they travel overseas. The NSA will also be allowed to use the Patriot Act to collect data domestically in an emergency.

The Left and privacy groups are split over the 2015 version of the USA Freedom Act. Some have endorsed it, because they believe that it is the best they can get and that it will open the door to greater reform down the road. These groups are pressuring Congress to remove the concessions made to the House Intelligence Committee. Several of these groups have stepped up their efforts to amend the bill in the light of the May 7 New York Court of Appeals decision.

Others on the left, such as the ACLU and the *New York Times*, do not support the 2015 USA Freedom Act, since they would prefer that the electronic-surveillance provisions of the Patriot Act be allowed to expire.

Senator McConnell has enlisted freshman Senator Tom Cotton (R., Ark.) to help push a clean reauthorization of the Patriot Act, which would retain the 215 program in its current form. Cotton, who now serves on the Senate Intelligence Committee and who supported the House version of the USA Freedom Act when he was a member of that body last year, has become a rising star in the Senate because of his outspoken opposition to the Obama administration's nuclear diplomacy with Iran. He reportedly is holding classified meetings with other Republican senators to explain the metadata program and to dispel the misinformation about it spread by its opponents.

Senators Richard Burr (R., N.C.), Jeff Sessions (R., Ala.), and Marco Rubio (R., Fla.) have also spoken out in defense of the NSA and in support of McConnell's Patriot Act bill. Rubio suggested during a May 7 floor speech that if the 215 program isn't reauthorized and there is then another terrorist attack within the United States, Congress will be under fire to explain whether the program could have helped prevent such an

attack.

With three GOP senators already running for president, the 215 program has become an issue in the presidential campaign. Senator Paul has criticized Rubio and Bush for supporting the program and opposes the 2015 USA Freedom Act, preferring that the Patriot Act be repealed. Senator Ted Cruz (R., Tex.) also opposes the metadata program but supports the USA Freedom Act. Senator Burr, the chairman of the Senate Intelligence Committee, has criticized Paul and Cruz for their attacks on the 215 program as weakening their standing on national defense; Burr claims that their position “tells me that they don’t want to learn what bulk data collection is.”

Security-minded Republicans therefore must work to strengthen the House bill and fend off efforts by Democrats and libertarians to weaken it. We may hope that growing concerns about future ISIS terrorism in the United States will allow Republican congressional leaders to limit the damage to the metadata program from the House bill and move it in McConnell’s direction. McConnell’s bill, which I strongly support, is unlikely to pass. The Snowden leaks and anti-NSA hysteria have done too much damage to the 215 program for it to continue without substantial changes. Moreover, support for the House bill is probably too strong to allow the McConnell version to become law.

Passage of the 2015 USA Freedom Act is far from an ideal outcome, since this bill would needlessly undermine an effective counterterrorism tool that is needed to protect our country. But this may be only a short-term setback for American national security: Already the shock of the Snowden leaks is fading, and the grandstanding against the NSA by Senator Paul, other libertarians, and the Left is becoming tiresome. This could mean the metadata program might be revised in a few years under a new Republican president.

Unfortunately, before that time comes, there is a real danger of an ISIS terrorist attack in the United States if Congress seriously weakens the metadata program. Congress needs to think long and hard about such an outcome as it moves ahead with legislation on this issue this month.

— *Fred Fleitz is senior vice president for policy and programs for the Center for Security Policy. He worked in national-security positions for 25 years with the CIA, the State Department, and the House Intelligence Committee. Follow him on Twitter [@fredfleitz](https://twitter.com/fredfleitz).*