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POLITICS

Watchdog Report Says N.S.A. Program Is Illegal and Should End

By CHARLIE SAVAGE JAN. 23, 2014

WASHINGTON — An independent federal privacy watchdog has concluded that the National Security Agency's program to collect bulk phone call records has provided only "minimal" benefits in counterterrorism efforts, is illegal and should be shut down.

The findings are laid out in a 238-page report, scheduled for release by Thursday and obtained by The New York Times, that represent the first major public statement by the Privacy and Civil Liberties Oversight Board, which Congress made an independent agency in 2007 and only recently became fully operational.

The report is likely to inject a significant new voice into the debate over surveillance, underscoring that the issue was not settled by a high-profile speech President Obama gave last week. Mr. Obama consulted with the board, along with a separate review group that last month delivered its own report about surveillance policies. But while he said in his speech that he was tightening access to the data and declared his intention to find a way to end government collection of the bulk records, he said the program's capabilities should be preserved.

The Obama administration has portrayed the bulk collection program as useful and lawful while at the same time acknowledging concerns about privacy and potential abuse. But in its report, the board lays out what may be the most detailed critique of the government's once-secret legal theory behind the program: that a law known as Section 215 of the Patriot Act, which allows the F.B.I. to obtain

business records deemed "relevant" to an investigation, can be legitimately interpreted as authorizing the N.S.A. to collect all calling records in the country.

The program "lacks a viable legal foundation under Section 215, implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value," the report said. "As a result, the board recommends that the government end the program."

While a majority of the five-member board embraced that conclusion, two members dissented from the view that the program was illegal. But the panel was united in 10 other recommendations, including deleting raw phone records after three years instead of five and tightening access to search results.

The report also sheds light on the history of the once-secret bulk collection program. It contains the first official acknowledgment that the Foreign Intelligence Surveillance Court produced no judicial opinion detailing its legal rationale for the program until last August, even though it had been issuing orders to phone companies for the records and to the N.S.A. for how it could handle them since May 2006.

The privacy board's legal critique of the program was approved by David Medine, the board's chairman and a former Federal Trade Commission official in the Clinton administration; Patricia M. Wald, a retired federal appeals court judge named to the bench by President Jimmy Carter; and James X. Dempsey, a civil liberties advocate who specializes in technology issues.

But the other two members — Rachel L. Brand and Elisebeth Collins Cook, both of whom were Justice Department lawyers in the George W. Bush administration — rejected the finding that the program was illegal.

They wrote in separate dissents that the board should have focused exclusively on policy and left legal analysis to the courts. Last month, two Federal District Court judges reached opposite legal conclusions in separate lawsuits challenging the program.

Ms. Brand wrote that while the legal question was "difficult," the government's legal theory was "at least a reasonable reading, made in good faith by numerous officials in two administrations of different parties." She also worried that declaring that counterterrorism officials "have been operating this program

unlawfully for years" could damage morale and make agencies overly cautious in taking steps to protect the country.

But the privacy board was unanimous in recommending a series of immediate changes to the program. The three in the majority wanted those changes as part of a brief wind-down period, while the two in dissent wanted them to be structural for a program that would continue.

Some of those recommendations dovetailed with the steps Mr. Obama announced last week, including limiting analysts' access to the call records of people no further than two links removed from a suspect, instead of three, and creating a panel of outside lawyers to serve as public advocates in major cases involving secret surveillance programs.

Other recommendations — like deleting data faster — were not mentioned in the president's speech. And all members of the board expressed privacy concerns about requiring phone companies to retain call records longer than they normally would, which might be necessary to meet Mr. Obama's stated goal of finding a way to preserve the program's ability without having the government collect the bulk data.

The program began in late 2001 based on wartime authority claimed by President Bush. In 2006, the Bush administration persuaded the surveillance court to begin authorizing the program based on the Patriot Act under a theory the Obama administration would later embrace.

But the privacy board's report criticized that, saying that the legal theory was a "subversion" of the law's intent, and that the program also violated the Electronic Communications Privacy Act.

"It may have been a laudable goal for the executive branch to bring this program under the supervision" of the court, the report says. "Ultimately, however, that effort represents an unsustainable attempt to shoehorn a pre-existing surveillance program into the text of a statute with which it is not compatible."

Defenders of the program have argued that Congress acquiesced to that secret interpretation of the law by twice extending its expiration without changes. But the report rejects that idea as "both unsupported by legal precedent and unacceptable as a matter of democratic accountability."

The report also scrutinizes in detail a handful of investigations in which the program was used, finding "no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack."

Still, in her dissent, Ms. Cook criticized judging the program's worth based only on whether it had stopped an attack to date. It also has value as a tool that can allow investigators to "triage" threats and provide "peace of mind" if it uncovers no domestic links to a newly discovered terrorism suspect, she wrote.

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