

Connecting the Dots: Analysis of the Effectiveness of Bulk Phone Records Collection

**Marshall Erwin
Research Fellow • Hoover Institution**

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Under Section 215 of the USA PATRIOT Act, the National Security Agency (NSA) has pooled the phone records of millions of U.S. citizens into a massive data set. An accurate assessment of the program's effectiveness is necessary to make an informed judgment about the privacy tradeoffs entailed by this collection. The program's effectiveness as a counterterrorism tool is also important to its legal underpinnings. And to many Americans, what is more important than even legality or intrusiveness of this program is its value, or lack thereof, to our nation's security.

The topic of Section 215 effectiveness has been addressed often by outside legal experts and pundits, the vast majority of whom lack any counterterrorism or intelligence expertise. Intelligence officials have also commented on the topic, but the sensitivity of their positions prevents an in-depth discussion. This paper provides a discussion of the effectiveness of bulk records collection using a degree of rigor that has been lacking from both critics and proponents of this intelligence program.

Intelligence community officials have given two primary examples of the value or prospective value of Section 215 bulk phone records collection: the disrupted 2009 al-Qaeda plot targeting the New York City subway and the case of Khalid al-Mihdhar, the 9/11 hijacker who was under surveillance by NSA and who, the government alleges, could have been found if NSA had Section 215 authorities before the 9/11 attacks. Upon review of the facts of these two cases, neither is compelling. Bulk phone records collection would not have helped disrupt the 9/11 plot and did not make a significant contribution to success against the 2009 plot.

The analysis presented here is limited to the bulk phone records collection. Based upon records available to the public, there is little question that the collection of Internet-based communications using Section 702 authorities is effective and has immense benefits to national security. Many will raise other, broader objections to Section 702. It is important to raise those objections despite its effectiveness, rather than in ignorance of its effectiveness, and to be very careful when considering changes to that section of FISA.

But as for Section 215, an analysis of the facts demonstrates that the bulk phone records collection program is of marginal value.

The Case of Najibullah Zazi

To justify the bulk collection of American's phone records, intelligence officials repeatedly cite the disruption of a 2009 al-Qaeda plot, led by Najibullah Zazi, to bomb the New York City subway. Described as the single most important al-Qaeda plot over the last decade involving American citizens, this intelligence and law enforcement success undoubtedly saved many American lives. Zazi, who was born in Afghanistan and grew up in New York, traveled to Pakistan in the summer of 2008 and learned bomb-making techniques there. He moved to Denver upon his return to the United States in January 2009 and began to make preparations for an attack to take place sometime around September 11, 2009.

NSA did play a key role in disrupting this plot. Under Section 702 authorities, NSA intercepted emails between Zazi and an associate in Pakistan on September 6 and 7, 2009 that contained coded messages concerning the pending attack.¹ These emails were provided by NSA to the FBI and proved to be the critical lead that allowed the FBI to identify Zazi.

Proponents of bulk collection argue that Zazi's phone records, although less important than his emails, also contributed to this success. According to a recently released 2009 statement from the Director of the National Counterterrorism Center (NCTC) and the NSA Associate Deputy Director for Counterterrorism to the House Permanent Select Committee on Intelligence (HPSCI):

“The FBI passed Zazi's mobile telephone number to NSA on the evening of 9 – 10 September [2009]... Shortly after receipt of Zazi's telephone number from FBI—and at approximately the same time that Zazi had obtained a one-way car rental from Colorado to New York City and had begun driving to New York—NSA issued a Business Records FISA metadata report on domestic and foreign contacts of that telephone. Among those contacts identified was a phone later confirmed as belonging to a key Zazi associate Adis Medunjanin. This was the FBI's first intelligence information about Medunjanin's telephone number and the contact corroborated other early information about Medunjanin's relationship with Zazi.”²

¹ One email from the morning of September 7th stated that, “the marriage is ready flour and oil.” ‘Marriage’ is often used as code for a pending attack and flour and oil are references to the chemicals used to make explosives. Transcript of Record, U.S. v. Zazi, No. 1:10-CR-60 (E.D.N.Y. July 18, 2011), available at <http://www.scribd.com/doc/146422383/Zaz-i-Hearing>.

² Michael Leiter and an unnamed NSA Associate Deputy Director, Joint Statement for the Record, the House Permanent Select Committee on Intelligence, Closed Hearing on Patriot Act Reauthorization, October 21, 2009, available at [http://www.dni.gov/files/documents/501/NSA%20joint%20report%20\(Oct%202009\)_Sealed%20FINAL.pdf](http://www.dni.gov/files/documents/501/NSA%20joint%20report%20(Oct%202009)_Sealed%20FINAL.pdf).

The argument here is twofold: 1) the phone records at NSA were important to linking Zazi to Medunjanin; and 2) the corroboration using the phone records was important to disrupting the plot because it “significantly accelerated and focused the investigation.”³ Both of these are highly questionable.

The FBI opened its investigation into Zazi on September 7, 2009, and began surveillance of Zazi’s residence in Denver that evening.⁴ Zazi departed for New York early on the morning of September 9, 2009. Authorities determined at around 7am that morning that he was driving to New York and began tailing Zazi as he traveled across the country.⁵ FBI agents in New York were alerted to Zazi’s travel at some point on September 9. If the government’s timeline concerning the phone records query at NSA is accurate, this would indicate that the FBI had been surveilling Zazi for approximately two days, was aware of the seriousness of the threat he posed, and was following him on his drive to New York, all before the phone records were queried.

The key term used in the statement from the NCTC Director and NSA Associate Deputy Director is “corroborated other early information about Medunjanin’s relationship with Zazi.” Although it is not clear exactly what information had previously linked Medunjanin to Zazi, various public accounts suggest that the law enforcement and intelligence communities probably had two sources connecting the two men—travel records and an unnamed informant.

FBI Special Agent Eric Jurgenson, during testimony in the trial of Zazi’s father, stated that one of the first steps taken in the investigation of Najibullah Zazi was to look at travel records.⁶ As noted above, that investigation was opened on September 7, 2009. Those records show that Zazi and Medunjanin were on the same flight, Qatar Airways Flight 84, departing the Newark Liberty International Airport on August 28, 2008.⁷ This was the first leg of their trip to training grounds in Pakistan. The two returned separately. That account is consistent with the one reported by Matt Apuzzo and Adam Goldman in their book *Enemies Within*, which states that by September 9, 2009, “Using flight manifests and seating charts, FBI analysts in Washington had concluded that Zazi probably had not traveled alone. They were confident that two others joined him: Zarein

³ Ibid.

⁴ Transcript of Record, U.S. v. Zazi, No. 1:10-CR-60 (E.D.N.Y. July 18, 2011).

⁵ Special Agent Eric Jurgenson testified that, “In early morning hours of September 9th, 2009, Najibullah got in a rental car,” Transcript of Record, U.S. v. Zazi, No. 1:10-CR-60 (E.D.N.Y. July 18, 2011). Zazi was stopped by the Colorado State Patrol at around 7am that morning an hour east of Denver, at which point authorities determined Zazi’s destination, according to Matt Apuzzo and Adam Goldman, *Enemies Within*, Simon & Schuster, Inc. 2013, p. 11.

⁶ Transcript of Record, U.S. v. Zazi, No. 1:10-CR-60 (E.D.N.Y. July 18, 2011).

⁷ Ibid.

Ahmedzay, a New York taxi driver, and Adis Medunjanin, a security guard in Manhattan.”⁸

The FBI or another intelligence agency also appears to have had a source or sources that had previously linked Zazi to Medunjanin. Press accounts of a 2011 evidentiary hearing against Medunjanin indicate that an intelligence agency source was with Zazi and Medunjanin in Pakistan and helped them gain access to a training camp there.⁹ The testimony of FBI Deputy Director Sean Joyce in a July 2013 hearing before the Senate Judiciary Committee also referenced a source who linked Zazi to Medunjanin.¹⁰ There is no further public information to indicate whether these are different references to the same source or to indicate how much the FBI knew about Medunjanin before September 2009. We do know that the FBI was already investigating one of Medunjanin’s associates as of September 9, 2009.¹¹

At the point when NSA utilized its bulk phone records collection program, the FBI was well on its way to disrupting Zazi’s plot, appears to have had sufficient information to do so, and had already linked Zazi to Medunjanin. This does not mean that the phone records played no role in this success. Any additional piece of information that provided insight into the relationship between the two men could have had some value. But the important operative question is whether the plot would have been disrupted without the phone records database. A reasonable analysis of the facts suggests that the answer is yes.

9/11 and the Case of Khalid al-Mihdhar

The second case for Section 215 bulk phone records collections concerns Khalid al-Mihdhar, the 9/11 hijacker who some argue would have been captured if the bulk phone records collection program had been in place before the attack. For example, according to the same 2009 statement to HPSCI:

⁸ *Enemies Within*, p. 9.

⁹ Mosi Secret, “Homegrown Bomb Plot is Rarity for Open Court,” *The New York Times*, April 15, 2012, available at <http://www.nytimes.com/2012/04/16/nyregion/revelations-expected-in-trial-of-adis-medunjanin-a-terror-suspect.html>.

¹⁰ U.S. Congress, Senate Judiciary Committee, Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance, July 31, 2013. Senator Leahy, in the context of a discussion about the role of Section 215 collection in the disruption of the Zazi plot, asked “Wasn’t there some undercover work that took place?” FBI Deputy Director Sean Joyce responded, “Yes, there was some undercover work.”

¹¹ Michael Leiter and an unnamed NSA Associate Deputy Director, Joint Statement for the Record, the House Permanent Select Committee on Intelligence, Closed Hearing on Patriot Act Reauthorization, October 21, 2009.

(TS//SI//NF) Members will recall that, prior to the attacks of 9/11, the NSA intercepted and transcribed seven calls from hijacker Khalid al-Mihdhar to a facility associated with an al Qaeda safehouse in Yemen. However, NSA's access point overseas did not provide the technical data indicating where al-Mihdhar was calling from. Lacking the originating phone number, and hearing nothing in the content of those calls to suggest he was in the United States, NSA analysts concluded that al-Mihdhar was overseas. In fact, al-Mihdhar was calling from San Diego, California. According to the 9/11 Commission Report (pages 269-272):

"Investigations or interrogation of them [Khalid al-Mihdhar, etc], and investigation of their travel and financial activities could have yielded evidence of connections to other participants in the 9/11 plot. The simple fact of their detention could have derailed the plan. In any case, the opportunity did not arise."¹²

12

Proponents of bulk phone collection argue that if NSA had had such a tool before 9/11, it would have been able to determine whether the phone number in Yemen had been in contact with a domestic number. Analysts would have then determined that al-Mihdhar was in the United States and could have alerted the FBI.

Bulk phone records collection *could* have allowed the intelligence community to stop the 9/11 attacks, but an experienced intelligence analyst will tell you that there is a gulf between *could* and *would*. A comprehensive assessment of the publicly available information about al-Mihdhar leads to the conclusion that the phone records would not have made a difference. The full history of lost opportunities regarding al-Mihdhar is not necessary here, as the 9/11 Commission and other investigations have provided extensive treatments of the subject. These investigations demonstrate that the intelligence and law enforcement communities had ample opportunity to identify al-Mihdhar and to disrupt the 9/11 plot, yet failed to do so.

The CIA as of early 2000 was aware of al-Mihdhar's affiliation with al-Qaeda, aware that he was in possession of a U.S. visa, and aware that one of his close associates (fellow hijacker Nawaf al-Hazmi) had traveled to the United States. The CIA did not provide this information to the FBI until soon before the 9/11 attacks.¹³ When he arrived in San Diego, al-Mihdhar also had frequent contact with an FBI asset and rented a room in the home of that asset.¹⁴

Notably, al-Mihdhar appears to have made some of his seven calls to Yemen *from the FBI asset's home*. This is clear from an analysis of his travels and a timeline of those

¹² Michael Leiter and an unnamed NSA Associate Deputy Director, Joint Statement for the Record, the House Permanent Select Committee on Intelligence, Close Hearing on Patriot Act Reauthorization, October 21, 2009.

¹³ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, July 2004, p. 182.

¹⁴ *Ibid*, p. 220. See also chapter five of U.S. Department of Justice, Office of Inspector General, *A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks*, June, 2006, p. 259.

calls but is never stated explicitly by the 9/11 Commission or by those advocating for bulk phone records collection. Al-Mihdhar moved into the home of the asset on May 10, 2000, and departed on June 9, 2000.¹⁵ The 9/11 Commission refers to multiple calls made to the Yemen safehouse from al-Mihdhar's residence soon before his departure from the United States that June.¹⁶ Other calls appear to have taken place before May 10.¹⁷

To justify Section 215 bulk collection, intelligence community documents delivered to Congress and to the Foreign Intelligence Surveillance Court (FISC) often cite al-Mihdhar's communications with the al-Qaeda safehouse in Yemen.¹⁸ As demonstrated above, these documents then immediately quote the 9/11 Commission report. This would seem to suggest that the Commission found that shortcomings of NSA phone records collection were critical. In fact, the quote reproduce above has been taken out of context. The seven pages about al-Mihdhar that precede the quote are dedicated to information sharing problems between the CIA and the FBI and do not identify NSA's records collection as a core problem.

Roughly twenty-nine pages of the *9/11 Commission Report* are dedicated to al-Mihdhar, his travels, and opportunities for his capture.¹⁹ One sentence on page 222 in the body of the report appears to reference the communications at issue in the debate over Section 215 authorities.²⁰ The report does list ten operational opportunities related to al-Mihdhar and his associate, Nawaf al-Hazmi, that could have allowed intelligence and law enforcement officials to disrupt the attack.²¹ Problems associated with NSA's collection of al-Mihdhar's communications did not make the list.

The Department of Justice Inspector General report on the FBI's handling of intelligence related to the 9/11 attacks spends 139 pages specifically discussing al-Mihdhar and al-Hazmi and related information sharing problems between the FBI and other members of

¹⁵ *The 9/11 Commission Report*, p. 220. The report states that al-Hazmi and al-Mihdhar found a room in the home of an individual they had met at a mosque in San Diego, moving in on May 9th. Page 314 of the DOJ Inspector General report on the FBI's handling of intelligence related to 9/11 states that this was the home of the FBI asset.

¹⁶ According to page 222 of the *9/11 Commission Report*, "Al-Mihdhar's mind seems to have been with his family back in Yemen, as evidenced by calls he made from the apartment telephone. When news of the birth of his first child arrived, he could stand life in California no longer. In late May and early June of 2000, he closed his bank account, transferred the car registration to Al-Hazmi, and arranged his return to Yemen." This indicates he was calling home from the FBI asset's home in May 2000.

¹⁷ The report from the Department of Justice's Office of Inspector General on the FBI's handling of intelligence related to the 9/11 attacks states that one of the calls to Yemen took place on March 20th. *A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks*, June, 2006, p. 251.

¹⁸ See, for example, U.S. Department of Justice, Office of Legislative Affairs, *Report on the National Security Agency's Bulk Collection Program for USA PATRIOT Act Reauthorization*, February 2, 2011, available at http://www.dni.gov/files/documents/2009_CoverLetter_Report_Collection.pdf.

¹⁹ This includes pages 181, 155 – 160, 215 – 223, 237, 240, 266 – 272, and 353 – 357.

²⁰ *The 9/11 Commission Report*, p. 222.

²¹ *Ibid.*, pp. 355 – 356.

the intelligence community.²² The communications at issue in the Section 215 debate are briefly referenced in two sentences on page 259 of the report.²³ The report specifically lists five missed opportunities for the FBI to learn about al-Mihdhar and al-Hazmi, including cases in which intelligence reporting could have been shared with the FBI. Problems associated with NSA's collection of al-Mihdhar's communications did not make the list.²⁴

More than twenty-six pages of the report from the congressional Joint Inquiry into the 9/11 attacks are dedicated to al-Mihdhar and his associates.²⁵ This includes several references—roughly a page of material in total²⁶—to NSA surveillance of al-Mihdhar's communications from San Diego and a more explicit discussion of NSA's inability to locate the source of Al-Mihdhar's calls:

While the Intelligence Community had information regarding these communications [between al-Mihdhar and the safehouse in Yemen], it did not determine the location from which they had been made...After September 11, the FBI determined from domestic [phone] records that it was in fact the hijacker Khalid al-Mihdhar who had made these communications and that he had done so from within the United States. The Intelligence Community did not identify what was critically important information in terms of the domestic threat to the United States: the fact that the communications were between individuals within the United States and suspected terrorist facilities overseas. That kind of information could have provided crucial investigative leads to law enforcement agencies engaged in domestic counterterrorism efforts.²⁷

As compared to the reports discussed above, the Joint Inquiry more clearly identifies al-Mihdhar's spring 2000 communications as a missed opportunity to disrupt the plot. Again, this should be understood in the context of other problems identified in the report. Eleven pages of the Joint Inquiry's discussion of al-Mihdhar focus on his contact with the FBI asset. Several pages discuss the CIA's failure to watchlist al-Mihdhar and to share sufficiently with the FBI. NSA is also criticized in the report for failing to disseminate information in its possession about al-Mihdhar to other members of the community, a problem unrelated to technical limitations of its collection.

In sum, post-9/11 investigations show that the intelligence community had sufficient information about al-Mihdhar to disrupt the attack but not sufficient initiative, largely as

²² See chapter five of U.S. Department of Justice, Office of Inspector General, *A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks*, June, 2006.

²³ *Ibid.*, p. 259.

²⁴ *Ibid.*, p. 313.

²⁵ A more exact page count is not possible because portions of the Joint Inquiry's report are redacted.

²⁶ See pages 16 - 17, 157, and 248 in the Joint Inquiry's report. U.S. Congress, the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*. December 2002. 107th Congress, 2nd session (H.Rept. 107-792). [Also, S.Rept. 107-351]

²⁷ *Ibid.*, p. 16.

a result of cultural barriers and other institutional impediments within different intelligence agencies. The congressional Joint Inquiry does suggest that bulk phone collection *could have* helped disrupt the attack, but the majority of its discussion of al-Mihdhar is dedicated to other missed opportunities. After the attack, the FBI was able to quickly identify the domestic source of calls to the al-Qaeda safehouse in Yemen, further demonstrating that the failure to locate al-Mihdhar was not truly a problem resulting from NSA collection or limits on FISA authorities. To suggest that one additional piece of information before the attack *would have* made a difference is incorrect.

Open Questions Concerning al-Mihdhar

Two issues may warrant further review and could provide additional insight into the prospective role of bulk phone records in the al-Mihdhar case.

The congressional Joint Inquiry criticized NSA for failing to disseminate al-Mihdhar's communications with his wife in Yemen. It does not indicate, at least in its unredacted text, why these communications could have been useful if they had been disseminated outside of NSA. One possible explanation of their prospective value may be that they provide contextual clues to indicate al-Mihdhar's presence in the United States. Given his dissatisfaction with the United States and his pending return to Yemen, it seems possible that these communications may reference his location. The statement above from the NCTC Director and NSA Associate Deputy Director indicates that this is not the case. An unredacted version of the Joint Inquiry report or a review of intercepts of al-Mihdhar may provide insights into this issue.

Lawrence Wright, in *The Looming Tower*, writes that, "The NSA, not wanting to bother with applying to the FISA court for permission to distribute essential intelligence, simply restricted its distribution [of communications between al-Mihdhar and the safehouse in Yemen]." ²⁸ This would suggest NSA was aware of al-Mihdhar's location. The 9/11 Commission similarly concludes that, "[W]hile NSA had the technical capability to report on communication with suspected terrorist facilities in the Middle East, the NSA did not seek FISA Court warrants to collect communications between individuals in the United States and foreign countries, because it believed that this was an FBI role." ²⁹ This may be a reference to al-Mihdhar's communications. The Commission does not further elaborate on the topic. These accounts are inconsistent with the Joint Inquiry and would indicate that NSA had the means, but not the inclination, to collect al-Mihdhar's records. That is, the agency knew (or could have known) al-Mihdhar's location, but chose not to use that capability to gather and disseminate intelligence about his communications.

²⁸ Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11*, Random House, 2006, p. 343.

²⁹ *The 9/11 Commission Report*, pp. 87 – 88.

Cases of Terrorist Facilitation

Intelligence officials have described twelve “terrorism events”—cases of either terrorist plots targeting the U.S. homeland or terrorist facilitation somehow linked to the homeland—in which the bulk phone records at NSA contributed to the disruption of terrorist activity. NSA Director General Alexander, in a hearing before the Senate Judiciary Committee on December 11, 2013, further elaborated on this claim. He stated that of these twelve, there is one case in which Section 215 played a unique role, seven in which it contributed, and four in which the phone records did not have value.³⁰ Intelligence officials have separately identified the case of Basaaly Moalin, a San Diego-based man who in 2007 and early 2008 coordinated fundraising efforts for al Shabaab, the Somali extremist group that merged with al-Qaeda in 2012. Presumably, the Zazi case is one of the seven in which the phone records are alleged to have contributed. That leaves six additional cases in which the phone records played a role but about which we know very little.

There is no basis upon which to judge the government’s assertions regarding these six unidentified cases and, in such circumstances where details are sensitive and classified, it is reasonable to assume that those assertions are accurate. It is also reasonable to conclude, however, that these are probably not plots targeting the U.S. homeland and that the majority are instances of terrorist facilitation, like the Moalin case, rather than active terrorist plotting against the homeland.³¹ If these were disrupted terror plots targeting the U.S. homeland, individuals would likely have been prosecuted and details would have almost certainly come to light even before the unauthorized disclosure of phone records collection this summer. This is exactly what happened with the Zazi case. Further, given the intense pressure NSA is under, these details would have been disclosed in recent months.

The question this raises is whether the one case of terrorist facilitation in which Section 215 records played a unique role and the six cases in which they played some role justify the collection and retention of most Americans’ phone records. This becomes a

³⁰ U.S. Congress, Senate Judiciary Committee, Oversight of Surveillance Agencies, 113th Congress, 1st sess., December 11, 2013.

³¹ NSA Deputy Director John Inglis stated in a July 31, 2013, hearing before the Senate Judiciary Committee that Section 215 made a contribution to a plot that was disrupted overseas. Recent FBI submissions in two lawsuits challenging the constitutionality of bulk phone records collection have identified two additional cases in which the bulk phone records were used; a 2009 plot to bomb the New York Stock Exchange and a 2009 plot against a Danish newspaper. It is not clear whether these two were included in the set of twelve identified earlier by intelligence officials. The FBI’s submissions are carefully worded and suggest the phone records played a marginal role in both cases. See page 10 of Declaration of Acting Assistant Director Robert J. Holley, Federal Bureau of Investigation, October 1, 2013, available at https://www.aclu.org/files/assets/2013.10.01_govt_oppn_to_pi_motion_-_holley_declaration.pdf. Intelligence officials have not otherwise distinguished between terror plots and terrorism facilitation when discussing the remaining undisclosed terrorist events in which the bulk phone records were used.

subjective policy judgment that depends on one's sensitivity to privacy and security concerns.

The Challenge of Layered Defense Against Terrorism

There does not appear to be a case in which Section 215 bulk phone records played an important role in stopping a terrorist attack.³² In light of this fact, intelligence community officials have also argued that the absence of such an example does not indicate that the program lacks value. NSA General Counsel Rajesh De, in a November 2013 hearing before the Privacy and Civil Liberties Oversight Board, argued that "From the intelligence community's perspective, intelligence is a function that is brought together by a lot of different tools that work in complement to one another and I'd also...suggest that [for] any particular plot, it is rare that you are going to find a situation where some particular event was only unearthed or only stopped as a result of one particular intelligence tool."³³

This is a fair characterization of the intelligence process. The problem with the argument is that it can be used to justify even useless intelligence and counterterrorism programs. It is a mistake to suggest that because good intelligence work is the result of the synthesis of many different tools, we cannot ask hard questions about the effectiveness of any particular tool. Further, it is somewhat inconsistent with the facts of the Najibullah Zazi case. Multiple accounts of the disruption of that plot indicate emails sent from Zazi to an individual in Pakistan and collected by NSA provided the critical lead that tipped the U.S. government off about the plot. The email address of Zazi's contact was originally collected and provided to NSA by our partners in the United Kingdom, and the emails sent from Zazi and shared by NSA prompted swift action from the FBI.³⁴ Thus, the success there was the result of the synthesis of different tools. But that does not diminish the singular role that emails collected using Section 702 authorities played in that case. We simply do not have a similar example where bulk phone records were nearly as critical.

In response to the terrorist attacks on 9/11, the United States put in place a layered system of defense, involving multiple overlapping tools and agencies working in concert. This system has accomplished its ultimate goal of saving American lives. Policymakers should

³² This is a conclusion shared by the President's Review Group on Intelligence and Communications Technologies, which found that "Section 215 telephony meta-data was not essential to preventing attacks and could readily have been obtained in a timely manner using conventional section 215 order."

³³ Rajesh De, comments before the Privacy and Civil Liberties Oversight Board, November 4, 2013, available at <http://www.pclob.gov/SiteAssets/PCLOB%20Hearing%20-%20Full%20Day%20transcript%20Nov%204%202013.pdf>. See also Matthew Waxman's "How to Measure the Value of NSA Programs," Lawfare, August 12, 2013, available at <http://www.lawfareblog.com/2013/08/how-to-measure-the-value-of-nsa-programs/>.

³⁴ *Enemies Within*, p. 54. The email address of Zazi's contact in Pakistan was collected by the British Secret Service in spring 2009.

therefore proceed with care as they consider curtailing certain authorities, for fear of weakening the integrity of the entire system. But they can nonetheless expect better of our intelligence and counterterrorism communities. Indeed, few with “on-the-ground” experience in the counterterrorism efforts of the last decade will argue that the system currently in place is smart or efficient. The system works but it does not work well. It has layers of redundancy that add value and layers that add little, tools that help find al-Qaeda leaders and tools that largely serve to take up computer memory at billion-dollar data centers.

This theme is echoed in the recent report from the President’s Review Group on Intelligence and Communications Technologies, which found that, “In many areas of public policy, officials are increasingly insistent on the need for careful analysis of the consequences of their decisions, and on the importance of relying not on intuitions and anecdotes, but on evidence and data.”³⁵ The Review Group recommendation that significant changes be made to the bulk phone records collection program suggests that a careful analysis of the evidence supporting the program had not been performed previously and that such an analysis does not support the program as it is currently implemented.

In an age of austerity and with 9/11 receding into history, a failure to justify our current counterterrorism tools and structure and to make them smarter will itself threaten the integrity of our counterterrorism efforts, as Americans look with growing skepticism at the entire intelligence apparatus. This is exactly what we see occurring with NSA now as important programs for national security have come under as much criticism as those of marginal value. If we want to ensure the long-term viability of counterterrorism efforts and our continued success against al-Qaeda, we must increasingly prune away those programs and activities that have not helped keep us safe.

Marshall Erwin is a Research Fellow at the Hoover Institution. He previously served as the intelligence specialist at the Congressional Research Service, as a professional staff member on the Senate Homeland Security and Government Affairs Committee, and as a counterterrorism analyst in the intelligence community.

³⁵ “Liberty and Security in a Changing World,” Report and Recommendations of the President’s Review Group in Intelligence and Communications Technologies,” December 12, 2013, p. 16.

**AMNESTY
INTERNATIONAL**



January 9, 2014

The Honorable Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Obama,

Amnesty International is deeply concerned that the US government's mass surveillance program violates the human right to privacy and threatens the rights to free expression and association as enshrined in international law.

As you consider changes to US surveillance policy, we urge you to take the following steps:

- Explain the purpose and disclose the scope of the US government's mass surveillance program.
- Ensure that US surveillance practices both inside and outside the United States are brought in line with international human rights standards, including the International Covenant on Civil and Political Rights.
- Publicly commit the US government to following the principles of legality, necessity, proportionality, due process, and transparency in any surveillance of communications. The International Principles on the Application of Human Rights to Communications Surveillance, available at <https://en.necessaryandproportionate.org/text>, provide guidance on implementation.
- Ensure that reform of US surveillance includes respect for the rights of people outside of US territory, as well as within.
- Establish a truly independent adversarial voice to champion privacy rights before the Foreign Intelligence Surveillance Court, and strengthen Congressional oversight of both the court and the NSA programs over which it has jurisdiction.
- Actively support, not undermine, efforts—including those of civil society—to create and maintain data encryption standards and effectively use encryption as a means to increase user security and trust.
- Recognize the right, indeed the duty, of federal employees to blow the whistle when they encounter evidence of human rights violations, and strengthen protections for whistleblowers.

**AMNESTY
INTERNATIONAL**



In your May, 2013 speech on national security, you stated that “the decisions that we are making now will define the type of nation—and world—that we leave to our children.” Respect for the human rights of all people is the cornerstone of a safe and free future. Accordingly, we urge you to make meaningful, human rights-centered reforms to US surveillance practices.

Sincerely,

Steven W. Hawkins
Executive Director
Amnesty International USA

Cc:

Lisa Monaco, Assistant to the President for Homeland Security and Counterterrorism
Stephen Pomper, Senior Director for Multilateral Affairs & Human Rights
John Kerry, Secretary of State
Samantha Power, US Ambassador to the United Nations
James R. Clapper, Director of National Intelligence
General Keith B. Alexander, Director of the National Security Agency
John Brennan, Director, Central Intelligence Agency
James B. Comey, Director of the Federal Bureau of Investigation

DO NSA'S BULK SURVEILLANCE PROGRAMS STOP TERRORISTS?

PETER BERGEN, DAVID STERMAN, EMILY SCHNEIDER, AND BAILEY CAHALL
NATIONAL SECURITY PROGRAM

JANUARY 2014

Executive Summary

On June 5, 2013, the *Guardian* broke the first story in what would become a flood of revelations regarding the extent and nature of the NSA's surveillance programs.¹ Facing an uproar over the threat such programs posed to privacy, the Obama administration scrambled to defend them as legal and essential to U.S. national security and counterterrorism. Two weeks after the first leaks by former NSA contractor Edward Snowden were published, President Obama defended the NSA surveillance programs during a visit to Berlin, saying: "We know of at least 50 threats that have been averted because of this information not just in the United States, but, in some cases, threats here in Germany. So lives have been saved."² Gen. Keith Alexander, the director of the NSA, testified before Congress that: "the information gathered from these programs provided the U.S. government with critical leads to help prevent over 50 potential terrorist events in more than 20 countries around the world."³ Rep. Mike Rogers (R-Mich.), chairman of the House Permanent Select Committee on Intelligence, said on the House floor in July that "54 times [the NSA programs] stopped and thwarted terrorist attacks both here and in Europe – saving real lives."⁴

However, our review of the government's claims about the role that NSA "bulk" surveillance of phone and email communications records has had in keeping the United States safe from terrorism shows that these claims are overblown and even misleading.* An in-depth analysis of 225 individuals recruited by al-Qaeda or a like-minded group or inspired by al-Qaeda's ideology, and charged in the United States with an act of terrorism since 9/11, demonstrates that traditional investigative methods, such as the use of informants, tips from local communities, and targeted intelligence operations, provided the initial impetus for investigations in the majority of cases, while the contribution of NSA's bulk surveillance programs to these cases was minimal. Indeed, the controversial bulk collection of American telephone metadata, which includes the telephone numbers that originate and receive calls, as well as the time and date of those calls but not their

* Peter Bergen is the director of the National Security Program at the New America Foundation, where David Sterman and Emily Schneider are research assistants and Bailey Cahall is a research associate. The authors would like to thank Kevin Bankston, Tim Maurer, and Shane Harris at the New America Foundation for their invaluable input on this paper.

content, under Section 215 of the USA PATRIOT Act, appears to have played an identifiable role in initiating, at most, 1.8 percent of these cases. NSA programs involving the surveillance of non-U.S. persons outside of the United States under Section 702 of the FISA Amendments Act played a role in 4.4 percent of the terrorism cases we examined, and NSA surveillance under an unidentified authority played a role in 1.3 percent of the cases we examined.

Regular FISA warrants not issued in connection with Section 215 or Section 702, which are the traditional means for investigating foreign persons, were used in at least 48 (21 percent) of the cases we looked at, although it's unclear whether these warrants played an initiating role or were used at a later point in the investigation. (Click on the link to go to a database of all 225 individuals, complete with additional details about them and the government's investigations of these cases: <http://natsec.newamerica.net/nsa/analysis>).

Surveillance of American phone metadata has had no discernible impact on preventing acts of terrorism and only the most marginal of impacts on preventing terrorist-related activity, such as fundraising for a terrorist group. Furthermore, our examination of the role of the database of U.S. citizens' telephone metadata in the single plot the government uses to justify the importance of the program – that of Basaaly Moalin, a San Diego cabdriver who in 2007 and 2008 provided \$8,500 to al-Shabaab, al-Qaeda's affiliate in Somalia – calls into question the necessity of the Section 215 bulk collection program.⁵ According to the government, the database of American phone metadata allows intelligence authorities to quickly circumvent the traditional burden of proof associated with criminal warrants, thus allowing them to “connect the dots” faster and prevent future 9/11-scale attacks. Yet in the Moalin case, after using the NSA's phone database to link a number in Somalia to Moalin, the FBI waited two months to begin an investigation and wiretap his phone. Although it's unclear why there was a delay between the NSA tip and the FBI

wiretapping, court documents show there was a two-month period in which the FBI was not monitoring Moalin's calls, despite official statements that the bureau had Moalin's phone number and had identified him.^{6,7} This undercuts the government's theory that the database of Americans' telephone metadata is necessary to expedite the investigative process, since it clearly didn't expedite the process in the single case the government uses to extol its virtues.

Additionally, a careful review of three of the key terrorism cases the government has cited to defend NSA bulk surveillance programs reveals that government officials have exaggerated the role of the NSA in the cases against David Coleman Headley and Najibullah Zazi, and the significance of the threat posed by a notional plot to bomb the New York Stock Exchange.

In 28 percent of the cases we reviewed, court records and public reporting do not identify which specific methods initiated the investigation. These cases, involving 62 individuals, may have been initiated by an undercover informant, an undercover officer, a family member tip, other traditional law enforcement methods, CIA- or FBI-generated intelligence, NSA surveillance of some kind, or any number of other methods. In 23 of these 62 cases (37 percent), an informant was used. However, we were unable to determine whether the informant initiated the investigation or was used after the investigation was initiated as a result of the use of some other investigative means. Some of these cases may also be too recent to have developed a public record large enough to identify which investigative tools were used.

We have also identified three additional plots that the government has not publicly claimed as NSA successes, but in which court records and public reporting suggest the NSA had a role. However, it is not clear whether any of those three cases involved bulk surveillance programs.

Finally, the overall problem for U.S. counterterrorism officials is not that they need vaster amounts of information from the bulk surveillance programs, but that they don't sufficiently understand or widely share the information they already possess that was derived from conventional law enforcement and intelligence techniques. This was true for two of the 9/11 hijackers who were known to be in the United States before the attacks on New York and Washington, as well as with the case of Chicago resident David Coleman Headley, who helped plan the 2008 terrorist attacks in Mumbai, and it is the unfortunate pattern we have also seen in several other significant terrorism cases.

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This report is divided into the following three sections: the methodology of our study, our findings regarding the NSA's role in initiating investigations, and a detailed look at the cases in which the NSA had some role.

Methodology

To review the U.S. government's claims about the efficacy of NSA bulk surveillance since 9/11, the New America Foundation's National Security Program compiled a database of 225 individuals in the United States, as well as U.S. persons abroad, who have been indicted, convicted, or killed since the terrorist attacks on September 11, 2001.* We

* The New America Foundation dataset seeks to include all American citizens and residents indicted for crimes who were inspired by or associated with al-Qaeda and its affiliated groups, as well as those citizens and residents who were killed before they could be indicted, but have been widely reported to have worked with or been inspired by al-Qaeda and its affiliated groups. The dataset does not include extremists tied to violent Islamist groups that do not target the United States, for example Hamas and Hezbollah, nor does it include individuals who were acquitted or charged with lesser crimes, such as immigration violations, that cannot be shown to involve

then conducted an analysis of all of these cases, reviewing court records, news stories, and related research to determine how the investigations into these extremists began and assessed the relative importance of the NSA's bulk surveillance programs in preventing their terrorist activities.

In particular, we identified the key methods used to initiate the investigations of these extremists and divided them into eight categories: those cases in which the initiating or key role was played by the bulk collection of American telephone metadata under Section 215; NSA surveillance of non-U.S. persons overseas under Section 702; NSA surveillance under an unknown authority; tips from the extremist's family or local community members; tips regarding suspicious activity from individuals who were not part of an extremist's family or local community; the use of an undercover informant; the routine conduct of law enforcement or intelligence operations in which the NSA did not play a key role; and self-disclosure of extremist activity on the part of the extremist in question. We also noted the cases in which a violent incident occurred prior to the extremist's apprehension.

Regular FISA warrants, which are an authority for investigating agents of foreign powers separate from those used to operate the NSA's surveillance programs under Section 215 and Section 702, are the traditional method of investigating suspected terrorists. In at least 48 of the 225 cases in our database, evidence derived from a regular FISA warrant was used by the government in court; there were at least three other cases where the defendant had reason to believe the government had used FISA evidence and filed a motion to compel disclosure of that evidence. Although

some kind of terrorism-related crime. The original dataset was a collaboration between the New America Foundation's National Security Program and Syracuse University's Maxwell School of Citizenship and Public Affairs, and underwent a full review and update by the New America Foundation in November 2013.

these court documents show that the government used FISA authorities to investigate these individuals, it is unclear at what point in the investigations it was used.

We acknowledge that the public record may not be complete and is evolving in a number of the cases we examined. As new information becomes available, we will update our assessment of the cases as merited. Additionally, there is reason to believe the government has at times actively concealed the role of NSA programs in investigations and criminal cases. Drug Enforcement Administration (DEA) agents have been trained in some instances, for example, to conceal the role of a DEA unit that analyzed metadata to initiate cases.⁸ Though this presents a challenge to our analysis, it seems unlikely that the government would conceal major cases of the NSA bulk surveillance programs' purported successes at a time when it has to defend the programs' very existence.

Findings

After examining all 225 cases of individuals charged with some kind of terrorism crime, we drew several conclusions.

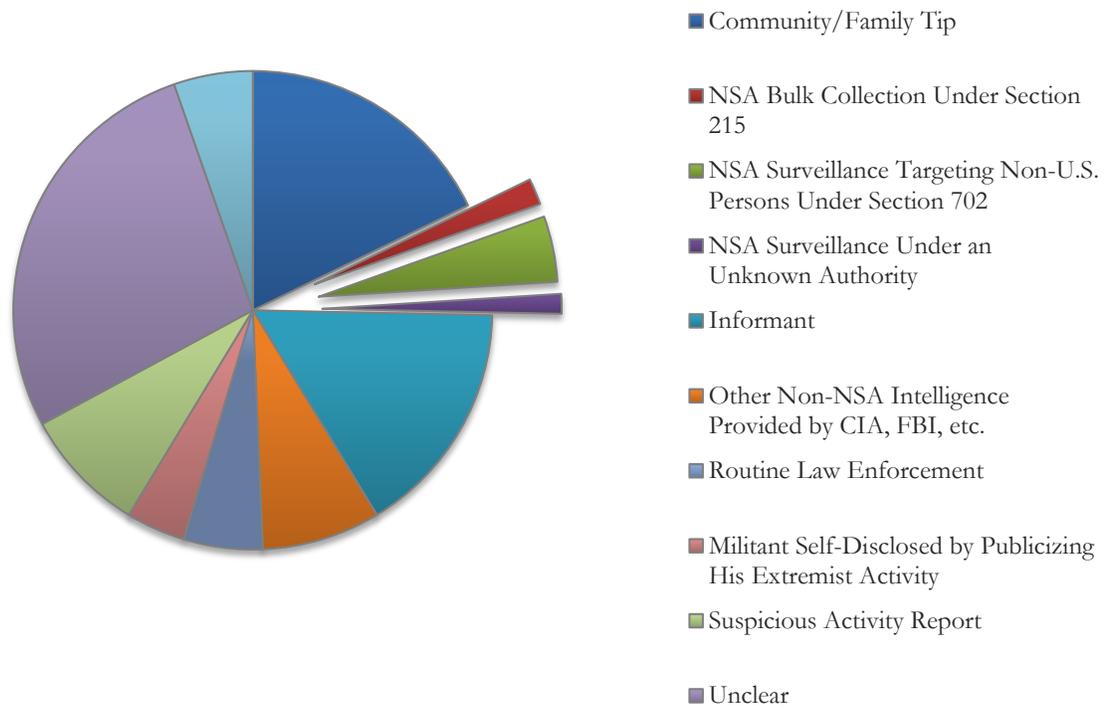
A. Traditional investigative methods initiated the majority of terrorism cases.

Traditional investigative methods initiated 60 percent of the cases we identified. In 5 percent of the cases, a violent incident occurred prior to prevention, and in 28 percent of the cases – involving 62 individuals – court records and public reporting do not identify which methods initiated the investigation. The unclear cases may have been initiated by an undercover informant, a family member tip, other traditional law enforcement methods, CIA- or FBI-generated intelligence, NSA surveillance of some kind, or any number of other methods. Additionally, some of these cases may be too recent to have developed a public record large enough to identify which investigative tools were used. In 23 of these 62 unclear cases (37 percent), an informant was involved, though we were unable to determine whether the informant initiated the investigation. The widespread use of informants suggests

that if there was an NSA role in these cases, it was limited and insufficient to generate evidence of criminal wrongdoing without the use of traditional investigative tools.

NSA surveillance of any kind, whether bulk or targeted of U.S. persons or foreigners, played an initiating role in only 7.5 percent of cases. To break that down further: The controversial bulk collection of telephone metadata appears to have played an identifiable role in, at most, 1.8 percent of the terrorism cases we examined. In a further 4.4 percent of the cases, NSA surveillance under Section 702 of targets reasonably believed to be outside of the country that were communicating with U.S. citizens or residents likely played a role, while NSA surveillance under an unknown authority likely played a role in 1.3 percent of the cases we examined.

How Were the Investigations of Terrorism Cases Initiated?



A detailed breakdown of the methods used to initiate a particular terrorism case can be seen below:

B. Surveillance of American phone metadata has had no discernible impact on preventing acts of

Table 1. Detailed Breakdown of Investigation Initiation Methods

Key Method	# of Cases	% of Total Cases
Community/Family Tip	40	17.8
NSA Bulk Collection Under Section 215	4	1.8
NSA Surveillance Targeting Non-U.S. Persons Under Section 702	10	4.4
NSA Surveillance Under an Unknown Authority	3	1.3
Informant	36	16.0
Other Non-NSA Intelligence Provided by CIA, FBI, etc.	18	8.0
Routine Law Enforcement	12	5.3
Militant Self-Disclosed by Publicizing His Extremist Activity	9	4.0
Suspicious Activity Report	19	8.4
Unclear	62	27.6
Plot Not Prevented Prior to Incident	12	5.3

terrorism and only the most marginal of impacts on preventing terrorist-related activity, such as fundraising for a terrorist group.

NSA director Gen. Alexander, under tough questioning from Sen. Patrick Leahy (D-Vt.) during a Senate Judiciary Committee hearing on October 2, 2013, admitted that there was only one plot – that involving Basaaly Moalin – in which, due to the bulk collection of American telephone metadata under Section 215, terrorist activity was prevented.* Our findings are consistent with that admission: The Moalin case is the only plot we were able to identify in which Section 215 appeared to play a potentially key role. Basaaly Moalin, a San Diego cabdriver, provided \$8,500 to al-Shabaab, al-Qaeda’s affiliate in Somalia, in 2007 and 2008.⁹ The U.S. government claimed that it used telephone metadata under Section 215 to identify Moalin as someone who was in contact with al-Shabaab officials. Three co-conspirators – Mohamed Mohamed Mohamud, Issa Doreh, and Ahmed Nasiri Taalil Mohamud – were charged along with Moalin.

Even granting the government’s explanation of the case, the Moalin case does not provide a particularly convincing defense of the need for bulk collection of American telephone metadata. The total amount going to a foreign

* When Sen. Leahy asked Gen. Alexander specifically about the number of cases where but for the use of Section 215, terrorist activity would have continued, citing an earlier statement by NSA Deputy Director John Inglis that there was only one such case, Gen. Alexander replied, “He’s right. I believe he said two, Chairman; I may have that wrong, but I think he said two.” (See “Sen. Patrick J. Leahy Holds a Hearing on FISA Oversight, Panel 1.” October 2, 2013.) In his testimony, Deputy Director Inglis in fact cited only a single case, that of Moalin. (See “Oversight of FISA (Foreign Intelligence Surveillance Act) Surveillance Programs: Hearing of the Senate Judiciary Committee on Strengthening Privacy Rights and National Security.” July 31, 2013.)

terrorist organization was around \$8,500 and the case involved no attack plot anywhere in the world, nor was there a threat to the United States or American targets.¹⁰ The four individuals involved in the plot make up only 1.8 percent of the 225 cases we identified.

The case highlights a disconnect between government officials’ statements defending the NSA’s bulk phone metadata program as critical to American national security and how it has been actually used. One reason offered by officials as to why the bulk collection of Americans’ phone records is necessary is that it saves valuable time in investigations.¹¹ But this supposed efficiency cited by the government is not supported by the facts in the Moalin case. Before the House Judiciary Committee in July 2013, Stephanie Douglas, executive assistant director of the FBI’s National Security Branch, said that in October 2007, the NSA provided a phone number to the FBI with an area code consistent with San Diego, saying the phone number had been in contact with someone affiliated with an al-Qaeda branch.¹² But the FBI did not begin monitoring Moalin’s phone calls immediately after receiving the tip. Instead, it did not start investigating Moalin and wiretapping his calls until two months later, in December 2007, according to the affidavit submitted by the government in support of a search warrant.¹³ This two-month delay is inconsistent with the justification the government has been using to defend the bulk collection of citizens’ metadata.

Similarly, U.S. District Judge Richard Leon, who presided over a federal court case challenging the constitutionality of the bulk collection program, and who read the government’s affidavits regarding the necessity of the program for national security, ruled on December 16, 2013, that the NSA’s bulk collection of American telephone metadata constitutes an unreasonable search under the Fourth Amendment because the government’s claims regarding time-sensitive investigations lacked evidence.¹⁴ He said in his opinion that given the “utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other

investigative tactics,” he had “serious doubts about the efficacy of the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism.”¹⁵

By contrast, on December 27, 2013, a federal judge in New York, William H. Pauley III, ruled that the NSA bulk surveillance programs were legal and he observed in his ruling that the NSA programs are the U.S. government’s “counter-punch” against the al-Qaeda terrorist network.¹⁶ However, Judge Pauley’s decision exhibited substantial deference to the government’s broad claims regarding its use of bulk collection under Section 215 and little examination of the particular cases beyond the government’s statements, for instance, arguing “offering examples is a dangerous stratagem for the Government because it discloses means and methods of intelligence gathering.”¹⁷

Judge Pauley’s overall representation of the importance of bulk collection under Section 215 also is at odds with the findings of the President’s own review commission. The White House review panel commissioned by President Obama said in their report released on December 18, 2013, that “the information contributed to terrorist investigations by the use of section 215 telephony meta-data was not essential to preventing attacks.”¹⁸

Geoffrey Stone, a member of the White House review panel and a University of Chicago law professor, said in an interview with NBC News that the panel was trying to answer whether the collection of telephone metadata had actually stopped “any [terror attacks] that might have been really big” but that “the results were very thin.”¹⁹ His conclusion: “We found none.”²⁰ But he did note that the comparison between Section 702 overseas intercepts and Section 215 bulk collection of American telephone metadata was “night and day.”²¹

NSA Bulk Collection Programs: Section 215 and Section 702

The bulk collection of American telephone metadata – the identification, management, nature, use, or location of information resources – is grounded in Section 215 of the USA PATRIOT Act of 2001, which allows the U.S. government to obtain any tangible record from a third party if it is deemed relevant to an international terrorism, counterespionage, or foreign intelligence investigation by the Foreign Intelligence Surveillance Court (FISC). These tangible records include: business records, phone provider records, apartment rental records, driver’s licenses, library records, book sale records, gun sale records, tax returns, educational records, and medical records. The Obama administration has interpreted this to allow for the NSA’s collection of all U.S. citizens’ phone records in order for them to be checked for links to suspected terrorist activities abroad. This telephone metadata is “understood as information that includes the telephone numbers that both originate and receive calls, time of call, and date of call. (Meta-data does not include the content of calls).”²²

The NSA is also conducting surveillance tied to Section 702 of the FISA Amendments Act of 2008, which allows the U.S. government to target the communications of non-U.S. persons “reasonably believed” to be outside the United States. FISA does not allow the NSA to target communications of U.S. citizens, but the surveillance program sweeps in large amounts of U.S. citizens’ communications because it allows the NSA to collect for foreign intelligence purposes the communications of anyone “reasonably believed” to be outside of U.S. borders. This definition has been applied loosely, and the NSA has said it needs only to believe with 51 percent confidence in the target’s “foreignness” to monitor his or her communications. Those communications are then automatically searched for keywords related to individuals or organizations that have been targeted by the NSA.²³

This statement further suggests that, even in the Moalin case, the administration exaggerated when Gen. Alexander and Deputy Director Inglis argued that the case represented an instance where terrorist activity would have continued but for the Section 215 program.

While administration officials have admitted that there was only one terrorism case in which bulk collection of telephone metadata was supposedly critical, they have also cited higher numbers when talking about the purported “contribution” to other terrorism cases from evidence gathered under Section 215. For example, NSA Deputy Director Inglis stated during a Senate Judiciary committee hearing in July 2013: “We have previously cited in public testimony, that Section 215 made a contribution to 12 of the

13 terror plots with a U.S. nexus, amongst the 54 worldwide plots cited earlier.”²⁴ But even by the administration’s own account, this contribution appears limited. In his 2013 speech at the Black Hat security conference, Gen. Alexander said that in four of the 12 plots, the examination of bulk records did not produce a lead: “It had a role in 12 of those 13. In four, it came up with no results that was operation – (inaudible) – value to the FBI. In the other eight, it provided leads for the FBI to go after.”²⁵

Below and on the next page are breakdowns of the NSA’s surveillance programs that shows the terrorism plots in which they have been involved and statement by officials about the NSA’s role in these cases.

Table 2: Bulk collection of U.S. phone metadata under Section 215

Basaaly Moalin , a San Diego cabdriver, in 2007 and 2008 provided \$8,500 to al-Shabaab, al-Qaeda’s affiliate in Somalia.	Government officials publicly claimed this as an NSA bulk surveillance program success under Section 215.
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Table 3: Bulk collection of the content of overseas communications under Section 702

David Coleman Headley , a Pakistani-American, plotted to attack the Danish newspaper <i>Jyllands-Posten</i> in Copenhagen in 2009.	
Najibullah Zazi , Zarein Ahmedzay, and Adis Medunjanin plotted to bomb the New York City subway system in 2009.	Government officials publicly claimed all of these cases as NSA bulk surveillance program successes under Section 702.
Khalid Ouazzani , a Kansas City small business owner, and his two co-conspirators, Sabirhan Hasanoff, a New York accountant, and Wesam El-Hanafi, a New York computer engineer, provided tens of thousands of dollars to al-Qaeda figures over a number of years.	
Jamshid Muhtorov and Bakhtiyor Jumaev , Uzbek nationals accused of providing support to the Islamic Jihad Union, an Uzbek terrorist organization.	The government admitted in court documents that it used surveillance under the Section 702 authority in this case.

Table 4: NSA surveillance programs under an unidentified authority not claimed by the government as examples of the success of NSA's bulk surveillance programs

Mohamed Warsame , a Canadian citizen of Somali descent living in Minnesota, traveled to Afghanistan in 2000 and 2001, during which time he attended al-Qaeda training camps.	Anonymous government officials said the NSA surveillance programs might have helped break this case.
Mohamed Osman Mohamud plotted an attack on a Christmas tree lighting ceremony in Portland, Ore., in 2010.	Anonymous government officials have linked the investigation to NSA surveillance.
Bryant Neal Vinas , an American citizen who joined al-Qaeda after 9/11, and was arrested in Pakistan.	Anonymous government officials have said that the NSA was tracking Vinas.

C. In three of the key terrorism cases it has cited to defend NSA bulk surveillance programs, the government has exaggerated the role of the NSA in two of them and the significance of the threat posed by the third case.

When the Snowden leaks first broke, the government declassified some of the details of four terrorism cases to make its defense of the NSA bulk surveillance programs. One was the Moalin case discussed in the previous section. The three others, involving surveillance under Section 702, are discussed below. (More detail about all of these cases can be found in the Appendix.) An examination of the terrorism cases that the government has cited to defend the NSA programs suggests that bulk surveillance's importance to those cases has been exaggerated.

- **David Coleman Headley's plot to attack the *Jyllands-Posten* newspaper:** David Coleman Headley plotted to attack the Danish newspaper *Jyllands-Posten* in Copenhagen in 2009. The newspaper had become the focus of controversy after publishing cartoons depicting the Prophet Mohammed. The U.S. government has claimed that it used NSA surveillance under Section 702 to identify Headley as a threat and prevent the attack.^{26,27} Tahawwur Rana, a Chicago businessman who allowed Headley to use his travel agency as a front, was found guilty of providing support to Headley's activities after Headley gave extensive testimony against him at trial.

However, the NSA's bulk surveillance programs likely played only a secondary role, if any, to British intelligence in discovering Headley's plotting. In June 2009, Headley was planning to meet with two British extremists who were already under surveillance in the United Kingdom. Headley, who played a key role in planning the 2008 terrorist attacks in Mumbai, confirmed that he had met these two extremists in Britain when he was later interrogated by Indian authorities following his arrest in October 2009.²⁸ According to reports by *ProPublica*, this meeting between Headley and the British extremists sparked the investigation into Headley, and the NSA's role was merely following up and identifying the individual in question as Headley.²⁹

Moreover, the government had received multiple tips over the years from individuals who knew Headley, including two of his wives, that he was likely a terrorist. So, even if the NSA played some kind of role in building the case against Headley, his case represents a colossal failure of the counterterrorism apparatus, which despite receiving multiple tips, failed to catch Headley, even after he assisted with the 2008 Mumbai attacks.³⁰ The main lesson from the Headley case should be the need for better information-sharing between law enforcement and intelligence agencies – not the development of a sprawling collection system.

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- **The 2009 plot by Najibullah Zazi et al. to attack the New York subway:** This case involved a foiled plot by Colorado resident Najibullah Zazi and two co-conspirators in New York, Zarein Ahmedzay and Adis Medunjanin, to bomb the New York City subway system in 2009. The government has claimed the case as an NSA success.³¹ Yet, the Zazi case was initiated not by the NSA but by British intelligence, according to a senior U.S. counterterrorism official with direct knowledge of the case whom we consulted.

Also, although the NSA was involved in intercepting Zazi's email to an al-Qaeda operative in Pakistan, this was an instance where the same result could have been obtained through traditional targeted investigative methods. The email address Zazi communicated with was known to belong to an al-Qaeda figure for at least five months prior to the NSA's interception of Zazi's email, due to a British intelligence operation in April 2009.³² The British shared their findings with U.S. intelligence, which then chose to use the NSA surveillance program to monitor the email address.

The knowledge that the email address was that of an al-Qaeda associate would have been sufficient to obtain a traditional, targeted criminal or FISA warrant for the email's contents.³³ The NSA may have opted to use the Section 702 authority, but the case, as currently explained in the public record, does not provide evidence for the need for bulk surveillance authorities.

It is also worth noting that the contribution from the bulk collection of Americans' telephone metadata under Section 215 was minimal, at best, in this case. The FBI identified a phone number included in Zazi's email and ran it against the NSA's phone metadata collected under Section 215 authority.³⁴ The query provided a previously unknown second phone number belonging to Adis Medunjanin, one of Zazi's co-conspirators, who was already a suspect in the plot. This brings into question how the government measures the "contribution" of the

NSA to terrorism cases and whether the "contributions" cited by officials reflect important and unique contributions to those cases by the NSA.

- **Khalid Ouazzani et al.'s provision of funds to al-Qaeda and the nascent plot to attack the New York Stock Exchange:** Khalid Ouazzani, a Kansas City small business owner, and his two co-conspirators, Sabirhan Hasanoff, a New York accountant, and Wesam El-Hanafi, a New York computer engineer, provided tens of thousands of dollars to al-Qaeda figures over a number of years. One of Ouazzani's co-conspirators also cased the New York Stock Exchange for a potential attack and produced a report for their handlers, though the plot was more notional than operational. The U.S. government has cited surveillance conducted under Section 702 as the cause of its investigation.³⁵

While little evidence is available to contest the government's assertion that the NSA under Section 702 played a role in this investigation, the seriousness of the threat is debatable. Even the government noted in a sentencing memorandum that the casing of the New York Stock Exchange by one of the defendants resulted in only a one-page report that was "rudimentary and of limited use."³⁶ During an interrogation, one of their contacts overseas (whose name was redacted in court documents) denied that there was "any real intention to plan or coordinate such an operation."³⁷ The plot was not a serious threat, though the contact these defendants had with foreign terrorists, which led them to provide a total of about \$67,000 and supplies to their contacts abroad, was certainly worrisome.³⁸

D. The administration has repeatedly exaggerated the role of NSA bulk surveillance programs in preventing terrorism and is misleading the public when it says that 9/11 could have been prevented by such programs when, in fact, better information-sharing about already existing intelligence would have been far more effective in preventing 9/11.

Members of Congress, senior government officials, and NSA officials have justified the programs with statements about how many terrorist events the surveillance programs have foiled – citing a total of 54 “events” around the globe, of which 13 were in the United States – and have warned of the risk of a future 9/11-like attack if the programs were curtailed. As mentioned above, President Obama defended the NSA surveillance programs during a visit to Berlin in June, saying: “We know of at least 50 threats that have been averted because of this information not just in the United States, but, in some cases, threats here in Germany. So lives have been saved.”³⁹ Gen. Alexander testified before Congress that: “the information gathered from these programs provided the U.S. government with critical leads to help prevent over 50 potential terrorist events in more than 20 countries around the world.”⁴⁰ Rep. Mike Rogers, chairman of the House Permanent Select Committee on Intelligence, said on the chamber floor in July that NSA programs “stopped and thwarted terrorist attacks both here and in Europe – saving real lives” a total of 54 times.⁴¹

The government’s defense has demonstrated a lack of precision regarding the exact nature of the threats in the terrorism cases the government has claimed were prevented by NSA surveillance. Were they real attacks that were thwarted? Serious plots that were still somewhere in the planning stages? Plots that were concerning, but never really operational? Or did they involve some sort of terrorism-support activity, such as fundraising? President Obama has called them “threats,” Gen. Alexander called them “events” and then later used the term “activities,”

while Rep. Rogers and one of Gen. Alexander’s slides at the 2013 Black Hat conference referred to them as “attacks.”⁴²

Sen. Leahy brought attention to this disconnect at a Senate Judiciary Committee hearing in July 2013, saying he had been shown a classified list of “terrorist events” detected through surveillance which did not show that “dozens or even several terrorist plots” had been thwarted by the collection of American telephone metadata under Section 215.⁴³ Sen. Leahy asked Gen. Alexander: “Would you agree that the 54 cases that keep getting cited by the administration were not all plots, and of the 54, only 13 had some nexus to the U.S.?” and Gen. Alexander’s reply was a simple “Yes.”⁴⁴ On this key point, beyond his one-word answer, the NSA director did not elaborate while under oath.

Leading reporters have sometimes simply parroted the government claims that more than 50 attacks have been averted. Bob Schieffer of CBS News, for instance, said on “Face the Nation” on July 28: “Fifty-six terror plots here and abroad have been thwarted by the NSA [*sic*] program. So what’s wrong with it, then, if it’s managed to stop 56 terrorist attacks? That sounds like a pretty good record.”⁴⁵ This misrepresentation in the media most likely stems from confusion about what this oft-cited 54 number really refers to – terrorist activity such as fundraising, plots that were really only notional, or actual averted attacks.

Despite the government’s narrative that NSA surveillance of some kind prevented 13 domestic “events” or “attacks” in the United States, of the eight cases we have identified as possibly involving the NSA, including the three the government has not claimed, only one can be said to involve an operational al-Qaeda plot to conduct an attack within the United States, three were notional plots, and one involved an attack plan in Europe. And in three of the plots we identified as possibly having been prevented by the NSA – Moalin, Muhtorov and Jumaev, and Warsame – the defendants were committing crimes of support for a terrorist group, rather than plotting terrorist attacks.

The administration has also deliberately tried to present the issue as one of preventing future 9/11s, taking advantage of the emotional resonances of that day. However, our review suggests that this rhetorical framing does not in any way accurately reflect the character of the plots that might be cited to justify the NSA programs. NSA talking points acquired by *Al Jazeera* through a Freedom of Information Act request, for example, demonstrate that the administration considered the 9/11 attacks a key point in its defense of the NSA programs. The talking points included statements such as, “NSA AND ITS PARTNERS MUST MAKE SURE WE CONNECT THE DOTS SO THAT THE NATION IS NEVER ATTACKED AGAIN LIKE IT WAS ON 9/11.”⁴⁶ Spokespeople were also encouraged to use “SOUND BITES THAT RESONATE,” specifically, “I MUCH PREFER TO BE HERE TODAY EXPLAINING THESE PROGRAMS, THAN EXPLAINING ANOTHER 9/11 EVENT THAT WE WERE NOT ABLE TO PREVENT.”⁴⁷

Administration officials have adhered to the talking points’ advice to utilize the 9/11 attacks to defend the program. During a House intelligence committee hearing on June 18, 2013, Gen. Alexander invoked 9/11 using language very close to that in the talking points, stating, “Let me start by saying that I would much rather be here today debating this point than trying to explain how we failed to prevent another 9/11.”⁴⁸ Indeed, the need to prevent a future 9/11 functions as the central framing for the administration’s case. In an October 29, 2013, House intelligence committee hearing on the NSA programs featuring Gen. Alexander and Director of National Intelligence James Clapper, the 9/11 attacks were mentioned 14 times.⁴⁹

On December 27, 2013, in a federal court ruling that the NSA’s bulk collection of American telephone records is lawful, U.S. District Judge William H. Pauley III of New York cited Gen. Alexander’s June 18 testimony and quoted him, saying, “We couldn’t connect the dots because we didn’t have the dots.”⁵⁰

But is it really the case that the U.S. intelligence community didn’t have the “dots” in the lead-up to 9/11?⁵¹ Hardly. In fact, the intelligence community provided repeated strategic warnings in the summer of 9/11 that al-Qaeda was planning large-scale attacks on American interests. Here is a representative sampling of the CIA threat reporting that was distributed to Bush administration officials during the spring and summer of 2001, according to the 9/11 Commission Report:

- CIA, “Bin Ladin Planning Multiple Operations,” April 20.
- CIA, “Bin Ladin Attacks May Be Imminent,” June 23.
- CIA, “Planning for Bin Ladin Attacks Continues, Despite Delays,” July 2.
- CIA, “Threat of Impending al Qaeda Attacks to Continue Indefinitely,” August 3.⁵²

The failure to respond adequately to these warnings was a *policy failure* by the Bush administration, not an *intelligence failure* by the U.S. intelligence community.

The administration’s claims regarding the NSA’s purported ability to stop the 9/11 attacks if the bulk collection programs were in place derive from the case of Khalid al-Mihdhar, one of the September 11 hijackers. Then-FBI Director Robert Mueller argued before the House Judiciary Committee on June 13, 2013, that bulk collection of telephone metadata might have prevented the 9/11 attacks:

“Before 9/11, there was an individual by the name of Khalid al-Mihdhar, who came to be one of the principal hijackers. He was being tracked by the intelligence agencies in the Far East. They lost track of him. At the same time, the intelligence agencies had identified an al-Qaeda safehouse in Yemen. They understood that that al-Qaeda safehouse had a telephone number, but they could not know who was calling into that particular safehouse. We came to find out afterwards that the person who had called into that safehouse was al-Mihdhar, who was in the United States in San Diego. If

we had had this program in place at the time, we would have been able to identify that particular telephone number in San Diego.”⁵³

Sen. Dianne Feinstein (D-Calif.), chairman of the Senate Select Committee on Intelligence, referenced Mueller’s explanation in an October 20, 2013, op-ed in *USA Today*, writing regarding the bulk collection of metadata that “Robert Mueller and Director of National Intelligence James Clapper testified that if this program existed before 9/11, it likely would have identified the presence inside the U.S. of hijacker Khalid al-Mihdhar.”⁵⁴

However, the Mihdhar case does not provide a good justification for the bulk collection of metadata. The government missed multiple opportunities to catch Mihdhar, and the primary failure was one of information-sharing inside the U.S. intelligence community rather than the lack of an additional data point. Furthermore, the information regarding the supposedly fateful phone call could likely have been obtained without the bulk collection of metadata.

The missed opportunities in the Mihdhar case are well documented.⁵⁵ The CIA failed to “watch list” Mihdhar and another suspected al-Qaeda terrorist, Nawaf al-Hazmi, whom the agency had been tracking since they attended an al-Qaeda summit in Malaysia on January 5, 2000. The failure to watch-list the two with the State Department meant that they were able to enter the United States under their real names with ease. Ten days after the meeting in Malaysia, on January 15, 2000, Hazmi and Mihdhar flew into Los Angeles.⁵⁶ The CIA also did not alert the FBI about the identities of the suspected terrorists so that the bureau could look for them once they were inside the United States. An investigation by the CIA inspector general – published in unclassified form in 2007 – found that this was not the oversight of a couple of agency employees, but rather that a large number of CIA officers and analysts had dropped the ball: “Some fifty to sixty” agency employees read cables about the two al-Qaeda suspects without taking

any action.⁵⁷ Some of those officers knew that one of the al-Qaeda suspects had a visa for the United States, and by March 2001 some knew that the other suspect had flown to Los Angeles.⁵⁸

The soon-to-be hijackers would not have been difficult to find in California if their names had been known to law enforcement. Under their real names they rented an apartment, obtained driver’s licenses, opened bank accounts, purchased a car, and took flight lessons at a local school. Mihdhar even listed his name in the local phone directory.⁵⁹ It was only on August 24, 2001, as a result of questions raised by a CIA officer on assignment at the FBI, that the two al-Qaeda suspects were watch-listed and their names communicated to the bureau. Even then the FBI sent out only a “Routine” notice requesting an investigation of Mihdhar.⁶⁰ A month later, Hamzi and Mihdhar were two of the “muscle” hijackers on American Airlines Flight 77 that plunged into the Pentagon, killing 189 people.

The CIA inspector general’s report concluded that “informing the FBI and good operational follow-through by CIA and FBI might have resulted in surveillance of both al-Mihdhar and al-Hazmi. Surveillance, in turn, would have had the potential to yield information on flight training, financing, and links to others who were complicit in the 9/11 attacks.”⁶¹

These multiple missed opportunities challenge the administration’s claims that the NSA’s bulk surveillance program could have prevented the 9/11 attacks. The key problem was one of information-sharing, not lack of information. If information-sharing had been functioning, Mihdhar would likely have been caught regardless of the collection of telephone metadata, and if information-sharing was not functioning, it is unclear why collecting more information would have changed the result. Even if Mihdhar’s phone calls from San Diego to Yemen is considered a moment for preventing the 9/11 attacks, it is likely that more targeted surveillance of that phone number rather than bulk collection of metadata would have been

sufficient. Communications to and from the house in Yemen were already being intercepted by the NSA as a result of investigations into the 1998 U.S. embassy bombings in Africa and the USS Cole bombing in 2000.⁶² According to U.S. officials quoted by Josh Meyer, a leading national security reporter at the *Los Angeles Times*, the information from the calls could have been shared through a FISA warrant under the authorities the NSA had even before 9/11.⁶³ The United States government could and should have been alerted to Mihdhar's phone calls even without the expanded authority to collect the telephone metadata of all Americans under Section 215.

Indeed, Richard Clarke, the national coordinator for security, infrastructure protection, and counterterrorism from 1998 to 2001, has explained that the Justice Department "could have asked the FISA Court for a warrant to all phone companies to show all calls from the U.S. which went to the Yemen number. As far as I know, they did not do so. They could have."⁶⁴ Clarke played down the need for bulk collection in such a scenario, continuing, "My understanding is that they did not need the current All Calls Data Base FISA warrant to get the information they needed. Since they had one end of the calls (the Yemen number), all they had to do was ask for any call connecting to it."⁶⁵ (Clarke was one of the five members of the White House review group that President Obama established in August 2013 to review the U.S. government's surveillance activities and which issued its report on December 18, 2013).

The overall problem for U.S. counterterrorism officials is not that they need the information from the bulk collection of phone data, but that they don't sufficiently understand or widely share the information they already possess that is derived from conventional law enforcement and intelligence techniques. This was true of the two 9/11 hijackers living in San Diego and it is also the unfortunate pattern we have seen in several other significant terrorism cases:

- Chicago resident David Coleman Headley was central to the planning of the 2008 terrorist attacks in Mumbai that killed 166 people. Yet, following the 9/11 attacks, U.S. authorities received plausible tips regarding Headley's associations with militant groups at least five times from his family members, friends, and acquaintances.⁶⁶ These multiple tips were never followed up in an effective fashion.
- Maj. Nidal Hasan, a U.S. Army psychiatrist, killed 13 people at Fort Hood, Texas, in 2009. Before the attack, U.S. intelligence agencies had intercepted multiple emails between Maj. Hasan and Anwar al-Awlaki, a U.S.-born cleric living in Yemen who was notorious for his ties to militants. The emails included a discussion of the permissibility in Islam of killing U.S. soldiers. Counterterrorism investigators didn't follow up on these emails, believing that they were somehow consistent with Maj. Hasan's job as a military psychiatrist.⁶⁷
- Carlos Bledsoe, a convert to Islam, fatally shot a soldier at a Little Rock, Ark., military recruiting office in 2009, several months after returning from a stay in Yemen. As a result of that trip, Bledsoe was under investigation by the FBI. Yet, he was still able to buy the weapons for his deadly attack when he was back in the United States.⁶⁸
- Nigerian Umar Farouq Abdulmutallab attempted to blow up Northwest Flight 253 over Detroit on Christmas Day 2009 with an "underwear bomb." Fortunately, the bomb failed to explode. Yet, a few weeks before the botched attack, Abdulmutallab's father contacted the U.S. Embassy in Nigeria with concerns that his son had become radicalized and might be planning something.⁶⁹ This information wasn't further investigated.

Abdulmutallab had been recruited by al-Qaeda's branch in Yemen for the mission. The White House review of the bomb plot concluded that there was sufficient information known to the U.S. government to determine that Abdulmutallab was likely working for al-Qaeda in

Yemen and that the group was looking to expand its attacks beyond Yemen.⁷⁰ Yet, Abdulmutallab was allowed to board a plane bound for the United States without any question.

All of the missed opportunities in these serious terrorism cases argue not for the gathering of ever-more vast troves of information, but simply for a better understanding of the information the government has already collected that was derived from conventional law enforcement and intelligence methods.

E. NSA surveillance programs under an unidentified authority may have been involved in terrorism cases that have not been publicly claimed by the government as examples of the success of NSA's bulk surveillance programs.

In addition to declassifying the role of the NSA in the four cases discussed above, the government stated in court filings that warrantless surveillance by the NSA had been involved in the investigation of a fifth plot, but the administration has not otherwise in its public statements pointed to the case as an example of the NSA's efficacy. This case is:

- **Jamshid Muhtorov and Bakhtiyor Jumaev's provision of support to the Islamic Jihad Union:** Jamshid Muhtorov and Bakhtiyor Jumaev, two Uzbek men living in Denver and Philadelphia, respectively, provided \$300 and other support to the Islamic Jihad Union, an Uzbek terrorist group, in 2011 and 2012.⁷¹ The U.S. government acknowledged its use of evidence derived from warrantless surveillance under Section 702 in a court filing in October 2013.^{72,73}

This case did not involve any plot to conduct an attack inside the United States. Further, the amount of money the two men provided to the Islamic Jihad Union was minimal.

In addition to the cases the government has declassified, we have identified three more cases in which a review of court documents and news reports suggests NSA surveillance of some kind may have been used. However, it is not clear whether any of these three cases involved the NSA's bulk surveillance programs.

- **Mohamed Warsame's attendance at training camps in Afghanistan in 2001:** Mohamed Warsame, a Canadian citizen arrested in Minneapolis in 2003, attended training camps in Afghanistan in 2000 and 2001, and was in contact with al-Qaeda figures. Anonymous government officials cited his case as a success of President George W. Bush's warrantless wiretapping and an FBI official referred to a tip from "another government agency" in a court hearing.^{74,75} However, the U.S. government has not publicly claimed this case as an NSA success.

Although Warsame traveled abroad and trained at al-Qaeda camps, the seriousness of his case is questionable. The judge who sentenced Warsame called his role in actual terrorist activities "minimal" and said that the court "found no evidence whatsoever" that Warsame had been "involved in a specific terrorist plot against the United States."⁷⁶

- **Mohamed Osman Mohamud's plot to attack the Christmas tree lighting ceremony in Portland, Ore., in 2010:** According to a senior counterterrorism official interviewed by Marc Ambinder, a national security reporter, the FBI was first alerted to Mohamud by an NSA operation in Somalia.⁷⁷ The *New York Times* reported a similar explanation, tracing the beginning of Mohamud's monitoring to the interception of his emails with an extremist, citing an anonymous law enforcement official.⁷⁸ Following initial intercepts of communications between the two men, the government turned to informants. Mohamud, under their watch, attempted to bomb the 2010 Christmas tree ceremony in Portland. However, at about the same time that the first intercepts

mentioned in court documents occurred, Mohamud's father provided a tip to the FBI about his son's extremism. The government has not publicly cited this case as an example of NSA surveillance, and it is quite possible that the father's tip to the FBI was the key initiator of this investigation.

- **Bryant Neal Vinas' notional plot in 2008 to attack the Long Island Rail Road:** NSA surveillance of militant communications in Pakistan picked up chatter regarding an American jihadist in the area in late 2007 or early 2008.⁷⁹ In cooperation with the FBI, the NSA identified the individual as Bryant Neal Vinas and began monitoring him.⁸⁰ However, they lost track of Vinas, who was eventually arrested in late 2008 at a routine Pakistani security service checkpoint.⁸¹ Vinas had provided information to his al-Qaeda handlers about the Long Island Rail Road as part of discussions regarding potential targets, and following his arrest, a terror alert for the Long Island Rail Road was issued as a result of the information he provided. The government has not publicly claimed the Vinas case as one of the NSA's successes, and his arrest was the result of routine Pakistani law enforcement activity, though the NSA was likely involved in monitoring him before his arrest.

It is difficult to determine the precise importance to counterterrorism of the NSA's surveillance programs under Section 702 in cases such as those above, because the NSA also conducts or has conducted surveillance under a range of other authorities. Not only are there the traditional, targeted FISA authorities and Section 702 of 2008's FISA Amendments Act, there is also Executive Order 12333, which primarily governs surveillance undertaken outside of the United States that is not targeted at U.S. persons, as well as the authorities that were used prior to 2008 to justify the Bush administration's warrantless wiretapping program, those being the temporary Protect America Act of 2007 and President Bush's own claims of inherent executive authority. The attempt to divine how useful Section 702 has been is also complicated by the fact that

unlike the Section 215-based telephone metadata collection program, the exact scope and methods of the 702-based programs are still unclear.

However, according to the White House review panel's report, surveillance conducted under Section 702 authorities "has produced significant information in many, perhaps most, of the 54 situations in which signals intelligence has contributed to the prevention of terrorist attacks since 2007."⁸² But the wording of the report also raises doubts about the importance of those contributions from Section 702, because the report concludes that it would be "difficult to assess precisely how many of these investigations would have turned out differently without the information learned through section 702."⁸³

Appendix: In-Depth Analyses of the Cases Discussed in This Paper*

A. Four plots the government has claimed as NSA bulk surveillance successes.

The following is an in-depth discussion of the four cases in which, according to U.S. officials, the NSA surveillance programs played a role in initiating the investigation. The first case involved evidence derived from the telephonic metadata collection program based on Section 215 of the PATRIOT Act, while the three others involved evidence derived from the use of FISA Amendments Act Section 702.

1. Basaaly Moalin, Issa Doreh, Mohamed Mohamed Mohamud, and Ahmed Nasiri Taalil Mohamud providing financial support to al-Shabaab starting in 2007.

Senior intelligence officials have offered Basaaly Moalin's case as a primary example of the value of the NSA's surveillance programs.⁸⁴

Sometime in 2007, the NSA discovered a phone number that it believed was linked to al-Shabaab, and informed the FBI that the U.S. phone number had been in "indirect" contact with an "extremist" in Somalia.⁸⁵ The FBI then initiated an investigation and found that the number belonged to Moalin. In December 2007, it began intercepting Moalin's phone calls. The government charged Moalin and three others – Issa Doreh, a worker at a money-transmitting business that was the conduit for moving the funds; Mohamed Mohamed Mohamud, the imam at a mosque frequented by San Diego's immigrant Somali

community; and Ahmed Nasiri Taalil Mohamud, a cabdriver from Anaheim, Calif. – with conspiring to provide material support to a foreign terrorist organization. Together, they provided just under \$8,500 to al-Shabaab.⁸⁶ According to court filings, Moalin's lawyer, Joshua Dratel, said in December 2011 that a year's worth of Moalin's phone calls were intercepted by the government, 1,800 of which were turned over to the defense for trial preparation.⁸⁷ Prosecutors also turned over 680 pages of Moalin's email traffic.⁸⁸

Interestingly, an investigation of Moalin had been opened in 2003 when the FBI suspected him of having terrorist links. However, no connections were found at that time and the case was closed.

During Moalin's trial in San Diego in February 2013, court papers identified the collaboration between the NSA and the FBI in monitoring Moalin's phone calls for contact with other suspects.⁸⁹ In a recently disclosed email, an unidentified FBI agent discussed the role of "another agency" – an apparent reference to the NSA – in intercepting a phone call that Moalin had just received from Moalim Aden Hashi Ayrow, an al-Shabaab leader in Mogadishu, Somalia.⁹⁰

"We just heard from another agency that Ayrow tried to make a call to Basaaly today, but the call didn't go through," the agent wrote to a colleague on January 27, 2008. "If you see anything today, can you give us a shout? We're extremely interested in getting real time info (location/new #s) on Ayrow." Three months later, Ayrow was killed in a U.S. drone strike.⁹¹ Another FBI email discussed how NSA surveillance of Moalin allowed the United States to pinpoint Ayrow's location and target him for the strike.⁹² Moalin and his co-conspirators were convicted in February 2013, but Moalin is appealing on the grounds that the NSA unconstitutionally targeted him.

* Information regarding all 225 individuals recruited by al-Qaeda or a like-minded group or inspired by al-Qaeda's ideology, and charged with an act of terrorism since the terrorist attacks on September 11, 2001, is available at <http://natsec.newamerica.net/nsa/analysis>.

2. David Coleman Headley plotting an attack on the Danish *Jyllands-Posten* newspaper in 2009.

The Obama administration has also argued that NSA surveillance played an important role in identifying David Coleman Headley, who helped plan the Mumbai terrorist attacks in November 2008 that killed 166 people and was planning an attack on the Danish newspaper *Jyllands-Posten* in 2009 because of its publication years earlier of cartoons of the Prophet Mohammed. James Clapper, the director of national intelligence, asserted during an interview with MSNBC's Andrea Mitchell on June 10, 2013, that NSA surveillance helped stop Headley's planned attack on the Danish newspaper.⁹³ Sen. Dianne Feinstein also counted Headley's capture a success for Section 215 during an interview on ABC the day before.⁹⁴

While government officials have argued that the Headley case is an example of successful NSA bulk surveillance, there is reason to believe that the initial tip may have come from British intelligence, which was monitoring a group of extremists in the United Kingdom with whom Headley made contact.⁹⁵ During an interrogation conducted by Indian government officials in 2010, while Headley was in U.S. custody, Headley described how he met with two Pakistani men, known only as Basharat and Sufiyaan, who were affiliated with al-Qaeda, in Derby, England, in July 2009, and received an undisclosed amount of money from them for the attack on *Jyllands-Posten*.⁹⁶ *ProPublica* has reported that U.S. government surveillance was implemented only after a tip from the British about this meeting.⁹⁷ Headley's interrogation by the Indians also supports this conclusion.

Officials in Clapper's office have said only that information lawfully gathered under FISA was integral to disrupting the attack in Denmark, but this does not rule out other sources of information at other points in the investigation.⁹⁸ The NSA's surveillance programs may still have been involved, as it appears that the British tip was the result of a communications intercept, and the NSA and GCHQ,

Britain's signals intelligence agency, are known to cooperate. But as the individuals Headley contacted were already under British surveillance, an NSA role would not provide support for the bulk surveillance programs, but rather for more traditional intelligence work.⁹⁹

The Headley case doesn't seem to have been initiated by the NSA, but rather from a tip provided by British intelligence, which in turn alerted the FBI. While NSA bulk communications surveillance does seem to have been helpful in building the case against Headley, it does not seem to have been critical. Headley was in contact with known al-Qaeda associates in Britain and was a longtime member of Lashkar-e-Taiba, a known Pakistani terrorist group, something that had been flagged repeatedly to U.S. law enforcement authorities.

In January 2009, Headley made a reconnaissance trip to Copenhagen to plot an attack on *Jyllands-Posten* on behalf of Lashkar-e-Taiba, a Pakistani militant group.¹⁰⁰ Headley returned to Pakistan to meet with his handlers, only to find out that the plot was to be sidelined, so he took his intelligence and pitched the idea of an attack to his al-Qaeda contact, Illyas Kashmiri. Kashmiri gave him the names of militants in Britain, Basharat and Sufiyaan, and in Sweden (known as Farid) who could help him with funds and weapons. While Headley was in Chicago during the summer of 2009 and preparing for a second reconnaissance trip to Denmark, he communicated with the two operatives in Britain.

British intelligence found out about Headley's upcoming visit and notified the FBI that a suspect was in contact with British militants. The FBI then alerted U.S. Customs and Border Protection about a suspect and asked for help in identifying him.¹⁰¹ U.S. authorities were able to identify Headley using information regarding his flight plans and coordinated with European counterterrorism officials to track his next moves, from Derby on July 26 to Stockholm then Copenhagen on July 31. Headley flew back to the United States on August 5, stopping in Atlanta, and was

questioned by airport security before being released so the FBI could continue to follow him. Shortly before his arrest, his phone calls to family members were also being intercepted, and the NSA retrieved previous communications to help build the case against him.¹⁰² The entire effort lasted over two months until Headley was finally arrested on October 9, 2009, at Chicago O'Hare International Airport as he tried to depart for Pakistan.

Importantly, Headley could have been stopped at any time after the 9/11 attacks as his militant activities were repeatedly flagged to U.S. authorities, but, inexplicably it seems, Headley kept evading serious law enforcement scrutiny. Following the 9/11 attacks, U.S. authorities received tips regarding Headley's terrorist activity at least five times from his family members, friends, and acquaintances.¹⁰³ The first tip was given by Terry O'Donnell, a bartender who alerted authorities in the weeks following 9/11 about Headley's extremist comments praising the attacks and his ties with Pakistan. As a result, two government officials interrogated Headley on October 4, 2001. He denied the accusations and cited his current cooperation with Drug Enforcement Administration (DEA) agents, who were also present at the interrogation, as an informant for drug smuggling.

In the summer of 2002, authorities received another call regarding Headley's suspicious behavior, which included telling his mother he was training at terrorist camps, from a friend of his mother. The FBI office in Philadelphia that received the call did a basic record check and closed the case without ever interviewing Headley, his mother, or his mother's friend.

In the summer of 2005, Headley was arrested after he assaulted one of his wives (he was married to different women at the same time) in Manhattan; his wife also called a terrorism tip line. Agents from the FBI-led Joint Terrorism Task Force interviewed her three times, and she told them about Headley's extremist activities. The FBI knew about the previous allegations of extremism and ties

to militant groups, but still closed the case without ever questioning Headley. The assault charges were also dropped.

In late 2007 and early 2008, Headley's then-wife, Faiza Outalha, reported him to the U.S. Embassy in Islamabad. She was interviewed by State Department and U.S. Immigration and Customs Enforcement agents multiple times. U.S. officials said her warnings were not specific enough to warrant any further investigation, though the State Department says it did communicate her warnings to the CIA, FBI, and DEA.

Following the 2008 Mumbai attacks, another of Headley's mother's friends informed the FBI that he might have been involved. FBI agents interviewed her on December 1, 2008. She told them that Headley was still involved in militant activity and, according to a U.S. law enforcement official, the FBI agents found the records and warnings about Headley dating back to 2001. On December 21, 2008, FBI agents interviewed Farid Gilani, Headley's cousin in Philadelphia, who told them Headley was in Pakistan (he was actually in Chicago). While the agents put the inquiry on hold since they believed Headley was abroad, their efforts show that conventional law enforcement techniques could have detected him almost a decade before he was arrested.

3. Khalid Ouazzani, Sabirhan Hasanoff, and Wesam El-Hanafi providing financial support to al-Qaeda and plotting attack on New York Stock Exchange in 2008.

Khalid Ouazzani and his co-conspirators, Sabirhan Hasanoff and Wesam El-Hanafi, appear to have been caught using NSA surveillance, though the specifics have not been addressed beyond the U.S. government's statement about the case. According to the government, the NSA was monitoring a known extremist in Yemen, with whom Ouazzani was in contact.¹⁰⁴ The court documents in the case focus on electronic communications and lack an alternative explanation for how the case developed,

suggesting that the government's explanation that NSA bulk surveillance led to the plotters is plausible.

The government also argued that the conspirators were involved in a nascent plot to attack the New York Stock Exchange, but this appears to be a stretch. While the claim arises from a trip Hasanoff took to New York, following orders to case the exchange, the extent of his efforts was a one-page report that "was rudimentary and of limited use," according to the government's sentencing memorandum.^{105,106}

FBI documents reveal that Hasanoff and El-Hanafi communicated with terrorists located in the United Arab Emirates known as "The Doctor" and "Suffian," both of whom were subsequently interrogated by the FBI and asked about whether there was a planned operation at the New York Stock Exchange.¹⁰⁷ One of the detained individuals, though it is unclear which one due to the report being redacted, responded no and denied that there was "any real intention to plan or coordinate such an operation."¹⁰⁸ The individual also said he did not discuss the plan with anyone else and that he burned the report.¹⁰⁹ Ouazzani was never charged in the plot to attack the New York Stock Exchange and it was not mentioned in the press release regarding Hasanoff and El-Hanafi's pleas, though it is mentioned in their sentencing memos.¹¹⁰

While the plot fizzled on its own, if there was ever a real plot to begin with, the connection to foreign terrorists did pose a threat, and the unnamed interrogated subject said he sought to involve Ouazzani, Hasanoff, and El-Hanafi in attacks inside the United States.¹¹¹ According to the government's sentencing memo, citing the interrogation of Suffian, El-Hanafi provided "The Doctor" with a total of about \$67,000, in addition to remote control devices, outerwear and boots, and three GPS devices.¹¹²

4. Najibullah Zazi, Zarein Ahmedzay, and Adis Medunjanin plotting attack on the New York subway in 2009.

The plot by Najibullah Zazi, Zarein Ahmedzay, and Adis Medunjanin to bomb the New York City subway system in 2009 was prevented by a Section 702 NSA intercept. The bulk collection of telephone metadata did not play an appreciable role in the prevention of the attack. There is no evidence that the NSA program used to help investigate the plot was critical for counterterrorism efforts, as the plot could have been prevented through the use of traditional, targeted criminal or FISA warrants.

On September 6, 2009, Zazi exchanged emails with a Pakistan-based email address in which he asked about the correct amounts of chemicals needed to produce a bomb. According to the statements of various government officials, the NSA intercepted this email and passed the information on to the FBI.¹¹³ The next day, the FBI opened a full investigation.¹¹⁴ (According to Associated Press reporter Matt Apuzzo, there is no evidence that the Pakistani state or intelligence services knew of Zazi and his co-conspirators.¹¹⁵)

However, the surveillance of the email address that led to Zazi's arrest did not rely on bulk collection of phone and email metadata. The email address was known to belong to an al-Qaeda figure for at least five months prior to the NSA's interception of Zazi's email as a result of a British operation in April 2009.¹¹⁶ On April 8, 2009, Britain's North-West Counter-Terrorism Unit, along with local police forces, arrested 12 people in "Operation Pathway."¹¹⁷ Abid Naseer, one of the men who was arrested and had been under surveillance, was in contact with the same email address between November 30, 2008, and April 3, 2009.¹¹⁸ On April 3, Naseer sent an encoded email, triggering greater attention from the British security services, who assessed that the email belonged to an al-Qaeda associate and was a sign of an impending attack.^{119,120}

The British shared their findings with the United States, enabling the NSA's surveillance of the email address. In the immediate wake of Zazi's arrest, the British press made clear the key role that Operation Pathway played in initiating the surveillance.¹²¹

This all suggests that the plot could have been prevented through traditional individualized FISA warrants without the expanded authorities that govern the NSA surveillance programs. The knowledge that the email address was that of an al-Qaeda associate would have been sufficient to obtain a warrant for the email's contents.¹²² However, while the expanded authorities do not appear to have been necessary, the NSA did play a role. The case could not have been cracked without surveilling the al-Qaeda fixer's email address.¹²³ It is also conceivable that the NSA's expanded surveillance capabilities played a key role in the Operation Pathway investigation, as GCHQ and NSA, as we noted previously, share information.

The extent of the publicly cited importance of the NSA's collection of American telephone metadata under Section 215 in the Zazi case appears to be the identification of an additional phone number for an individual who was already under suspicion. Once the FBI identified a phone number included in Zazi's email as belonging to the individual, the NSA checked the number against telephone metadata collected under the authority.^{124,125} The agency's examination of this metadata provided a previously unknown phone number for Adis Medunjanin, one of Zazi's co-conspirators, in New York City.^{126,127} However, Medunjanin was already known to the FBI as a person of interest. Indeed, according to the AP's Apuzzo and Adam Goldman, who reported on the case, the first FBI examination of travel records noted that Zazi likely traveled to Pakistan with Medunjanin and Ahmedzay.¹²⁸

Moreover, the FBI itself is capable of obtaining phone records of suspects as part of specific investigations, rather than relying upon bulk collection. According to Apuzzo and Goldman, "one of the first things the FBI did when

investigating Zazi was to obtain a national security letter for his phone records and those of his friends and family."¹²⁹ The FBI made widespread use of "national security" and "imminent threat of death" letters to monitor Zazi's associates, who were also under 24-hour surveillance, using wiretaps under FISA warrants.¹³⁰ These factors suggest that, in foiling the New York City subway plot, the contribution of the NSA's bulk collection of American telephone metadata was minimal at best.

B. An investigation the government has admitted in court proceedings was initiated by warrantless NSA surveillance.

The following is an in-depth discussion of the only case in which the government admitted during court proceedings that the NSA surveillance programs played a role in initiating the investigation.

Jamshid Muhtorov and Bakhtiyor Jumaev providing support to the Islamic Jihad Union in 2010.

On October 25, 2013, the U.S. government admitted that it had used warrantless wiretapping in the case of Jamshid Muhtorov, an Uzbek national accused of providing support to the Islamic Jihad Union (IJU), an Uzbek terrorist organization.^{131,132} The notice filed by the government in that case stated that the investigation had used wiretaps authorized under Section 702, which do not require a warrant.¹³³ Specific details about the use of wiretapping are not public, but the affidavits filed in the cases of Muhtorov and his co-conspirator, Bakhtiyor Jumaev, provide some suggestions as to how the investigation came about.

According to the affidavit filed in conjunction with the complaint in Muhtorov's case, the FBI was investigating him based on his communication with Abu Muhammad, the website administrator for www.sodiqlar.info, which hosts IJU material and is believed to be owned and operated by the organization.^{134,135} Muhtorov used two different email accounts to communicate with Muhammad, accounts the

FBI “lawfully discovered” and linked to Muhtorov, according to the affidavit.¹³⁶

Jumaev, Muhtorov’s partner, had provided his mobile phone number to the U.S. Department of Homeland Security after a February 2010 immigration charge arrest, and the FBI “lawfully searched and obtained information through various investigative techniques.”^{137,138} Using these techniques, the FBI determined that there were incriminating communications originating from the phone, namely that Jumaev was in contact with Muhtorov, who relayed his dealings with Muhammad and requests for funds.^{139,140}

The U.S. government does not allege that this case involved any plot to conduct an attack inside the United States.¹⁴¹ The extent of the funds the pair is charged with attempting to send to the IJU is only \$300, though Muhtorov also planned to travel abroad to fight for the IJU.^{142,143}

C. Plots in which the NSA was likely involved, but which have not been claimed as NSA successes by the government.

The following is an in-depth discussion of the three cases in which NSA surveillance programs of some kind likely played a role in initiating the investigation, but which the government has neither claimed as NSA successes publicly nor admitted NSA involvement.

1. Mohamed Warsame attending al-Qaeda training camps in Afghanistan in 2001.

The investigation of Mohamed Warsame, a Canadian citizen of Somali descent living in Minnesota, appears to have begun with warrantless surveillance by the NSA, but many of the case details remain unclear. According to the affidavit of FBI agent Kiann Vandenoever, Warsame was interviewed by the FBI in Minneapolis on December 8 and 9, 2003, and admitted that he traveled to Afghanistan in 2000 and 2001, during which time he attended two al-

Qaeda training camps.¹⁴⁴ He was arrested on December 10, 2003, on a material witness warrant and was later indicted on material support charges.¹⁴⁵ The affidavit provided no details on how suspicion fell on Warsame in the first place.

However, when the *New York Times* broke the story on the NSA’s warrantless wiretapping, it cited government officials as saying the programs may have assisted in the Warsame case.¹⁴⁶ Warsame’s attorney also suggested that NSA surveillance played a key role, as the government presented evidence derived from FISA surveillance and, during a hearing, an FBI agent said the investigation began after a tip from another agency, without naming the agency.^{147,148}

As to the seriousness of Warsame’s plot, during sentencing the judge called Warsame’s role in actual terrorist activities “minimal” and stated: “I have found no evidence whatsoever that you were involved in a specific terrorist plot against the United States.”¹⁴⁹ However, he also noted that Warsame had trained at the terrorist camps and had contact with al-Qaeda figures.¹⁵⁰

2. Mohamed Osman Mohamud plotting attack on a Christmas tree lighting ceremony in Portland, Ore., in 2010.

The details of the means used to prevent the attack on the 2010 Portland Christmas tree ceremony by Mohamed Osman Mohamud remain unclear. Anonymous government officials have suggested that he was initially discovered through an NSA operation, but his father also provided a tip to the FBI in August 2009, raising questions about whether the NSA initiated the investigation and whether it would have occurred regardless of the NSA’s involvement. The government has not officially claimed the case as an NSA success.

Whichever method sparked the investigation, an informant and undercover employees were used to assess Mohamud and conduct a sting operation in which Mohamud planned

to attack the local Christmas tree lighting ceremony. Though the case can be considered a form of an attack plot, it is distinctly different from some of the other plots because it was organized under the eyes of undercover agents. However, Mohamud's connections to Amro al-Ali, a suspected terrorist from Saudi Arabia, and Samir Khan, a U.S. citizen who published *Inspire*, an al-Qaeda propaganda magazine, caution against dismissing the plot as something that would not have occurred but for the government's involvement.

According to a senior counterterrorism official interviewed by Marc Ambinder, a national security reporter, the FBI was first alerted to Mohamud by an NSA operation in Somalia.¹⁵¹ The *New York Times* reported a similar explanation, tracing the beginning of Mohamud's monitoring to the interception of his emails with an extremist, citing an anonymous law enforcement official.¹⁵² Based on court documents, that extremist can be identified as Ali.

Ali is a Saudi national who lived in Portland from 2007 to 2008, and was a wanted international terrorist for whom an Interpol Red Notice was issued on October 18, 2009; he is now believed to be in prison in Saudi Arabia.¹⁵³ He is referred to in many of the court documents as "Unindicted Associate 1" or "UA1."

According to the criminal complaint, court-authorized surveillance showed that Mohamud was in contact with Ali in August 2009.¹⁵⁴ On August 31, 2009, Ali forwarded to Mohamud an email link regarding a religious school in Yemen.¹⁵⁵ While email intercepts may have triggered the investigation, there is also an alternative explanation. The same day Ali sent the email about the religious school, Mohamud's father called the FBI office in Portland and said he was worried about his son's jihadist leanings. The call led to an in-person meeting between Mohamud's father and FBI Special Agent Isaac Delong.¹⁵⁶

On November 9, 2009, a confidential FBI source contacted Mohamud by email to help the FBI assess him, and by the time they last communicated in August 2010, they had exchanged 44 emails, though they never met in person or talked over the phone.¹⁵⁷

About three weeks after the source contacted Mohamud, Ali contacted Mohamud from northwest Pakistan.¹⁵⁸ In a December 3, 2009, email to Mohamud, Ali said he was on a pilgrimage to Mecca, but a review of the IP address, a numerical label that identifies where a device connected to the Internet is located, showed that the email was sent from Pakistan's tribal regions.¹⁵⁹ It is believed that the email notified Mohamud that Ali had successfully engaged in terrorist activity.¹⁶⁰

In emails from Pakistan, Ali discussed Mohamud joining terrorist activity abroad using coded language and provided instructions for Mohamud to contact another extremist, Abulhadi (UA2), to coordinate the plan.¹⁶¹ Beginning on December 12, 2009, Mohamud attempted to contact UA2, as UA1 instructed, but his efforts were ultimately unsuccessful.

On June 14, 2010, Mohamud was stopped at Portland International Airport while trying to fly to Kodiak, Alaska, and was interviewed by the FBI.¹⁶² Later that month, an undercover FBI employee (UCE1) contacted Mohamud and said he was affiliated with UA1.¹⁶³ Mohamud responded to the agent's email and agreed to meet with the employee in Portland on July 30, 2010 – thus beginning an undercover operation.¹⁶⁴

On August 19, 2010, Mohamud met with UCE1 again and was introduced to a second FBI undercover agent (UCE2).¹⁶⁵ During the meeting, Mohamud identified the Portland Christmas tree lighting ceremony as a potential target.¹⁶⁶

On September 7, 2010, UCE1, UCE2, and Mohamud met again and the undercover employees asked Mohamud to

buy bomb components, send them to UCEI, and find a place to park the bomb. Mohamud agreed.¹⁶⁷ On November 26, 2010, Mohamud was arrested as he tried to detonate the fake bomb.¹⁶⁸

3. Bryant Neal Vinas plotting a notional attack on the Long Island Rail Road in 2008.

NSA surveillance likely provided important information regarding Bryant Neal Vinas, an American citizen who joined al-Qaeda after 9/11. However, Vinas' arrest was the result of a routine Pakistani security checkpoint and the strangeness of a Hispanic man being in Pakistan's tribal areas, not NSA surveillance. While Vinas had been involved in discussions about potential targets inside the United States, specifically the Long Island Rail Road, it is unclear whether the discussions were part of a specific plot or simply hypothetical targets.

As for the NSA's involvement in the case, it appears that the agency intercepted chatter from jihadists in Pakistan in late 2007 or early 2008 regarding an American jihadist.¹⁶⁹ The conversations referred to a U.S. citizen from New York who was missing a toe, a description broadly corresponding to Vinas, though he was not known to be the subject of the chatter at the time.¹⁷⁰ The NSA alerted the CIA, which worked its sources on the ground and confirmed the presence of an American in Pakistan's tribal regions.¹⁷¹ That intelligence was taken to the Joint Terrorism Task Force in New York, where travel records and customs information were used, along with Pakistani records, to track Americans who had arrived in Pakistan.¹⁷² By March 2008, the FBI and CIA were certain the chatter was about Vinas.¹⁷³

In early 2008, Vinas sent emails from a cyber cafe in Peshawar that attracted the NSA's attention, but the agency lost track of him in March 2008 when he ceased his emails.¹⁷⁴

On November 13, 2008, Vinas bought a bus ticket in Miran Shah.¹⁷⁵ The bus was stopped at a routine checkpoint. Vinas

tried to escape and attempted to stab a guard in the process, but the Pakistani police arrested him.¹⁷⁶ Upon his arrest, the FBI was notified.¹⁷⁷ When news of Vinas' arrest reached the assistant special agent in charge of counterterrorism, he said he was surprised that Vinas was not dead, further suggesting that Vinas' arrest was the result of routine actions by the Pakistani security services, not a U.S.-directed operation.¹⁷⁸

After his capture, Vinas provided intelligence to U.S. intelligence agencies, explaining his role in providing information for a potential attack on the Long Island Rail Road, which led to a terror alert being issued for the system.¹⁷⁹ In court, Vinas testified that he suggested the idea of attacking the railroad and drew a map of the area.¹⁸⁰

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² Calmes, Jackie. "Obama Says Surveillance Helped in Case in Germany." June 19, 2013. *New York Times*. Accessed January 1, 2014. <http://www.nytimes.com/2013/06/20/world/europe/obama-in-germany.html>.

³ Disclosure of National Security Agency Surveillance Programs: Hearing before the H. Perm. Select Comm. on Intelligence, 113th Cong. (2013) (statement of Gen. Keith Alexander, Dir., Nat'l. Sec. Agency).

⁴ Congressional Record. House of Representatives. 113th Cong. (2013). July 24, 2013. Accessed January 1, 2014. <http://www.gpo.gov/fdsys/pkg/CREC-2013-07-24/pdf/CREC-2013-07-24.pdf>.

⁵ Nakashima, Ellen. "NSA cites case as success of phone data-collection program." *Washington Post*. August 8, 2013. Accessed December 13, 2013. http://articles.washingtonpost.com/2013-08-08/world/4198093_1_phone-records-nsa-national-security-agency.

⁶ Affidavit in Support of a Search Warrant at 8, United States v. Moalin, et al., No. 3:10-cr-04246 (S.D. Cal. Dec. 9, 2011).

⁷ Oversight of the Administration's Use of FISA Authorities: Hearing before the H. Judiciary Comm., 113th Cong. (2013) (statement of Stephanie Douglas, Exec. Assistant Dir., Fed. Bureau of Investigation Nat'l Sec. Branch).

⁸ Shiffman, John, and Kristina Cooke. "Exclusive: U.S. directs agents to cover up program used to investigate Americans." *Reuters*. August 5, 2013. Accessed December 19, 2013. <http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805>.

⁹ Nakashima. "NSA cites case as success of phone data-collection program."

¹⁰ *Ibid*.

¹¹ Feinstein, Dianne. "Sen. Dianne Feinstein: Continue NSA call-records Program." *USA Today*. October 20, 2013. Accessed January 1, 2014. <http://www.usatoday.com/story/opinion/2013/10/20/nsa-call-records-program-sen-dianne-feinstein-editorials-debates/3112715/>.

¹² Oversight of the Administration's Use of FISA Authorities: Hearing before the H. Judiciary Comm., 113th Cong. (2013) (statement of Stephanie Douglas, Exec. Assistant Dir., Fed. Bureau of Investigation Nat'l Sec. Branch).

¹³ Moalin Affidavit in Support of a Search Warrant at 8.

¹⁴ Klayman et al., v. Obama et al., No. 13-0851 (D.C. Dec. 16, 2013).

¹⁵ *Ibid* at 62.

¹⁶ Memorandum and Order, American Civil Liberties Union v. Clapper et al. at 52, No. 13 Civ. 2994 (WHP) (S.D.N.Y. Dec. 27, 2013).

¹⁷ *Ibid* at 48.

¹⁸ "Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies," p. 104. December 12, 2013. Accessed January 2, 2014.

http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

¹⁹ Isikoff, Michael. "NSA program stopped no terror attacks, says White House panel member." *NBC News*. December 20, 2013. Accessed December 20, 2013. http://investigations.nbcnews.com/_news/2013/12/19/21975158-nsa-program-stopped-no-terror-attacks-white-house-panel-member?lite.

²⁰ *Ibid*.

²¹ *Ibid*.

²² "Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies," p. 17.

²³ Savage, Charlie. "N.S.A. Said to Search Content of Messages to and from U.S." *New York Times*. August 8, 2013. Accessed December 26, 2013. http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?_r=0.

²⁴ Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing before the S. Comm. on the Judiciary, 113th Cong. (2013) (statement of John C. Inglis, Deputy Dir., Nat'l. Sec. Agency).

²⁵ "Keynote Address by General Keith Alexander, Director, National Security Agency, Black Hat USA 2013." *Federal News Service*. July 31, 2013. Accessed December 13, 2013. http://www.nsa.gov/public_info/_files/speeches_testimonies/Transcript_of_GEN_Alexanders_Black_Hat_Speech_31_July_2013.pdf.

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²⁸ Government of India, National Investigation Agency. Interrogation Report of David Coleman Headley, para. 165-172.

²⁹ Rotella, Sebastian. “The American Behind India’s 9/11— And How U.S. Botched Chances to Stop Him.” *ProPublica*. January 24, 2013. Accessed December 13, 2013. <http://www.propublica.org/article/david-headley-homegrown-terrorist>.

³⁰ Ibid.

³¹ “Keynote Address by General Keith Alexander, Director, National Security Agency, Black Hat USA 2013.”

³² Apuzzo, Matt, and Adam Goldman. *Enemies Within: Inside the NYPD’s Secret Spying Unit and bin Laden’s Final Plot Against America*. New York: Simon and Schuster, 2013, p.54.

³³ Apuzzo, Matt, and Adam Goldman. “NYC BOMB PLOT DETAILS SETTLE LITTLE IN NSA DEBATE.” *Associated Press*. June 11, 2013. Accessed December 13, 2013. <http://bigstory.ap.org/article/nyc-bomb-plot-details-settle-little-nsa-debate>.

³⁴ “Keynote Address by General Keith Alexander, Director, National Security Agency, Black Hat USA 2013.”

³⁵ How Disclosed NSA Programs Protect Americans and why Disclosure Aids Our Adversaries: Hearing before H. Perm. Select Comm. on Intelligence, 113th Cong., (2013) (testimony of Sean Joyce, Deputy Dir., Fed. Bureau of Investigation).

³⁶ Sentencing Memo at 4-5, *United States v. Sabirhan Hasanoff*, No. S6 10-cr-162 (S.D.N.Y. May 31, 2013).

³⁷ Ibid at 12.

³⁸ Ibid.

³⁹ Calmes. “Obama Says Surveillance Helped in Case in Germany.”

⁴⁰ Disclosure of National Security Agency Surveillance Programs: Hearing before the H. Perm. Select Comm. on Intelligence, 113th Cong. (2013) (statement of Gen. Keith Alexander, Dir., Nat’l. Sec. Agency).

⁴¹ Congressional Record. House of Representatives. 113th Cong. (2013). July 24, 2013.

⁴² “Keynote Address by General Keith Alexander, Director, National Security Agency, Black Hat USA 2013.”

⁴³ Continued Oversight of the Foreign Intelligence Surveillance Act: Hearing before the S. Comm. on the Judiciary. 113th Cong. (2013) (statement of Sen. Patrick J. Leahy).

⁴⁴ Ibid.

⁴⁵ “Face the Nation transcripts July 28, 2013: Rogers, Udall, and the latest from Egypt.” *CBS News*. July 28, 2013. Accessed December 16, 2013. <http://www.cbsnews.com/news/face-the-nation-transcripts-july-28-2013-rogers-udall-and-the-latest-from-egypt/>.

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⁵⁰ *American Civil Liberties Union v. Clapper* at 35, No. 13 Civ. 399. (S.D.N.Y. Dec. 27, 2013).

⁵¹ Portions of this section are reflected in a previously published article by Peter Bergen. See “Would NSA Surveillance Have Stopped 9/11 Plot?” *CNN*. December 30, 2013. Accessed January 2, 2014. http://www.cnn.com/2013/12/30/opinion/bergen-nsa-surveillance-september-11/index.html?hpt=op_t.

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⁵⁸ "The 9/11 Commission Report," p. 267.

⁵⁹ Defense Exhibit 950 at 29, *United States v. Moussaoui*, No. 01-455-A (E.D. Va. March 6, 2006).

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⁶¹ Central Intelligence Agency. "OIG Report on CIA Accountability With Respect to the 9/11 Attacks.;" See also Moussaoui Defense Exhibit 950.

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⁶³ *Ibid.*

⁶⁴ Elliott, Justin. "Fact-check: The NSA and Sept. 11." *ProPublica*. June 20, 2013. Accessed December 13, 2013. <http://www.propublica.org/article/fact-check-the-nsa-and-sept-11>.

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⁷⁹ Apuzzo and Goldman. *Enemies Within*, p. 210.

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⁸¹ Ibid, pp. 214-219.

⁸² Ibid.

⁸³ Ibid, p. 145

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⁸⁷ Statement of Facts and Memorandum of Points and Authorities in Support of Motions for Basaaly Moalin at 6, No. 3:10-cr-04246-JM (S.D. Cali. Feb. 9, 2011).

⁸⁸ Ibid.

⁸⁹ Ibid, p. 30

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<p>MAIN OFFICE 1899 L Street, NW Suite 400 Washington, DC 20036 Phone 202 986 2700 Fax 202 986 3696</p>	<p>NEW AMERICA NYC 199 Lafayette St. Suite 3B New York, NY 10012</p>	