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Unpacking the court's decision on NSA surveillance: Guest opinion

By Ofer Raban

Last Monday, a federal district court in Washington D.C. found a "significant likelihood" that the NSA secret surveillance program of telephone metadata – the numbers, the time and duration of calls, and possibly the location of all calls made in the United States – is unconstitutional. (The order dealt with a "preliminary injunction," and therefore merely concerned the *likelihood* that a constitutional violation had occurred.) The ruling is significant: It is the first time the metadata program is declared to be unconstitutional. It is a rejection of the government's principal argument for the program's constitutionality. It presents a skeptical evaluation of the program's efficacy. It is occasioned by the leaks of Edward Snowden. And it is the natural culmination of years of government deception.

The Foreign Intelligence Surveillance Court, the secret body that repeatedly authorized the metadata surveillance program, relied on a 1979 Supreme Court precedent titled

Smith v. Maryland

That case held that there was no constitutional violation when the police recorded the phone numbers dialed from a defendant's phone without first obtaining a judicial warrant. Monday's opinion declared, as many legal experts have been arguing for years, that this 1979 precedent was irrelevant to the constitutionality of the NSA's secret surveillance program.

The *Smith v. Maryland* case dealt with a single telephone line, with surveillance that was extremely limited in duration and scope, and set in an altogether different technological universe. "The [NSA] surveillance program ... is so different ... [it is] is of little value in assessing whether the Bulk Telephony Metadata Program constitutes a Fourth Amendment search....," the court wrote in its opinion released last week. "The almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979." This determination alone pulled the rug out from under the chief argument for the constitutionality of the program.

Prior to the leaks of Edward Snowden, courts repeatedly dismissed challenges to the NSA surveillance program by claiming that plaintiffs failed to establish they were actually subjected to any surveillance, and that their claims were too speculative. Snowden's revelations put an end to these spurious claims, opening the way for a substantive constitutional evaluation of the government's extensive surveillance activities.

The decision was clearly influenced by years of government deception regarding the scope and nature of its surveillance program. Government officials lied to the public (NSA Director Keith

Alexander repeatedly made misleading statements regarding the scope and efficacy of the program), to Congress (James Clapper, director of national intelligence, lied to the Senate Select Committee on Intelligence about the scope of the program) and to the courts (a recently released FISC opinion stated that the NSA repeatedly deceived the court and failed to comply with its orders). It was therefore unsurprising that last week's opinion cast a skeptical eye on some of the government's claims, characterizing them as "glaring understatement[s]" and "defy[ing] common sense." The chickens came home to roost.

Finally, the court recognized that the danger of terrorism may justify invasions of privacy, but such invasions must be effective means of combating terrorism. "Although the Government has publicly asserted that the NSA's surveillance programs have prevented 54 terrorist attacks, no proof of that has been put before [this court]," the court wrote. "The Government does not cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack...."

The court concluded that the government failed to demonstrate a sufficient government interest that would outweigh the plaintiff's interest in personal privacy.

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