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N.S.A. Collection of Bulk Call Data Is Ruled Illegal



The entrance to a National Security Agency data collection center in Bluffdale, Utah. Credit George Frey/Getty Images

By CHARLIE SAVAGE and JONATHAN WEISMAN MAY 7, 2015

WASHINGTON — A federal appeals court in New York ruled on Thursday that the once-secret [National Security Agency](#) program that is systematically collecting Americans' phone records in bulk is illegal. The decision comes as a fight in Congress is intensifying over whether to end and replace the program, or to extend it without changes.

In a [97-page ruling](#), a three-judge panel for the United States Court of Appeals for the Second Circuit held that a provision of the U.S.A. [Patriot Act](#), known as Section 215, cannot be legitimately interpreted to allow the bulk collection of domestic calling records.

The provision of the act used to justify the bulk data program is to expire June 1, and the ruling is certain to increase tension that has been building in Congress.

It also comes as controversy over electronic surveillance is building in Europe, including a [push in France](#) to increase domestic spying and a [decision by Germany](#) to reduce cooperation on surveillance with the United States.

The ruling puts new pressure on Senator Mitch McConnell of Kentucky, the majority leader, to make serious changes to the [Patriot Act](#), which he has so far aggressively defended against any alteration, even as recently as Thursday on the Senate floor. Mr. McConnell has pressed to maintain the N.S.A.'s existing program against bipartisan efforts to scale it back, and has proposed simply extending the statute by the June 1 deadline.

What the Latest N.S.A. Phone Ruling Means

The National Security Agency's mass collection of Americans' phone records was deemed illegal by a federal appeals court.

An Act

To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001”.

But the court's ruling calls into question whether that statute can still be used to issue new orders to phone companies requiring them to turn over their customers' records.

Thursday's ruling is the first time a higher-level court in the regular judicial system has reviewed the N.S.A. phone records program. It did not come with any injunction ordering the program to cease, and it is not clear that anything else will happen in the judicial system before Congress has to make a decision about the expiring law.

The data collection had repeatedly been approved in secret by judges serving on the Foreign Intelligence Surveillance Court, known as the FISA court, which oversees national security surveillance. Those judges, who hear arguments only from the government, were willing to accept an interpretation of Section 215 that the appeals court rejected on Thursday.

The court, in a unanimous ruling written by Judge Gerard E. Lynch, held that Section 215 “cannot bear the weight the government asks us to assign to it, and that it does not authorize the telephone metadata program.” It declared the program illegal, saying, “We do so comfortably in the full understanding that if Congress chooses to authorize such a far-reaching and unprecedented program, it has every opportunity to do so, and to do so unambiguously.”

The House [appears ready to pass a bill](#) next week that would end the government's bulk collection of phone records. That bill, known as the U.S.A. Freedom Act, would replace it with a new program that would preserve the N.S.A.'s ability to analyze links between callers to hunt for terrorists, but keep the bulk records in the hands of phone companies, which would be free to dispose of them after 18 months. The N.S.A. keeps them for five years.

But the appeals court ruling raises the question of whether Section 215, extended or not, has ever legitimately authorized the program. The statute on its face permits only the collection of records deemed “relevant” to a national security case. The government secretly decided, with the FISA

court's secret approval, that this could be interpreted to mean collection of all records, so long as only those that later turn out to be relevant are scrutinized by analysts.

However, Judge Lynch wrote: "Such expansive development of government repositories of formerly private records would be an unprecedented contraction of the privacy expectations of all Americans. Perhaps such a contraction is required by national security needs in the face of the dangers of contemporary domestic and international terrorism. But we would expect such a momentous decision to be preceded by substantial debate, and expressed in unmistakable language."

The White House argued that the ruling in effect validated President Obama's support for legislation taking the government out of bulk data collection and leaving the information with the telecommunications companies.

"Our team is still reviewing the details of the ruling," Eric Schultz, a White House spokesman, told reporters. "But we believe that regardless of the fine print of that ruling, that legislation is the way to go."

Judge Lynch, who was appointed by Mr. Obama, was joined in the decision by Judge Robert D. Sack, a Clinton appointee, and Judge Vernon S. Broderick, another Obama appointee. Judge Broderick usually hears Federal District Court cases but was sitting on the appeals court for this case as a visiting judge.

The appeals court sent the matter back to a Federal District Court judge to decide what to do next. The government could also appeal the ruling to the full appeals court, or to the Supreme Court. Parallel cases are pending before two other appeals courts that have not yet ruled.

Alexander Abdo, who argued the case for the American Civil Liberties Union, praised the ruling as a "victory for the rule of law that should spur Congress into action."

Several lawmakers who helped draft the U.S.A. Freedom Act seized on it as justification for enacting their bill. Among them, Senators Patrick J. Leahy, Democrat of Vermont, and Mike Lee, Republican of Utah, said in a joint statement: "Congress should not reauthorize a bulk collection program that the court has found to violate the law. We will not consent to any extension of this program."

But Mr. McConnell gave no ground. On Thursday he blasted the House bill as "an untested, untried and more cumbersome system" that would neither "keep us safe or protect our privacy."

"Section 215 helps us find a needle in the haystack," he said. "But under the U.S.A. Freedom Act, there might not be a haystack at all."

Senator Charles E. Grassley of Iowa, chairman of the Senate Judiciary Committee, said both sides now have to come to the table because it was not clear that either option — the U.S.A. Freedom Act or extending the existing program — has the 60-vote support necessary to overcome a [filibuster](#).

Mr. McConnell has the power to decide which bills get brought up for a vote. To create more time for debate, Democrats might permit an extension of the existing statute for a month, said a person familiar with the negotiations who spoke on the condition of anonymity to discuss their

progress. The Democrats would do that in exchange for a promise by Mr. McConnell to allow a vote on the House bill in June.

Still, even if there were votes in Congress for a short-term extension of the existing statute, Thursday's ruling would create potential political and legal difficulties for keeping the program going in the interim.

To bridge any gap between the existing program and a new one, the Obama administration would have to ask the FISA court to reauthorize the program, and a FISA judge would have to agree to do so, notwithstanding the Second Circuit's ruling that Section 215 cannot authorize such an order. (The FISA court is not directly subject to the Second Circuit's authority because it has its own appeals court.)

In a statement, Edward Price, a spokesman for the National Security Council, said the administration was still evaluating the ruling but reiterated Mr. Obama's support for legislation that would transform the program is in line with the U.S.A. Freedom Act.

The bulk phone records program traces back to October 2001. After the Sept. 11 attacks, President George W. Bush secretly authorized the N.S.A. to begin a group of surveillance and data-collection programs, without obeying statutory limits on government spying, for the purpose of hunting for terrorist cells.

Over time, the legal basis for each component of that program, known as Stellarwind, evolved. In 2006, the administration persuaded a FISA court judge to issue an order approving the bulk phone records component, based on the idea that Section 215 could be interpreted as authorizing bulk collection.

Many other judges serving on the FISA court have subsequently renewed the program at roughly 90-day intervals. It came to light in June 2013 as part of the leaks by the intelligence contractor Edward J. Snowden.

The revelation led to a series of lawsuits challenging the program. Different district court judges reached [opposing conclusions](#) about its legality. Thursday's ruling did not address the A.C.L.U.'s separate argument that bulk collection of records about Americans is unconstitutional regardless of any laws that support it.

<http://www.nytimes.com/2015/05/08/us/nsa-phone-records-collection-ruled-illegal-by-appeals-court.html?rref=homepage&module=Ribbon&version=origin®ion=Header&action=click&contentCol&r=0>