President Signs PATRIOT Act Reauthorization Bill Lacking Civil Liberties Protections

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On March 9, 2006, the day before sixteen provisions of the PATRIOT Act were to expire, President Bush signed a PATRIOT Act reauthorization bill and a group of minor amendments, making most of the Act permanent without the modest but meaningful civil liberties protections that had enjoyed bipartisan support in the House and Senate.

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Last summer, the House and Senate passed different bills to reauthorize the PATRIOT Act. The Senate version was significantly better for civil liberties than the House version. However, when Congressional negotiators met to iron out their differences, they produced a weak combined bill that failed to contain the reforms in the Senate version.

That House-Senate "conference report" passed in the House but was blocked in the Senate last December when four Republican Senators (John Sununu (NH), Chuck Hagel (NE), Lisa Murkowski (AK) and Larry Craig (ID)) joined all but two Democratic Senators in a filibuster.

Last month, under tremendous pressure from the White House, the four Republican Senators agreed to support renewal of the PATRIOT Act with only minor changes to the conference report. Among the provisions in the PATRIOT Act as renewed:

- It still allows the government to obtain business records under Section 215 without showing that the target of the request is connected to terrorism.
- The recipient of a business records order under Section 215 can challenge the order in court and, after a year, can challenge the prohibition (the "gag") against disclosing the order. (Recipients probably already had the right to challenge both without waiting.)
- A judge can overturn the gag order upon finding there is no reason to believe that disclosure of the existence of the underlying records disclosure order may endanger national security or interfere with an investigation or diplomatic relations or endanger the life or physical safety of any person, but the government's certification that disclosure would endanger national security or interfere with diplomatic relations will be treated as conclusive unless made in bad faith.
- The Attorney General must adopt minimization procedures governing the retention and dissemination of information obtained under Section 215 business records orders, but it does not require minimization procedures for NSLs. It merely requires the Attorney General and

Director of National Intelligence to submit a report on the feasibility of applying minimization procedures to NSLs after the Inspector General of the Department of Justice conducts a study of how the government uses them.
- It clarifies that libraries are not subject to NSLs except to the extent they provide email access. Libraries are still subject to Section 215 business records orders, but the FBI Director must personally approve applications for disclosure of library records that identify a person.
- The FBI Director's personal approval is also required for disclosure of other records that would identify a person, namely bookstore records, records of firearms sales, and medical, tax and educational records.
- It specifies that notice of "sneak and peek" searches can be delayed for 30 days, a clear expansion of the limits that federal courts had deemed reasonable.
- It eliminates the catch-all provision ("unduly delay a trial") from the list of circumstances under which the government can conduct "sneak and peek" searches, but still allow these searches when notice to the target would "seriously jeopardize" an ongoing investigation.
- Three provisions are subject to a new four-year sunset--Section 215 business records orders, roving wiretaps, and the "lone wolf" provision, which applies the Foreign Intelligence Surveillance Act to non-US citizens who are not connected to foreign powers or terrorist groups.
- It allows roving wiretaps without requiring the government to identify the target of surveillance (the government instead can describe the specific target) and without requiring the government to ascertain that the target is using the equipment or facility before it begins monitoring.
- The government is required to provide after-the-fact notice to the court whenever a roving wiretap is directed at a new facility or place.
- It increases the duration of FISA surveillance orders and FISA pen register and trap and trace orders for non-US persons from 90 days to up to one year.
- It requires disclosure to the government of additional information under FISA pen register and trap and trace orders, including information about anyone communicating with the target of the order.
- It requires additional reporting to Congress on the use of certain PATRIOT Act powers.

The reauthorization also contains additional provisions relating to terrorism, such as an expansion of the offenses that constitute terrorist attacks, criminal penalties for those acts and additional predicates for criminal wiretaps.

Unfortunately, the reauthorization did not address major concerns with the PATRIOT Act, which still authorizes the government to obtain orders for the disclosure of records without showing a connection to a suspected terrorist, to issue National Security Letters without prior judicial approval, and to conduct "sneak and peek" searches of citizens' homes and businesses in ordinary criminal cases.

USA PATRIOT Improvement and Reauthorization Act of 2005
http://www.cdt.org/legislation/109/4#H.R.3199 [1]

USA PATRIOT Act Amendments Package (S. 2271) http://www.cdt.org/legislation/109/4#S.2271 [2]

More information on the PATRIOT Act: http://www.cdt.org/security/010911response.php [3]

(2) CDT Urges Senators to Support Specter Bill To Improve Checks and Balances

Senate Judiciary Committee Chairman Arlen Specter, who last summer led the Judiciary Committee's unanimous passage of the Senate version of PATRIOT Act reauthorization legislation, voted for the PATRIOT Reauthorization Act, but vowed to continue fighting for reforms. To that end, Senator Specter has co-sponsored a bill (S. 2369) that contains the civil liberties protections that were dropped from the bill signed by the President on March 9.

The Specter bill, which has the support of other Republican and Democratic Senators, would make the following improvements to the PATRIOT Act:

Section 215--FISA Business Records Orders:

Under Section 215 of the PATRIOT Act, the government can obtain secret court orders for disclosure of personal records held by any third party upon a mere showing that the records are relevant to an investigation to prevent against terrorism. The government is not required to show some connection, however tangential, between the records it seeks - including personal records like medical and insurance records - and a suspected terrorist. A connection to terrorism merely creates a presumption that the records sought are relevant.

Under the Specter bill, the FBI would retain the ability to obtain personal records of any kind, but it would have to make a factual showing of individualized suspicion that the records are connected to a terrorist suspect, the activities of a terrorist suspect or someone known to or in contact with a terrorist suspect. CDT believes this is a balanced approach: While the government should have the authority to obtain the records it needs to fight terrorism, it should not be allowed to sweep up information about innocent people. Specter's bill would strengthen the standard to ensure that the government will not engage in fishing expeditions.

In addition, the Specter bill would somewhat improve the ability of recipients of Section 215 orders to challenge the orders and the gag orders that accompany them. However, CDT has never found much comfort in the ability of recipients to challenge a 215 order, since the orders are usually directed at businesses that are unlikely to spend the time and money to challenge an order on behalf of an individual customer - especially since the business is immune from liability for compliance and the individuals whose privacy is really at stake are never told that their records have been disclosed to the government.

Sneak and Peek Searches:

The PATRIOT Reauthorization Act failed to include the Senate's limitations on so-called "sneak and peek" searches -- physical searches of homes and offices carried out without simultaneous notice to the homeowner or other person whose privacy is being invaded. Although some courts had allowed "sneak and peek" searches before the PATRIOT Act, they were constitutionally suspect and the courts had normally allowed the government to delay giving notice of the search for only 7 days. The Specter bill would codify the seven-day limit, subject to extensions when needed.

National Security Letters (NSLs):

The PATRIOT Reauthorization Act allows the FBI to continue issuing NSLs without judicial approval to obtain transactional records without any showing of any connection to a suspected terrorist, and it maintains the "relevance" standard that allows the government to conduct unchecked fishing expeditions that can sweep up the records of innocent Americans. The PATRIOT Act reauthorization law signed by the President actually expands the FBI's NSL power by giving the government the power to compel compliance with a court order and by creating a new crime, punishable by up to five years in prison, of willful disclosure of an NSL with intent to obstruct an investigation.

The Specter bill would improve the right to challenge the gag order that accompanies NSLs by eliminating the provision that makes the government assertion of danger to national security conclusive. As stated above, however, the right of the recipient to challenge the NSL and the gag order that accompanies the NSL is usually not a meaningful protection because the recipients (usually third-party entities) are not likely to spend the time or money to challenge either the underlying order or the gag order.

The Specter bill would also add a much-needed sunset to the NSL provisions, making them expire on December 31, 2009.

Specter Bill (S. 2369): http://www.cdt.org/legislation/109/4#S.2369 [4]

(3) Harman Bill Would Addresses Problems With National Security Letters

Too late to have any meaningful impact, the debate on the PATRIOT Act turned last year to National Security Letters (NSLs), which were vastly expanded under provisions of the original PATRIOT Act that were not subject to the sunset. NSLs, which are disclosure demands issued by FBI officials without judicial review, are used far more often that PATRIOT Section 215 orders and pose an even greater threat of unchecked power than some of the sunsetting provisions.

Therefore, CDT is urging Congress to take up H.R. 4570, legislation introduced in the House last December by Rep. Jane Harman (D-CA).

This legislation would require the government to show a connection between the records sought with an NSL and a terrorist or foreign power. In addition, it would require NSLs to be approved by the FISA court or a federal magistrate judge, would create an expedited electronic filing system for NSL applications, and would require the government to destroy information obtained through NSL requests that is no longer needed.

The Harman bill would also mandate more robust congressional oversight, requiring semi-annual reports to both the Congressional Intelligence and Judiciary Committees on all NSLs issued, minimization procedures, any court challenges and an explanation of how NSLs have helped investigations and prosecutions.

Harman NSL Bill (H.R. 4570): http://www.cdt.org/legislation/109/4#H.R.4570 [5]

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