House Patriot Act Bill Draws Broad Support On Account of National Security Letter Fix

by Greg Nojeim [1]
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A coalition of 20 civil liberties organizations, including the Center for Democracy & Technology, released a letter [2] today endorsing H.R. 3845, the USA Patriot Amendments Act. The bill was introduced by the Chairman of the House Judiciary Committee, Rep. John Conyers (D-MI) and Subcommittee Chairs Rep. Jerrold Nadler (D-NY) and Rep. Bobby Scott (D-VA). The Senate version of the legislation, the PATRIOT Act Sunset Extension Act, S. 1692, has not drawn a similar level of support in the civil liberties community, largely because of the different ways the bills deal with National Security Letters. CDT has prepared a chart [3] that compares the two bills.

An NSL is a simple form document issued by the FBI and other intelligence agencies that requires Internet Service Providers, banks and other financial institutions, and credit agencies to turn over records about their customers. There is no judicial authorization; the letters are issued when the agency seeking the records decides that they are relevant to its own investigation. The letters are usually accompanied by a “gag” order that, with limited exceptions, bars anyone from disclosing that information was sought or obtained with an NSL. Two Inspector General reports have found widespread abuse and misuse of NSLs.

The bill the groups endorsed would require that NSLs issue only when a government official has prepared a statement of specific and articulable facts showing reasonable grounds to believe that records sought with an NSL pertain to a spy, terrorist or other agent of a foreign power. It also retains the requirement in current law that information sought with an NSL also be relevant to an investigation. The Senate version, in contrast, retains the relevance standard, which permits the government to issue the letters to get records about everyone, including those who have no relationship whatsoever to a terrorist or a spy. Under the Senate bill, the issuing agency merely has to satisfy itself that specific facts indicate that the records sought are relevant to an investigation. The requirement in both bills of specific facts showing relevance is new, and marks a slight improvement in the NSL standard. But the real reform is in the House bill, because it requires that the records pertain to a terrorist or spy.

Because the Patriot Act removed the agent of a foreign power requirement for NSLs, two troubling trends have developed. Prior to the Patriot Act, most records sought with NSLs pertained to foreign visitors to the U.S., to undocumented immigrants, and to foreigners abroad. Today, most records sought with NSLs pertain to citizens of the U.S. and to lawful permanent residents. Even more troubling, the Inspector General found that records are being obtained about people who are 2-3 steps removed from the target of the investigation. A return to the agent of a foreign power standard, as would be required in the House bill, would likely arrest both trends.

The 20 civil liberties groups endorsing the House bill said that it would “help restore checks and balances without blunting surveillance tools that can help keep Americans safe.” They pointed out that the legislation not only raises the standard for issuing in NSLs, but also for pen register and trap and trace orders, which give law enforcement and intelligence agencies real time access to email to/from information and numbers dialed on a telephone.

The organizations also pointed out that the House bill would limit the “sneak and peek” warrants authority – also created in the Patriot Act – to cases where contemporaneous notice of a search would endanger a person or result in evidence tampering, flight from prosecution, or witness intimidation. The bill eliminates the “catch all” provision that would permit the government to delay notice any time contemporaneous notice would damage an investigation. Though justified as an anti-terrorism tool in 2001 when it was adopted, sneak and peek warrants are used overwhelmingly in drug related cases; they have been used in terrorism cases only a handful of times.

One shortcoming of the House bill identified by the civil liberties groups is its failure to include a meaningful fix the Section 215 of the Patriot Act, the “library records provision.” Under this provision, the government can secure a court order that gives it access to “any tangible thing” held by any person or business if facts indicate that the thing sought is relevant to an investigation. The House bill slightly raises the standard, — as does the Senate bill – but neither takes the critically important step of requiring that the records sought pertain to terrorist or spy or other agent of a foreign power, or to someone with ties to such a person.

The House bill is currently on track to be marked up at the House Judiciary Committee on Wednesday, November 4.

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- Patriot Act
- NSL
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