Patriot Act Sunsets Should Prompt Re-Consideration of Anti-Terror Powers; Adjustments Needed To Protect Civil Liberties

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1) Patriot Sunsets Should Prompt Broad Examination of Intelligence Authorities, with a Focus on Documented Abuses

With letters to Congress this week, the Obama Administration kicked off a debate on the reauthorization of three intelligence surveillance provisions related to the USA PATRIOT Act. The Administration called for all three provisions to be renewed but, in an important development, it said it was willing to consider amendments to the expiring provisions that would protect civil liberties, provided the amendments don't undermine the provisions' effectiveness.

The three sunsetting provisions deserve attention, but their expiration at the end of this year should prompt Congress to begin a broader examination of surveillance authorities granted in the aftermath of the September 11, 2001 terrorist attacks. This examination should focus on powers that have been abused even if those powers do not sunset. Because it is well documented that the FBI has abused its authority to use National Security Letters to obtain business records, Congress should make reform of NSL authorities its first priority, even though the NSL provisions do not expire. Focus on NSLs is further justified because, as we explain below, they are closely related to one of the expiring provisions of the Patriot Act (Section 215 orders) and it would make little sense to add civil liberties protections to Section 215 without addressing NSLs.

This Policy Post provides an overview of the provisions that expire, explains why Congress should focus on reform of NSL authorities, and closes with an explanation about what to expect as the legislative process unfolds.

Congress passed the Patriot Act (Pub. L. 107-56) just a few weeks after 9-11. The law expanded the government's authority to conduct intelligence surveillance in the United States and to access records about individuals, including citizens. Because many members of Congress were concerned about the scope of the powers being conferred in the bill and because it was enacted in great haste, 16 of its surveillance provisions were made subject to a "sunset" clause, meaning they would expire in four years unless reauthorized by Congress. In March 2006, all of the expiring provisions were reauthorized, some with amendment, in the USA PATRIOT Improvement and Reauthorization Act of 2005 (Pub. L. 109-177). Still not fully satisfied, Congress extended the sunsets on three authorities: Patriot Act Section 206 (roving intelligence wiretaps), Patriot Act Section 215 (access to business records), and Section 6001 of the Intelligence Reform and Terrorism Prevention Act (Pub. L. 108-458)

(lone wolf terrorists). These are the three provisions that will expire on December 31, 2009 unless Congress acts to reauthorize them.

Administration letter to Sen. Leahy [1] (September 15, 2009)

The USA PATRIOT Act [2]

USA PATRIOT Improvement and Reauthorization Act of 2005 [3]

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2) Most Expiring Provisions Should Be Amended and Reauthorized

The first thing to know about the three sunsetting provisions is that they are not the most troubling provisions associated with the Patriot Act. Also, they pale in comparison to the changes to the Foreign Intelligence Surveillance Act that were made last year, in the FISA Amendments Act, which responded to President Bush's warrantless surveillance program. Nevertheless, the sunsetting provisions deserve some attention. In CDT's view, two of the three expiring provisions - Section 215 and roving wiretaps - should be reauthorized with amendments to protect civil liberties. The Obama Administration revealed this week that the "lone wolf" terrorist provision has never once been used. In light of this, and of the availability of criminal wiretap authority for surveillance of lone wolf terrorists, this provision should be allowed to expire.

Summary of Section 215: Section 215 of the Patriot Act, as amended, permits the FBI to obtain a court order requiring anyone to produce any "tangible thing," including business records and other documents, relevant to any investigation to protect against international terrorism or clandestine intelligence activities. If the tangible things sought pertain to a non-U.S. Person (someone who is neither a U.S. citizen or lawful permanent resident), the standard is lower: the investigation need only be commenced in order to obtain foreign intelligence information, regardless of any tie to terrorism. Prior to the Patriot Act, this authority was much more limited: information could be sought only about a person who was believed to be an agent of a foreign power and only certain categories of information could be obtained, notably information about travel, car rental, and storage facilities. The Patriot Act eliminated those limitations. It also imposed a strict "gag order," which, with limited exceptions, bars "any person from disclosing to any other person" that the FBI has sought or obtained materials under this section. The 2006 amendments added back some standards, requiring the government to include a statement of the facts that establish reasonable grounds to believe that the tangible things sought are relevant to an investigation and providing a limited right to appeal an order.

The Administration revealed this week that Section 215 was used 220 times from 2004 to 2007; 173 of those were in situations where a 2006 change in the law now makes use of 215 unnecessary.

Proposed Changes to Section 215: While it is appropriate for the government to have judicially-supervised authority to obtain business records for intelligence purposes, the standards for obtaining an order for such records should be tightened and the gag on those who receive Section 215 orders should be loosened. In terms of the standard for obtaining an order, to prevent fishing expeditions the government should be required to make some minimal showing that the person whose records are sought is an agent of a foreign power or someone with strong ties to such an agent. In addition, the gag provision, which may be unconstitutional, should be amended to limit the circumstances under which a gag is imposed and to establish procedures for removing any gag that is imposed. Finally, because the changes we propose to National Security Letter authority would likely channel more business records requests to Section 215, Congress should look for ways to streamline the process the FBI currently uses to apply for Section 215 orders.

Summary of roving intelligence wiretapping provision: Roving wiretaps allow the FBI to obtain authorization to tap a target's communications regardless of the device the target uses. Thus, if a target uses multiple disposable cell phones, the FBI does not have to return to court to get a new wiretap order each time the target abandons one disposable phone and picks up another. However,

FISA's roving wiretap provision, as added by Section 206 of the Patriot Act, and as amended by Section 314 of the Intelligence Authorization Act for FY 2002 (Pub. L. 107-108), permits the government to obtain a FISA surveillance order without specifying either the person who is the target of surveillance or the facility (the phone number, email address, IP address etc.) to be surveilled. As a result, FISA's roving wiretap provision apparently allows the government to obtain "John Doe" surveillance orders of unnamed persons using unspecified facilities, which can be served on unnamed communications service providers. Such an order would be so lacking in specificity that it would seem to be unconstitutional. In contrast, the comparable roving surveillance authority for criminal investigations clearly requires the government o specify either the person or the facility that is to be surveilled.

Proposed changes to roving intelligence wiretapping provision: The FBI should have roving wiretap authority for intelligence surveillance so that it does not have to obtain a new order when a target changes cell phones. However, the Patriot Act provision should be amended to make it clear that roving wiretap applications and orders must specify either the target or the facility to be surveilled, as is required for roving wiretaps for criminal purposes. The Administration's recent letter describes the use of the roving tap authority only in situations in which the target is known, so such an amendment would not seem to deprive the government of any technique it uses, but clarifying the law could prevent future abuse. The provision should also be amended to require that government agents ascertain that the target is actually using a particular facility before the listening device is turned on. This safeguard is required for bugs used under the criminal wiretapping provision. The Administration's letter indicates that its practice in the FISA context is also to ascertain that the target is using a particular facility before turning on the tap, but this should be made an explicit requirement of the statute.

Summary of the "lone wolf terrorist" provision: This provision for the first time permitted the government to conduct FISA intelligence surveillance of individuals in the United States even if they are not suspected of being a member of a terrorist group. This was a significant departure from the original justification for FISA: that foreign powers (including international terrorist groups) pose a special threat such that their agents should be eavesdropped upon in the U.S. even if they were not engaging in a crime, to gather foreign intelligence that could help secure the nation. All other electronic surveillance is justified by the need to investigate crime. The lone wolf authority permits intelligence surveillance of non-citizens who are not suspected of being affiliated with any group. Under the lone wolf authority, non-citizens who are in the United States temporarily or without authorization can be subjected to electronic surveillance under FISA if there is probable cause to believe that they are engaged in international terrorism or in activities in preparation therefore.

For the first time, the Administration reported this week that the lone wolf provision has never been used, posing the question of whether it is needed at all. If it were to be used, the practical significance it would have is unclear. Since all "international terrorism" as defined under FISA involves criminal activities that are probably already wiretap predicates under the law for wiretaps in criminal cases, the main effect of this provision may be to authorize the government to conduct under the greater secrecy and longer timeframes of FISA the same surveillance that could be conducted under the criminal wiretap law. Another effect, however, may be to expand surveillance authority to any "activities in preparation for" crimes of terrorism that are not themselves criminal.

Proposed changes to "lone wolf" provision: In its letter acknowledging that the lone wolf authority has never been used, the Administration offers hypotheticals in which it might be useful sometime in the future, but even those situations would seem to fit under the criminal wiretap statute. The Administration's letter does not explain why intelligence, as opposed to criminal surveillance authority must be used to in the hypothetical situations it outlines. In light of these facts, absent any additional public justification for the lone wolf provision, Congress should allow it to expire.

CDT Testimony on Reform of the Patriot Act [4], Including Section 215 (May 11, 2005)

ABA "Patriot Debates" on Roving Wiretaps, [5] with analysis of roving taps by CDT's Jim Dempsey (June 25, 2005)

ABA "Patriot Debates" on Lone Wolf surveillance [6] (June 25, 2005)

3) Reform Should Start with Powers That Have Been Abused: National Security Letters

While Congress should fix the expiring provisions of the Patriot Act, it should focus most of its energy on strengthening the standards for issuing National Security Letters and on amending the gag that prohibits NSL recipients and others from talking about them. This should be a higher priority for three reasons: (1) unlike the three expiring provisions, NSLs are issued without prior judicial authorization; (2) while the expiring provisions are infrequently used, the FBI yearly issues tens of thousands of NSLs; (3) the DOJ's own Inspector General found that the NSL provisions have been abused on a large scale. Moreover, the gag that accompanies most NSLs has been ruled unconstitutional, and this alone should spur Congress to reform these statutes.

NSLs are simple form documents signed by officials of the FBI and other agencies to compel disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet Service Providers. They can be issued under five different statutes. The Patriot Act weakened the standard for issuing NSLs by eliminating the requirement that the records sought pertain to an agent of a foreign power, by eliminating the requirement that agents provide a factual basis for seeking the records, and by permitting FBI field offices to issue the letters, instead of limiting issuing authority to FBI headquarters. The Intelligence Authorization Act for FY 2004 (Pub. L. 108-177) expanded the types of entities on which NSLs could be served to include travel agencies, real estate agents, jewelers, the Postal Service, insurance companies, casinos and car dealers. Finally, the 2006 legislation that reauthorized the expiring provisions of the Patriot Act gave the government the power to compel record holders to comply with NSLs and imposed criminal penalties of up to five years in prison for willful disclosure of an NSL with intent to obstruct an investigation.

The DOJ Inspector General has issued two reports on NSLs, finding that the FBI:

- Issued NSLs when it had not even opened the investigation that is supposed to be the pre-condition for issuing an NSL;
- Used "exigent letters" not authorized by law to quickly obtain information without ever issuing the NSL that it promised to issue to cover the request;
- Has used a single NSL to obtain records about thousands of individuals;
- Used NSLs to circumvent adverse rulings of the FISA Court; and
- Retains almost indefinitely the information it obtains with an NSL, even after determining that the subject of the NSL is not suspected of any crime and is not of any continuing intelligence interest, and makes the information widely available to thousands of people in law enforcement and intelligence agencies.

The Inspector General also found that while NSLs prior to the Patriot Act were used primarily to obtain records about non-U.S. Persons, today they are used primarily to obtain records about U.S. citizens and lawful permanent residents.

While NSL authorities do not expire this year, Congress should address NSLs in any legislation passed to reauthorize the expiring provisions of the Patriot Act. It should permit the government to continue to use NSLs to obtain less sensitive information, such as a person's name, address, email address, phone number and other identifying information. However, Congress should raise the standard for issuing an NSL to require some tie between the person whose records are sought and a foreign power or agent of a foreign power. Moreover, it should prohibit use of NSLs for more sensitive information, such as financial records, email to/from information, and local and long distance telephone records. Instead, such information should be available to the FBI under other authorities involving more checks and balances, such as a Section 215 or other court order, or a subpoena. It should also amend the gag provision to bring it in line with the First Amendment. Finally, Congress should subject NSL authority to a sunset to prompt it to re-visit these statutes and assess the effect of the changes it makes.

CDT Testimony on National Security Letters [7] (April 23, 2008)

Inspector General Reports on NSLs
March 2007 [8]
March 2008 [9]

Court Opinion Finding NSL Gag Order Unconstitutional [10] (December 15, 2008)

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4) What's Next In Congress for the Patriot Act?

The Administration's statement of its position on the expiring provisions comes late in the year. The Senate Judiciary Committee chairman announced that he will hold a hearing next week on the sunsetting provisions, and the House Judiciary Committee is also likely to hold a hearing in the same week. Meanwhile, Senators Feingold and Durbin have said that they plan to introduce legislation that would restore checks and balances on a number of powers that have grown since 9-11. The intelligence committees in both houses of Congress share jurisdiction with the Judiciary Committees over the Foreign Intelligence Surveillance Act and therefore would have a claim over any amendments to the sunsetting provisions.

The Administration's statement that it would consider amendments to the sunsetting provisions is a welcome development. The spirit of that statement should extend to the NSL authorities as well. President Obama, while serving in the U.S. Senate, co-sponsored the NSL Reform Act, which contains, in substance, the changes to the NSL statutes and to Section 215 that are outlined above. He also co-sponsored the SAFE Act, which contains the roving wiretap changes outlined above.

Dealing with the sunsetting provisions and NSL reform, plus perhaps other Patriot provisions, will keep Congress fully occupied this year. However, at some point, Congress should begin to bring public scrutiny to other intelligence surveillance authorities that do not sunset. Most importantly, it should examine implementation of the FISA Amendments Act of 2008, which poses civil liberties concerns that are much more significant than those posed by the expiring provisions. Congress should determine how the 2008 Act is being interpreted, whether it is being used to permit bulk collection of Americans' international communications with people who are abroad, and how FISA should be amended to permit defendants to challenge the lawfulness of surveillance used against them in criminal prosecutions. It should also consider amendments to the "sneak and peek" warrant provisions of the Patriot Act, which were justified as anti-terror tools, but that are used primarily in drug investigations. It should also require additional public reporting about the uses of intelligence surveillance powers.

S. 2088, The NSL Reform Act in the 109th Congress [11]

S. 737, The Security and Freedom Enhancement (SAFE) Act in the 109th Congress [12]

Statement of Senators Feingold and Durbin [13] (August 6, 2009)

Links:
[1] http://www.cdt.org/security/20090914_leahy.pdf
[2] http://www.gpo.gov:80/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf
[3] http://www.gpo.gov:80/fdsys/pkg/PLAW-109publ177/pdf/PLAW-109publ177.pdf

[4] http://www.cdt.org/testimony/20050511dempsey.pdf
[5] http://www.abanet.org/natsecurity/patriotdebates/206-2#opening
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