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Real Reform for the PATRIOT Act?

The Senate is reviewing Bush-era surveillance powers set to expire at the end of the year. This could be the moment to revise the whole architecture of post-9/11 spying law.

JULIAN SANCHEZ | *October 1, 2009* | web only



Sen. Patrick Leahy, right, and Sen. Russ Feingold. (AP Photo/Dennis Cook)

George W. Bush may have left D.C., but the vast surveillance machine he spent eight years building via the PATRIOT Act hums merrily along. Whether or not that continues could well be determined today, as the Senate Judiciary Committee meets to mark up legislation renewing a series of PATRIOT Act powers due to expire at the end of the year. Barack Obama's Justice Department has said it's open to "modifications" of the **expiring powers** -- but some Democratic legislators see an opportunity to revisit and revise the whole architecture of post-9/11 spying law.

If history is any guide, press attention will focus overwhelmingly on a **proposal** to repeal the controversial immunity Congress **retroactively granted** to telecoms that participated in the National Security Agency's extralegal program of warrantless wiretaps. Far more consequential for the privacy rights of Americans, however, are two surveillance powers that would finally be subject to reasonable limits by the ambitious **JUSTICE Act**, sponsored by Sen. Russ Feingold, a Democrat from Wisconsin: **National Security Letters** and the sweeping wiretap authority granted by the **FISA Amendments Act**. Today's markup will focus on a far more modest renewal and reform bill sponsored by Sen. Patrick Leahy, a Democrat from Vermont and the commission's chair, but civil libertarians are hoping elements of Feingold's more sweeping effort will make it into the text ultimately sent to the full Senate. Of all the vital privacy safeguards Feingold has proposed, the provisions fixing NSLs and the FISA amendments are probably the most important.

Once upon a time, National Security Letters were an important but narrowly limited investigative tool. They were designed to permit investigators to obtain very basic information about customers from financial institutions and telecom providers without having to obtain a full-blown search warrant.

After 9/11, however, Congress turned the NSL into a blank check, massively expanding the range of businesses from which records could be sought and the types of information that could be obtained.

As David Kris, now Obama's assistant attorney general for national security, explained in his book on national-security investigations, current law "allows the government to use an NSL to request almost any record concerning a customer from traditional financial institutions (such as banks) as well as from virtually any commercial or government entity that handles cash transactions with customers." No judicial approval is necessary, and the people whose records are handed over need not be suspected of any wrongdoing: The FBI just needs to deem the records "relevant" to an investigation. NSLs

typically come with hard-to-challenge gag orders that prevent the businesses served from ever talking about them -- orders that courts have **found** raise serious First Amendment concerns.

It should come as no surprise that such broad power has given **rise** to abuses. An **investigation** by the department's inspector general found endemic misuse of NSL powers, including the improper use of "exigent letters" when no true emergency existed. In at least one case, the FBI sought records by court order, was rejected, then turned around and obtained the records anyway using an NSL. As the FBI itself admits, the letters are most frequently used in the early phases of an investigation to "close down leads," suggesting that many -- perhaps most -- of the people investigated are innocent of any wrongdoing.

In 2008, the Bureau **issued** 24,744 of those letters and obtained information about 7,225 Americans -- assuming that they've managed to start providing accurate data to Congress, something else the inspector general found they had trouble with. (That number is down from an astonishing 2004 peak of more than 56,000 letters issued.) But at least they're getting rid of all those innocent people's information once they're cleared of suspicion, right? Not a chance. The FBI **maintains** a vast database that now houses over 1.5 billion government and private-sector records, on the theory that all that data can be "mined" to spot suspicious patterns.

The Leahy bill would at least require something a bit more substantive than a vague assertion of "relevance" before an NSL could be used: Anyone thought to have any direct contact with a suspected terrorist would still be fair game, but six-degrees-of-separation fishing expeditions would be barred. Feingold's proposal goes further, restoring NSLs to their original purpose of obtaining basic, nonsensitive data, and requiring investigators to seek an order from a judge when they want to dig deeper.

Entirely absent from Leahy's bill is any mention of the FISA Amendments Act, which gave the attorney general sweeping discretion to authorize broad programs of electronic surveillance "directed at" foreign targets, subject to only the most anemic judicial oversight. The bill permits the NSA to conduct broad "vacuum cleaner" surveillance of international communications -- to suck up the haystack and sift it for needles later -- including Americans' communications with people overseas. Earlier this year, *The New York Times* **reported** that the agency was having trouble staying within even these incredibly capacious limits: Intelligence officials say there has been a "significant and systemic" problem with the "overcollection" of Americans' purely domestic communications.

The JUSTICE Act would shut off the vacuum cleaner, prohibiting "bulk collection" and requiring that wiretaps record only communications where at least one party is an actual target. It would also strengthen the prohibition on "reverse targeting" to ensure that eavesdropping nominally "directed at" an overseas target could not be used as a pretext to spy on Americans. Perhaps most important, it would require that conversations between Americans and people abroad be collected only when there was some specific reason to believe the particular communication was related to terrorism.

Civil liberties advocates have **hastily revived** a campaign to support commonsense limits on government surveillance, but with health-care reform dominating headlines and anxieties about the Bush administration's excesses fading like the memory of a bad dream, precious little attention is being paid to the PATRIOT renewal debate. But if the Senate declines to press for real reform this week, the issue is unlikely to be taken up again for at least another four years -- during which those new powers will only become more entrenched, more heavily relied upon, and more difficult to roll back. It's no exaggeration to say that today may well be the most important day of the Obama administration for privacy and civil liberties -- or the biggest squandered opportunity.



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