

USA PATRIOT Act: What's Next?

By George H. Pike*

After nearly a year of proposals and counter-proposals, two extensions, and ongoing behind the scenes negotiations, Congress passed two bills renewing the USA PATRIOT Act. President Bush signed the legislation only hours before the Act was set to expire.

The USA PATRIOT Act was enacted weeks after the September 11, 2001 attacks as a response to concerns about breakdowns in intelligence gathering that may have contributed to the attack. In particular, Congress and the Bush Administration were concerned that existing statutes had not evolved enough to respond to new communication technologies such as cellular telephones, electronic finance and banking and the Internet.

There was also concern that intelligence and criminal investigation agencies were unable (or unwilling) to exchange information. The 9/11 Commission noted a number of breakdowns in the exchange of information even within the FBI. Three months prior to 9/11, an FBI agent investigating the attack on the *U.S.S. Cole* obtained information about one of the 9/11 hijackers. However, that information was not shared due to real or perceived “need to know” barriers.

Breaking down barriers

The Act was intended to break down those barriers and respond to new communication technologies in a number of ways. In summary it broadened the definition of terrorism, permitted extensive sharing of intelligence information, made it easier to obtain warrants to conduct intelligence investigations, increased the secrecy relating to search warrants, and expanded the scope of information that could be obtained. Because in part of its haste in passing the Act, Congress provided that many—but not all—of the PATRIOT Act’s provisions were to expire on December 31, 2005.

While acknowledging that breakdowns contributed to 9/11, the PATRIOT Act also generated opposition. Critics charged that many of its provisions threatened civil liberties and constitutional rights including the right to free speech and protections against warrantless searches. Among the most criticized were provisions allowing for “sneak and peak” warrants—issued secretly and with no notice until after the search is completed—and expansions in the use of National Security Letters (NSLs)—demands for certain records issued without a warrant. Of most concern to librarians and others in the information industry was Section 215 of the Act, which expanded the definition of business recorders that could be obtained under a secret warrant to include “any tangible things”—a broad definition that would include records from libraries and bookstores.

These criticisms were contrasted by expressions from the Bush Administration and the Act’s supporters that the Act was necessary, that it was working, and that the concerns about civil liberties were misplaced. In Congressional testimony, it was noted that investigations under the Act had broken up several potential terrorist threats. Justice

Department officials also said that there had been very few verified complaints about abuses of civil liberties, and that Section 215 had never been used to access library records. In the words of former Attorney General John Ashcroft, the Justice Department has neither, “the time nor inclination to monitor the reading habits of Americans. . . .No offense to the American Library Association, but we just don’t care.”

The renewal debate

Against this backdrop, Congress took up renewal of the PATRIOT Act through the summer and fall of 2005. Although a consensus developed quickly on a number of the more non-controversial provisions, a joint House and Senate Conference Committee’s proposal was unable to overcome a filibuster over civil liberties concerns. After two extensions to maintain the status quo, a second compromise was ultimately hammered out and approved.

So after months of debate and discussion, the Act continues as the law of the land. There were, however, a number of changes that make the new version substantially different from the old version.

The new laws made all but two of the PATRIOT Act provisions permanent. Section 215 dealing with business and library records and Section 206 dealing with roving wiretaps were extended to December 31, 2009.

Changes to Section 215

Several changes were made to Section 215 in order to address concerns about the threat to civil liberties. First, the standard for obtaining a warrant was changed. (The warrant is obtained from a specific federal court empowered to issue warrants in secret and only for intelligence gathering purposes.) The request must be approved by the FBI Director or Deputy Director, and must show that the material is “relevant to an authorized investigation...to protect against international terrorism.”

The recipient of a Section 215 request may also disclose the request to an attorney and may challenge the request in a special federal court procedure. However, the other secrecy provisions of Section 215 remained intact.

The second compromise added a new provision that would permit the recipient of a Section 215 order to challenge the secrecy provisions after one year has passed. The challenge is made in the same kind of special federal court proceeding and may be granted only if the court finds no reason to believe that disclosure would threaten national security, or interfere with an ongoing investigation. However, the same compromise gave the Justice Department or FBI the right to “certify” that disclosure would be harmful. If the certification is made in good faith, the court must consider that to be conclusive and enforce the secrecy provision.

National Security Letters

NSLs also figured prominently in the PATRIOT Act renewal legislation. An NSL can be issued by the FBI to specific individuals or businesses and request specific information. NSLs have been used primarily to obtain information from “electronic communication service” providers about subscribers. According to an October 2005 lawsuit, at least one NSL was issued to a person identified as a “member of the American Library Association.”

The NSL provisions were modified somewhat by the renewal legislation. An NSL recipient may petition their local federal court for an order to modify or set aside the NSL. The secrecy provisions remain largely intact—including the threat of criminal charges for unauthorized disclosure—but the NSL can be disclosed to an attorney and the NSL recipient does not have to disclose the name of the attorney to the FBI. In addition, there are new provisions providing for increased internal auditing and external reporting to Congress on the use of NSLs.

The second compromise also provide specific language stating that a library that provides access to the Internet or digital databases is not an “electronic communication service provider” under the NSL statutes. This should prevent most libraries from receiving NSLs to disclose information about Internet or database use by patrons. However, if a library acts as an “Internet Service Provider”, they would be subject to NSLs. Some library consortiums provide Internet access to their members and could be considered electronic communication service providers.

More changes still needed?

There were other changes to the PATRIOT Act as well. The Justice Department pointed out 30 new provisions alone with they indicate serve to protect privacy and civil liberty. However, critics continue to contend that the changes do not go far enough. Sen. Russ Feingold, D-Wis, and the American Library Association continue to recommend that Section 215 be strengthened further to establish a tighter connection to specific terrorist threats before records could be obtained. NSLs remain very easy to obtain and subject to extensive secrecy. Finally, the provision for getting a court order to permit disclosure of a Section 215 order after one year is very weak.

Will passage of the PATRIOT Act reauthorizations end the debate now that most of the Act is “permanent”? Probably not. Any law can be changed at any time and already, additional legislation to target these issues is being proposed. Finally, the sunset provisions that remain in the Act mean that this debate will take center stage again in three-and-a-half years.

History’s paradox

But history provides an interesting paradox on whether the conditions which provoke civil liberties concerns will change. It has not been uncommon for civil liberties to be curtailed in times of national security threat. The Civil War, World War I, and World

War II all led to suspensions of constitutional rights. However, in each case, those suspensions ended when the wars ended. The “war on terrorism”, however, is different. There is less likelihood of an “Armistice Day” or “V-E Day” establishing a clear end to the war on terrorism. And if there is no clear end to the war, it will be difficult to end the threat to civil liberties.

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