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Can You Hear Me Now? Appeals Court Permits Bulk Collection of Metadata for One More Month

By Martin Salvucci, J.D. Candidate 2018 | November 6, 2015

In a narrow ruling last week, a federal appeals court declined to enjoin the National Security Agency (NSA) from the bulk collection of metadata on domestic phone conversations. Controversy has dogged the once-secret bulk collection program since its existence was first revealed by Edward Snowden. Earlier this year, the same three-judge panel of the United States Court of Appeals for the Second Circuit had ruled that bulk collection fell outside the ambit of the USA PATRIOT Act. Amid heated debate this summer, Congress enacted companion legislation, the USA Freedom Act, which sought a groundwork for an alternative phone records program and proscribed bulk collection after a "transition period" of 180 days.

Although the federal government had obtained permission from the Foreign Intelligence Surveillance Court to operate the bulk collection program for the duration of this transition period, the American Civil Liberties Union (ACLU) sought injunctive relief against the N.S.A. on the theory that bulk collection violates the Fourth Amendment of the United States Constitution. In declining to intervene, the Second Circuit also punted on this constitutional question, suggesting that it would be unwise to address such a complex and weighty topic for the sake of a transition period that is, by definition, finite.

This rationale has been met with cautious approval from some quarters, including Orin Kerr at *The Volokh Conspiracy*. Kerr credits the Second Circuit with political pragmatism in provoking Congress to address the issue of bulk collection explicitly. He likewise endorses the court's path of constitutional avoidance, given the manifest possibility for overreach. Other so-called "privacy hawks," including Steve Vladeck at *Just Security*, have criticized the Second Circuit for ducking potentially serious questions. Vladek expresses skepticism that the matter will become genuinely moot at the end of the transition period, noting that the ACLU had sought a purge of any records the federal government had retained from the bulk collection program.

Although the Second Circuit's decision likely brings closure to this chapter in the debate surrounding bulk collection, persistent criticisms from civil libertarians suggest a likelihood that serious constitutional questions will endure. In its opinion, the Second Circuit acknowledged that Fourth Amendment jurisprudence remains "in some turmoil," particularly with respect to recent technological innovations. Accordingly, it seems unlikely that the Second Circuit will have final word on these matters for long - especially as difficult questions remain as to the full scope of government surveillance of American citizens.