

**Statement to the Privacy and Civil Liberties Oversight Board by Jameel Jaffer,
ACLU Deputy Legal Director
July 9, 2013**

Thank you for the invitation to participate in this workshop.

Since *The Guardian* and *The Washington Post* exposed surveillance programs implemented under s.215 and s.702, much of the public debate has focused on policy issues. That's understandable and appropriate. No government has ever trained this kind of surveillance power on its own citizens—until quite recently, none had the technological capacity to do so. We need to think carefully about how the heedless exploitation of new technology could affect liberties that generations of Americans have fought to protect.

What I'd like to underscore today is that the recently disclosed surveillance programs are not just unwise but unconstitutional as well. I'm going to focus first on the program that's been implemented under s.215, with the hope that I'll have a chance to return to s.702 later on.

Under the s.215 program, the NSA collects "metadata" about every phone call made or received by a resident of the United States. Some news reports indicate that the NSA is collecting Internet metadata as well, making a note of every website an American visits and every e-mail she sends or receives. The program is a massive dragnet, one that raises many of the concerns associated with general warrants—that is, many of the concerns that led to the adoption of the Fourth Amendment in the first place. You might say that these s.215 orders are general warrants for the digital age.

The President and the DNI have been at pains to emphasize that the government is collecting metadata, not content. But the suggestion that metadata is somehow beyond the reach of the Constitution is wrong. For Fourth Amendment purposes, the crucial question is not whether the government is collecting content or metadata but whether it is invading reasonable expectations of privacy. Here, it clearly is.

The Supreme Court's recent decision in *U.S. v. Jones* is instructive. In that case, a unanimous Court held that long-term surveillance of an individual's location

constituted a search under the Fourth Amendment. The Justices reached this conclusion for different reasons, but at least five Justices were of the view that the surveillance infringed on a reasonable expectation of privacy. Justice Sotomayor observed that tracking an individual's movements over an extended period allows the government to generate a "precise, comprehensive record" that reflects "a wealth of detail about her familial, political, professional, religious, and sexual associations."

The same can be said of the tracking now taking place under s.215. Call records can reveal personal relationships, medical issues, and political and religious affiliations. Internet metadata may be even more revealing, allowing the government to learn which websites a person visited, precisely which articles she read, whom she corresponds with, and whom *those* people correspond with.

The long-term surveillance of metadata constitutes a search for the same reasons that the long-term surveillance of location was found to constitute a search in *Jones*. In fact, the surveillance held unconstitutional in *Jones* was narrower and shallower than the surveillance now taking place under s.215. The location tracking in *Jones* was meant to further a specific criminal investigation into a specific crime, and the government collected information about one person's location over a period of less than a month. What the government has implemented under s.215 is an indiscriminate program that has already tracked the communications of tens of millions of people over a period of seven years.

Some have argued that the s.215 program is lawful under the Supreme Court's decision in *Smith v. Maryland*, which upheld the installation of a pen register in a criminal investigation. But the pen register in *Smith* was very primitive—it tracked the numbers being dialed, but it didn't indicate which calls were completed, let alone the duration of the calls. And the surveillance was directed at a single criminal suspect over a period of less than two days. The police weren't casting a net over the whole country.

Another argument that's been offered in defense of the metadata program is that, though the NSA collects an immense amount of information, it examines only a tiny fraction of it. But the Fourth Amendment is triggered by the *collection* of information, not simply by the querying of it. The same is true of the First Amendment, because the chilling effect of government surveillance stems from

the *collection* of information by the government, not merely from the analysis of it.

The Constitution is not indifferent to the government's accumulation of vast quantities of sensitive information about Americans' lives. Neither should this Board be. Indeed, it is worth remembering in this context that other countries have aspired to total awareness of their citizens' associations, movements, and beliefs. The experiences of those countries should serve as a caution to us, not a roadmap.

Thank you again for inviting me to participate today, and I look forward to the Board's questions.