Do NSA's Bulk Surveillance Programs Stop Terrorists?

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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

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content, under Section 215 of the USA PATRIOT Act, appears to have played an identifiable role in, 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 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 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.

[*] 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 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.

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.

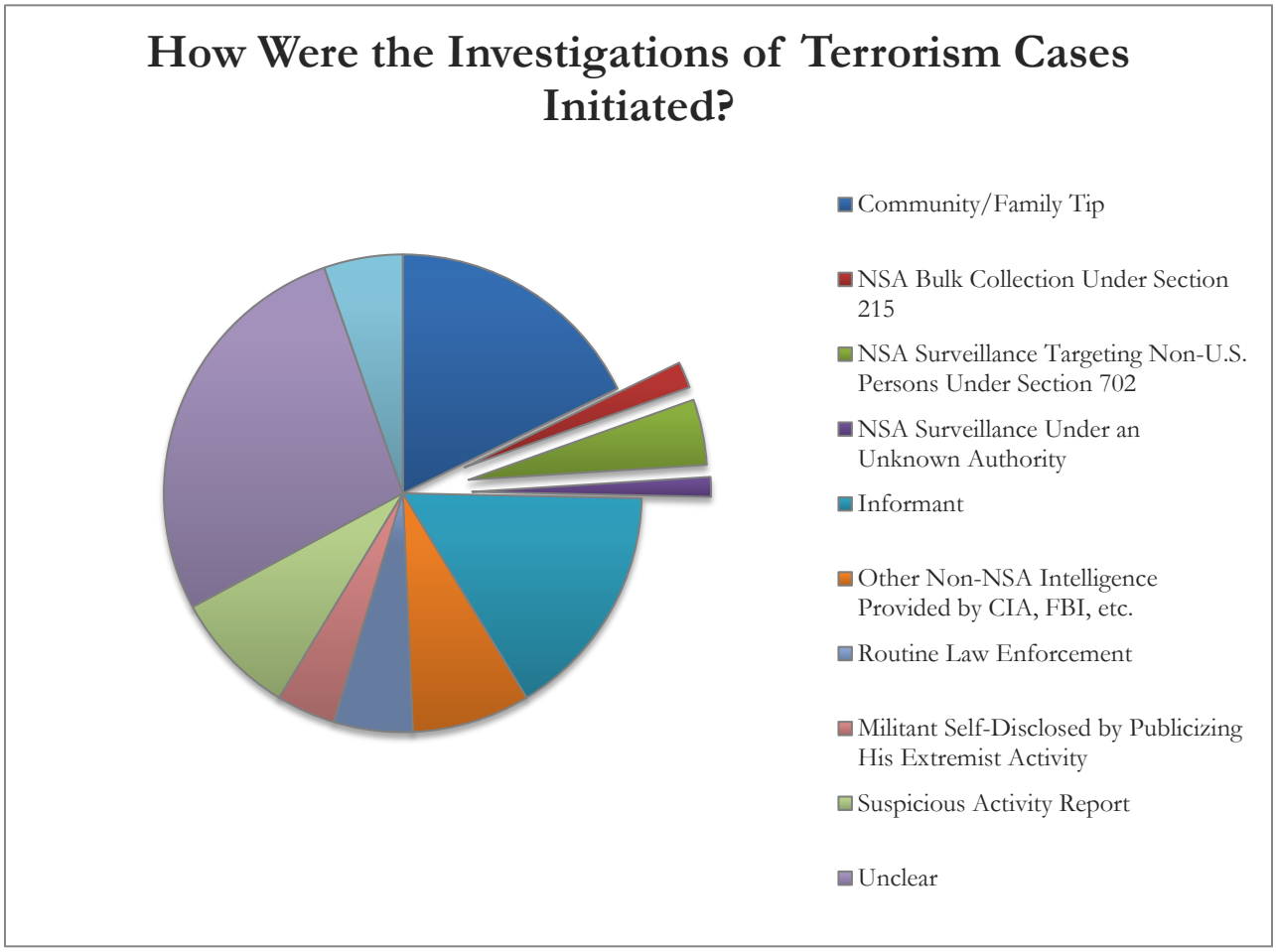
Findings

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.



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

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

B. 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.

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 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 in favor of an injunction against the NSA programs on December 16, 2013. He noted that the plaintiffs have a "substantial likelihood" of showing their privacy interests outweigh the Government's interest in the NSA's bulk collection of American telephone metadata, and therefore the NSA's

* 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.)

bulk collection program constitutes an unreasonable search under the Fourth Amendment.[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.

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 *Jyllands-Posten* in Copenhagen in 2009.	Government officials publicly claimed all of these cases as NSA bulk surveillance program successes under Section 702.
Najibullah Zazi, Zarein Ahmedzay, and Adis Medunjanin plotted to bomb the New York City subway system in 2009.	
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.

- **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 NASA [*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 or allegedly 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, allegedly 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 allegedly 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 allegedly 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 Vandenover, 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 UCE1, 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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