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NSA Data Collection Ruling To Fuel Congressional Action

By **Allison Grande**

Law360, New York (May 07, 2015, 8:43 PM ET) -- The Second Circuit's finding Thursday that the National Security Agency's bulk telephone data collection program is unlawful will provide privacy hawks in Congress the necessary support they need to curtail the agency's controversial information-gathering powers as lawmakers face a June 1 deadline to renew the Patriot Act provision in question.

In a 97-page opinion, the appellate panel concluded that Congress had never intended for Section 215 of the Patriot Act — which authorizes the government to obtain from service providers business records and other "tangible things" that have been deemed "relevant" to an investigation — to allow for the bulk collection of domestic phone records by the NSA.



The security entrance to the NSA's new data collection center is seen Thursday south of Salt Lake City. Reportedly, the center is the largest of its kind with massive computer power for processing data. (Credit: Getty)

While the ruling marked a triumph for the American Civil Liberties Union and other privacy advocates who have long argued that the government was overstepping its authority to scoop up noncontent data related to domestic phone calls, the panel's decision to strike down the data collection efforts based on the statutory authority that the NSA had rather than on constitutional grounds means that the dispute over the scope of the agency's intelligence-gathering capabilities is far from over.

"Without question, the Second Circuit has passed the ball to Congress," American

University Washington College of Law professor Stephen Vladeck said. "[Now], the question becomes whether today's ruling helps empower those in Congress who desire more aggressive reforms, and, if so, what those reforms will look like."

As the appellate panel noted in its opinion, Congress will be forced to at least consider the bulk phone data collection program in the coming weeks, given that Section 215 is **set to expire** on June 1.

Late last month, lawmakers began taking the first steps toward addressing the looming sunset deadline by **reintroducing legislation in both chambers** that would bar the NSA's bulk collection of phone records under Section 215.

But while a House panel **agreed to move the bill**, known as the USA Freedom Act, to the full chamber on April 30, the Senate has been slower to embrace the legislation, with Senate Majority Leader Mitch McConnell, R-Ky., earlier this week throwing his support behind a "clean" extension of the existing law with no changes rather than the overhaul suggested by the USA Freedom Act, a position that he was still advocating for even after the Second Circuit's ruling Thursday.

The majority leader's stance quickly drew opposition from privacy advocates both inside and outside Congress, with a coalition of groups from both sides of the political spectrum teaming up Wednesday to fight back against his plan to renew the program without changes.

In a letter to congressional leaders, the ACLU, Gun Owners of America and dozens of others warned that reform was necessary to reflect the original intent of Congress and address the "deleterious impact" that mass surveillance has had on Americans' privacy, an argument that may have far more traction in Congress following the Second Circuit's ruling.

"This Second Circuit opinion cannot be ignored in the reauthorization debate," said Philip Hilder, the founder of Hilder & Associates PC and a former federal prosecutor. "It's likely to give further support to those that wish to have the program curtailed and have some of the controversial data collection provisions gone."

Those in support of narrowing the NSA's data collection authority are likely to focus most heavily on the appellate panel's wholesale rejection of **the government's argument** that the bulk collection of domestic phone records had been approved by Congress in enacting the statute.

Specifically, the panel wrote that the interpretation of "relevance" that the government sought to apply to the statute "defies any limiting principle" and would enable the NSA to use the provision to "collect and store in bulk any other existing metadata available anywhere in the private sector," including financial and medical records, a result that would be an "unprecedented contraction" of Americans' privacy expectations.

"If nothing else, the Second Circuit has provided Congress with directions on what to address in the legislative process to authorize the NSA to legally continue the bulk telephone metadata collection program that the court has ruled to be illegal," said Pat Fowler, Snell & Wilmer LLP's privacy, data protection and cybersecurity practice chair.

Given the Second Circuit's ruling, Congress is now forced to act affirmatively if it wants to preserve the government's long-running phone surveillance powers.

"Under this decision, bulk collection has to stop, so it requires Congress to do something and changes the status quo from Congress simply being able to reauthorize the program as is to having lawmakers have to affirmatively authorize bulk collection if they want to

keep the program going," said ZwillGen PLLC founder and managing member Marc Zwillinger.

Congress will find itself saddled with multiple options as it races against the looming deadline, including substantially revising the program, refusing to renew the program in any form, or reauthorizing it without change, attorneys say.

If the program is overhauled or if it is killed due to lawmakers' inability to beat the sunset clock, the concerns that prompted the Second Circuit appeal will likely be largely negated, and the litigation will either be ended or restarted in order to address a new batch of issues raised by the latest version of Section 215.

However, if Congress ultimately decides that the bulk data collection is necessary to protect national security and expressly declares that the statute covers such expansive activities, challenges are likely to abound, although opponents will likely be unable to rely on the statutory arguments that served them well in the current appeal.

"Usually, when Congress reauthorizes a statute, it is deemed to have approved the administrative interpretations that the executive branch has adopted under the statute, [but] the court rejected that rule in this case because when Congress reauthorized Section 215 in 2010 and 2011, not every congressman and certainly the public didn't understand how it was being applied," Steptoe & Johnson LLP partner Stewart Baker said. "But of course that won't be true if the law is reauthorized this year. In 2015, everyone knows how the program works, so there will be a good argument that Congress was approving existing practice by reauthorizing the statute."

Instead, the dispute will likely turn on the constitutional arguments that the Second Circuit skirted in its decision Thursday.

"If Congress explicitly approves bulk collection, then that likely tees it up for a constitutional challenge," said Weisbrod Matteis & Copley PLLC partner and former federal prosecutor Peter Toren, adding that many courts would likely find the NSA's current bulk collection program to be unconstitutional because "it is not limited in any way and captures very sensitive data without any sort of control or showing of probable cause."

Besides having a significant impact on the resolution of the Section 215 reauthorization debate, the Second Circuit's ruling is also likely to aid service providers that want to push back at user data requests from the government by opening the door for them to bring challenges outside of the secret Foreign Intelligence Surveillance Act court, and fuel tangential debates about the legality of other surveillance methods currently being deployed by government agencies, attorneys say.

"Domestic surveillance activities have become much more prevalent and frequent in recent years, and the logic contained in the Second Circuit's opinion opens the door for further litigation in this area over the balance between national security and individual freedom," Hilder said.

U.S. Circuit Judges Gerard Lynch and Robert Sack and U.S. District Judge Vernon Broderick of the Southern District of New York, sitting by designation, sat on the panel for the Second Circuit.

The government is represented by Stuart Delery, David S. Jones and Benjamin H. Torrance of the U.S. Department of Justice.

The ACLU is represented by in-house counsel Alexander Abdo, Arthur Nelson Eisenberg, Jameel Jaffer, Brett Max Kaufman and Patrick Toomey.

The case is ACLU et al. v. Clapper et al., case number 14-42, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Katherine Rautenberg and Emily Kokoll.

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