TriCorner News
from The Lakeville Journal,
The Millerton News and The Winsted Journal

Charles R. Church is an attorney who devotes most of his efforts to human rights issues: detention, torture, the facility at Guantanamo Bay, habeas corpus, etc.
His website is: www.churchlawllc.com
Email him at: charleschurchllc@gmail.com

The NSA: Congress finds still another way to fail us

Thu, 12/19/2013 - 10:12am Field Notes From A Battleground [1] Opinion/Viewpoint [2]
By Charles R. Church

For months now, courtesy of Edward Snowden and our government (pursuant to President Obama's directive or forced by Freedom of Information Act litigation) we have been deluged by oceans of hyper-technical material about the actions of the National Security Agency, which had been deemed unsafe for the world to know. More striking than anything, we have discovered that the NSA, in the name of making us more secure, conducts surveillance on a scale we could hardly have imagined and that, to be effective, one of its programs sweeps up data potentially relating to almost every U.S. citizen. But no worries, officials explain, the program has been carefully designed to protect our privacy, and is closely monitored on our behalf by Congress and the courts.

Let's examine a remarkable failure in that congressional oversight (problems with judicial monitoring will have to wait for another day, excepting as they appear below). We must begin, however, by understanding certain basics of Section 215 of the Patriot Act, a controversial provision added to the Foreign Intelligence Surveillance Act (FISA) in 2001 that created the program. An August 2013 Amended Memorandum Opinion by FISA Judge Claire Eagan helps us do that. The FBI had applied for an order requiring specified telephone companies to provide ongoing daily production to the NSA of "telephony metadata," that is certain call detail records, for 90 days. Such orders usually require production relating to "substantially all of the telephone calls handled by the companies," including those made entirely within the U.S. The metadata includes communications routing information, such as the originating and terminating telephone numbers, and the time and duration of calls. It does not disclose the content of any communication, or the name, address or financial information of the customer. By the terms of a prior order, access to the data is restricted through technical means, limits on personnel who can work with it, and a query process that requires a "reasonable, articulable suspicion" that the "selection term" (e.g., a telephone number) used to search the data is associated with an identified international terrorist organization.

The government, of course, had presented its request to Judge Eagan with no adverse party to contest its worthiness, and the proceedings were governed by "security procedures." Eagan swept aside any Fourth Amendment concerns (though Federal District Court Judge Richard Leon just last Monday disagreed with her view in the strongest terms, according to Charlie Savage's

Dec. 16 piece in the New York Times), and in other respects interpreted the statute as authorizing what the government sought. Then she dealt with the “doctrine of re-enactment,” under which “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts the statute without change.” This applied because Congress voted by overwhelming majorities in 2011 to re-authorize Section 215 without amendment for another four years. This presumption might easily be overcome in the national security context where, as here, legal decisions are classified and therefore not widely available to members of Congress for close review. But prior to the 2011 vote, the Obama administration provided a “Report on the National Security Agency’s Bulk Collection Programs (for the Patriot Act) Reauthorization” that offered extensive and detailed information regarding the FISA Court’s implementation of Section 215 to the Intelligence Committees of both houses, while stating, “We believe that making this document available to all Members of Congress is an effective way to inform the legislative debate about reauthorization of Section 215....” Not only would the report be made available to all members of Congress, but the members of both Intelligence Committees and Executive Branch staff “would ... be made available to answer any questions from members of Congress.” Eagan, however, deemed it unnecessary to look into how many of the 535 members of Congress took advantage of the opportunity. Since Congress, having been granted the chance, later re-authorized the section without change, “that re-authorization carried with it this Court’s interpretation of the statute....”

Days later, Congressman James Sensenbrenner (R-Wisc.), the author of the Patriot Act who supported its revision in 2006 and its reauthorizations in 2009 and 2011, filed a friend-of-the-court brief in the ACLU suit challenging Sec. 215. In it, he “vehemently disputes that Congress intended to authorize the (current) program..., namely, the unprecedented, massive collection of the telecommunications data of millions of innocent Americans....” The unfocused dragnet — “the ongoing collection of every telephone call made to or by every person on American soil” — now employed is “exactly the type of unrestrained surveillance Congress ... tried to prevent.”

As for the notion that Congress “legislatively ratified” the current construction of Section 215 in 2011, such a finding is “not appropriate merely upon a showing that Congress was notified about an interpretation of the statute.” Such can only be found where “Congress considered [the interpretation] in great detail,” conducted extensive hearings, and repeatedly sought to amend the measure amid public controversy. That a five-page report, containing the very interpretation at issue, was made available to Members of Congress to read in a secure location for limited periods of time in both 2009 and 2011, when Congress was considering whether to reauthorize Section 215, does not suffice. (The brief fails to mention the offer by the Intelligence Committees and the Executive Branch to answer questions). Now comes the shocker: “[T]here is no evidence that anything more than a handful of Members of Congress had actual knowledge of the Executive’s interpretation.” Sensenbrenner himself was not aware of the full scope of the program when he voted to reauthorize, and “attests that had he been fully informed” he would not have cast such vote!

In other words, Sensenbrenner didn’t bother to read the Report fully on what, as we now see, is one of the most hotly contested policy issues of our time. Nor, he claims, did all those others.

Pathetic.

Charles R. Church is an attorney practicing in Salisbury who focuses primarily on Guantanamo Bay, detention, torture, habeas corpus and related issues.

Links:
[1] http://tricornernews.com/category/opinion-author/field-notes-battleground
[2] http://tricornernews.com/category/articlead-category/lakeville-journal/opinionviewpoint