

ON PATRIOTS AND JUSTICE: LEAHY'S PATRIOT RENEWAL

The House and Senate had hearings on the reauthorization of the PATRIOT Act last week while I was traipsing around the Big City. You can access links to watch the Senate hearing [here](#) and the House hearing [here](#). In addition, four Senators (including Feingold, Dodd, Leahy and Merkley) have introduced a bill to repeal telecom immunity, and Senators Feingold and Durbin introduced a JUSTICE bill to further roll back the PATRIOT Act as well as parts of FISA.

I'm going to try to do a blizzard of posts between now and Thursday, when the Senate Judiciary Hearing will be marking up its version of the bill. For now though, let me review what Leahy's reauthorization bill—S.1692—does. As described by Leahy in his testimony, the PATRIOT reauthorization extends the sunset for some PATRIOT provisions to 2013, but adds in additional oversight as follows.

I introduced a bill with Senators Cardin and Kaufman that aims to strike the kind of balance the administration urges. It will extend the authorization of the three expiring provisions with new sunsets. It adds checks and balances by increasing judicial review of Government powers that capture information on U.S. citizens. It expands congressional oversight and public reporting on the use of intrusive surveillance measures.

[snip]

In response to these concerns, our bill would impose higher standards on the issuance of NSLs and improve judicial oversight of their use. The bill also addresses the constitutional deficiency recently identified by the Second Circuit Court of Appeals, which found

that the nondisclosure, or "gag orders," issued under NSLs infringe constitutional rights, as I have long maintained. The bill establishes a procedure giving the recipient of an NSL greater ability to challenge a gag order, eliminates presumptions that allow the Government to ensure itself of victory in defending such orders, and imposes a renewable one-year time limit on these orders.

[snip]

The power of the Government to collect records for tangible things under Section 215 of the original Patriot Act, commonly referred to as the "library records" provision, is another authority that I fought hard to reform during the last reauthorization. The Leahy-Cardin-Kaufman bill adopts the appropriate constitutional standard that I supported in 2006. The standard we propose eliminates the presumption in favor of the Government and, instead, requires the Government to show the connection between the items sought and a suspected terrorist or spy.

This bill would also establish more meaningful judicial review of Section 215 orders and the gag orders covering them. It repeals the requirement in current law that requires a recipient of a Section 215 nondisclosure order to wait for a full year before challenging that gag order. It also repeals the conclusive presumption in favor of the Government for such gag orders any time a high-level official certifies that disclosure of the order would endanger national security or interfere with diplomatic relations.

[snip]

The Leahy-Cardin-Kaufman bill also

improves Government accountability through more transparent public reporting of the use of surveillance, and by requiring audits of how these vast authorities have been used since they were last reauthorized.

[snip]

This bill will strengthen court oversight of Section 215 orders by requiring court oversight of minimization procedures when information concerning a U.S. person is acquired, retained, or disseminated. Requiring FISA Court approval of minimization procedures would simply bring Section 215 orders in line with other FISA authorities – such as wiretaps, physical searches, and pen register and trap and trace devices – that already require FISA court approval of minimization procedures. This is another common sense modification to the law that was drafted in consultation with Senators Feingold and Durbin. If we are to allow personal information to be collected in secret, the court must be more involved in making sure the authorities are used responsibly and that Americans' information and personal privacy are protected.

Finally, this bill addresses concerns over the use of pen register or trap and trace devices ("pen/trap"). The bill raises the standard for pen/trap in the same manner as it raises the standard for Section 215 orders. The Government would be required to show that the information it seeks is both relevant to an investigation and connected to a suspected terrorist or spy. This section also requires court review of minimization procedures, which are not required under current law, and adds an Inspector General audit of the use of

pen/trap that is modeled on the audits of Section 215 orders and NSLs.

The NSL—or National Security Letter—allows law enforcement officers to get certain kinds of financial records. NSLs do not require court review.

Section 215 allows law enforcement officers to get tangible things—be they library records or any other tangible thing—with court review. Both NSLs and Section 215 orders include a gag order, so the recipient cannot reveal they have received such an order.

So to summarize, the Leahy bill (which is co-sponsored by Ben Cardin, Ed Kaufman, and Bernie Sanders) would do the following:

- Extend the roving wiretap, Section 215 (tangible things), and "lone wolf" provisions of the PATRIOT Act to 2013
- Mandate further audits of some of these provisions, such as the use of pen registers
- Give the Court oversight over the minimization procedures for the use of Section 215 and pen register and trap and trace devices
- Require that Section 215 and pen registers only be granted if authorities can show that the requested information has ties to terrorism
- Gives recipients of NSLs and Section 215 orders greater

means to appeal the gag
order associated with it

This seems to be the starting point, with
Leahy's bill (co-sponsored by Joe Biden's sit-
in) to apparently form the model for the
PATRIOT renewal going forward.