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Subject: In Holding NSA Spying Illegal, the Second Circuit Treats Data as Property  
Posted by [CyberkNight](#) on Mon, 11 May 2015 15:07:35 GMT

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The U.S. Court of Appeals for the Second Circuit has ruled that section 215 of the USA-PATRIOT Act never authorized the National Security Agency's collection of all Americans' phone calling records. It's pleasing to see the opinion parallel arguments that Randy Barnett and I put forward over the last couple of years.

Two points from different parts of the opinion can help structure our thinking about constitutional protection for communications data and other digital information. Data is property, which can be unconstitutionally seized.

As cases like this often do, the decision spends much time on niceties like standing to sue. In that discussion--finding that the ACLU indeed has legal standing to challenge government collection of its calling data--the court parried the government's argument that the ACLU suffers no offense until its data is searched.

"The Fourth Amendment protects against unreasonable searches and seizures," the court emphasized. Data is a thing that can be owned, and when the government takes someone's data, it is seized.

In this situation, the data is owned jointly by telecommunications companies and their customers. The companies hold it subject to obligations they owe their customers limiting what they can do with it. Think of covenants that run with land. These covenants run with data for the benefit of the customer.

Far later in the decision, on the other side of the substantive ruling that section 215 doesn't authorize the NSA's program, the court discusses the Supreme Court's 2012 Jones decision. Jones found that attaching a GPS tracking device to a vehicle requires a warrant.

<http://megalexoria.blogspot.com/2015/05/in-holding-nsa-spying-illegal-second.html>

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