

OPINION

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COMMENTARY | DOYLE MCMANUS

What Edward Snowden started

Edward Snowden should be proud. Until this week, the National Security Agency could argue that its massive effort to collect every American's telephone records had been approved, at least tacitly, by all three branches of government.

The president was on board; the people running the program were his appointees. The House and Senate intelligence committees knew what was going on and chose not to stop it. And the Foreign Intelligence Surveillance Court, which reviews NSA activities in secret, hadn't objected.

But now, thanks to Snowden's renegade disclosures, all three branches have decided that the routine federal collection of metadata - records of who calls whom, and when, but not the content of the calls - needs another hard look.

Congress is debating several proposals to rein in the program, including a bill that would effectively end it. President Obama is considering recommendations from his own advisors, including one to take the data away from the NSA and ask telephone companies to hold them instead. And, last week, a federal judge found that the program was probably unconstitutional - that it invaded citizens' privacy beyond what they had a right to expect.

"I cannot imagine a more indiscriminate and arbitrary invasion" of citizens' rights, District Judge Richard J. Leon wrote in a blistering opinion. "The author of our Constitution, James Madison, would be agast."

Until Snowden's disclosures, Leon wouldn't have had a chance to weigh in on the matter. Earlier challenges were thrown out of court because civil libertarian plaintiffs couldn't prove that the NSA was collecting data about them. Snowden's leaks forced the government to acknowledge what it has been doing since 2001, and opened the way to a battle in the U.S. appeals court, followed almost certainly by one before the Supreme Court.

Yes, for the record, Snowden went about his whistle-blowing the wrong way; officials say the damage he's done to U.S. security is real. As he sits in chilly Moscow requesting asylum from one country after another, he can consider that question at leisure. But golly, has he been effective.

Whether Snowden, other civil libertarians - and now, Leon - will prevail in higher courts is a different matter.

The core question is whether the government's actions violate what the Supreme Court has called "a reasonable expectation of privacy." But what exactly does that mean? One leading scholar of the Fourth Amendment, Orin Kerr of George Washington University, calls the standard "notoriously murky."

Kerr wrote this week that the metadata program might survive a Supreme Court test because the government doesn't look at everyone's telephone records - only at those that might yield foreign intelligence information.

At the heart of the issue is a kind of riddle: When and where do we have a reasonable expectation of privacy? You probably think your email is private, but Google analyzes your metadata to decide what advertising you'd like to see. You might have thought the names and addresses on your love letters were private, but the U.S. Postal Service scans many letters' exteriors and keeps the records for 30 days. And now that we know the NSA has been collecting phone records, haven't we been put on notice that those records aren't private?

The NSA argues that the metadata program is legal thanks to a 1979 Supreme Court case, which held that telephone records aren't private because citizens share them with the telephone company.

But Leon ruled that times have changed. "People in 2013 have an entirely different relationship with phones than they did 34 years ago," he wrote. "Records that once would have revealed a few scattered tiles of information about a person now reveal an entire mosaic, a . . . picture of the person's life."

At least one Supreme Court justice has sounded ready to hear that argument. In a ruling last year, Justice Sonia Sotomayor wrote that the 1979 standard merits a new look.

"This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks," Sotomayor wrote in a case involving whether police needed a warrant to place a GPS tracker on a criminal suspect's car.

Do Americans accept the disclosure to the government of every telephone number they've called in the last five years, which is what NSA has collected? In fact, we already have a kind of answer to that question: Americans are divided down the middle.

In a Quinnipiac poll released in July, for example, 55 percent of respondents said the government's actions amounted to "too much intrusion into Americans' personal privacy," and 41 percent disagreed. But 50 percent said they supported the program, and only 44 percent said they opposed it. So putting the question up for a referendum, alas, wouldn't work.

That means it's up to Obama, Congress and the courts to find the right balance: rules that give the government the tools it needs to investigate terrorist threats, but not at the cost of our reasonable expectation of privacy. If only we knew what that was.

WEEKLY COLUMN | SEN. TOM O'MARA

For the sake of tradition

It's a season of traditions. Family traditions, community traditions, and so many others. So like I traditionally do this time of year, I'll take a pause from dissecting the challenges facing us and, instead, focus on expressing our collective gratitude for priorities more in keeping with the spirit of the season.

Despite the stubborn economic and fiscal challenges continuing to plague New York and every other state across the nation, we can never stop being thankful for the foundations of the future.

Everything flows, of course, from the most important foundation of all: a strong economy. There's a persuasive case to be made that the greatest hope for strong, successful communities stems directly from an economy that's producing good jobs and providing long-term economic security and stability for workers and families.

So we're fortunate, as I stressed here last week, that the Southern Tier and Finger Lakes regional economic development councils continue to pursue a quest to develop dynamic, promising, locally based economies.

We're still battling a weak national economy and some tough, tough job losses, so the rays of economic hope these councils provide are more than welcome.

And here at the beginning of this week of celebration and reflection, I'll take this chance to express my appreciation for the hard work. After all, of all of this region's gifts, our greatest asset remains the people here, of every age and every walk of life, who live and work, go to school and provide public service, and otherwise take part in our cities, towns and villages in countless, meaningful ways. I simply can't say enough about all of the business owners and their employees, the first responders and educators,

the volunteer relief groups and concerned citizens who keep answering the call throughout the Southern Tier and Finger Lakes regions.

That's the difference. It's what sets us apart.

It's hard to believe that the final days of my third year as this region's state Senator are on the doorstep, but here they are. Looking back, New York government's started to right the ship in some important ways. But it's still missing the boat far too often.

So I'll close out year three in the Senate in the same way I began this tenure, by saying that I'm looking forward to the opportunities we'll have to keep working together. The emphasis remains on together.

I'll be doing my best to provide as many of these opportunities as possible, because a return to the fundamentals of good government is needed more than ever. It's a list

that always begins with open, straightforward give-and-take between elected officials and those they represent.

Priority No. 1 remains to carry on a tradition of accessibility and teamwork in representing the communities of the Southern Tier and Finger Lakes. My service will stay focused on fundamental principles: Accessibility to those you represent. Responsibility to the taxpayers. Economic and fiscal soundness.

The truest meaning of this season endures. My very best wishes to all of you and your families, friends and neighbors during these holidays and throughout the New Year. I look forward to hearing from you.

State Sen. Tom O'Mara, R-Big Flats, represents New York's 58th Senate District, which includes Steuben, Chemung, Schuyler and Yates counties, and part of Tompkins County.

ANOTHER VIEW



OTHER VIEW | PHILADELPHIA INQUIRER

Reform shouldn't stop with Volcker rule

It took five federal agencies three years to wade through the stalling tactics of banking lobbyists - including the 20,000 comments they filed - to come up with 963 pages of regulations with 2,826 footnotes that boil down to one admonition: Don't make reckless bets with other people's money.

Finally, on Tuesday, the Federal Reserve Board, Commodity Futures Trading Commission, Securities and Exchange Commission, Federal Deposit Insurance Corp., and Office of the Comptroller of the Currency approved the so-called Volcker rule, named for former Federal Reserve Board Chairman Paul Volcker, an adviser to President Obama during the recession.

That it took so long to write the rule is an indication of the difficulty regulators face in getting the financial industry to not just admit its

gambling problem, but do something about it.

The reckless risk-taking known as proprietary trading rang up massive profits for banks, as well as \$2 million-a-year incomes for star traders. But it also produced massive losses. Banks gambled customers' federally insured deposits on derivatives and other exotic, barely regulated financial products, putting them on a virtual roller-coaster ride of high-flying gains and steep losses.

Even as the financial industry used its political clout to try to block the Volcker rule, another scandal became known. JPMorgan Chase lost \$6 billion in bad trades set up by a broker known as the "London whale," and then tried to hide the losses from customers. Two JPMorgan traders have been indicted in the case, which shows how quickly trade losses can grow and threaten the

entire financial system.

Risky trading of mortgage-backed derivatives was a contributing factor in causing the recession, which occurred when avaricious lending institutions went beyond federal directives to make home ownership easier to attain by extending credit to people that they knew couldn't afford the mortgages.

The Volcker rule, part of the sweeping 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, prohibits banks from proprietary trading, or transactions conducted purely for a bank's gain, rather than to serve its customers. The rule, which goes into effect in April, but does not require full compliance until mid-2015, isn't perfect. Analysts say the financial industry's army of lawyers will find loopholes to exploit.

One important flaw is that the rule does not appear to go far enough

to hold bank executives accountable. They must sign statements attesting to the existence of a compliance plan at their bank, but they do not have to actually assert compliance, which may allow them to avoid being held liable when a bank is said to have violated the regulation. That's a pretty big distinction, and should be fixed.

In anticipation of the rule, some banks have already changed their practices and returned to the boring old days when banks made conservative investments that better ensured the safety of their customers' deposits.

There's nothing wrong with that. In fact, there's nothing wrong with taking even more steps to prevent a return to the type of devil-may-care lending and investment decisions that almost led to another Great Depression.

Consider Dodd-Frank a first step.