

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

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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

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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 Waxmen'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.

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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.