The Patriot Act and Middle Eastern Terrorists

by **Michael Jacobson (/experts/michael-jacobson)**

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Brief Analysis

FBI officials recently announced that they are trying to retrace the steps of Dhiren Barot, a suspected al-Qaeda operative who spent time in New Jersey in 2000 and 2001. The FBI is particularly focused on determining whether any of Barot's associates remain in the area. Recently, however, the bureau's ability to investigate this and other international terrorist networks was potentially curtailed when a federal court ruled that a key investigative tool -- a special subpoena referred to as a "National Security Letter" (NSL) -- was unconstitutional. The type of NSL at issue in this case allowed the FBI to obtain customer information from email and internet companies without judicial review and prohibited the companies from ever disclosing that they received an NSL. It is difficult to gauge the full extent to which this ruling will affect the FBI's counterterrorism efforts, since the Department of Justice (DOJ) has released so little information about how it has used NSLs. The DOJ has been equally secretive in its use of many other legal tools established or enhanced by the USA PATRIOT Act. This reticence continues to undermine public confidence in the legislation's necessity, in addition to raising serious civil liberties concerns.

Background

NSLs are a type of administrative subpoena available to the FBI in international terrorism and foreign counterintelligence investigations to obtain such items as telephone, financial, and electronic communication records. There are four separate statutes under which the FBI has NSL authority; the statute to which the aforementioned federal ruling applies is 18 United States Code (USC) Section 2709, which was enacted as part of Title II of the Electronic Communications Privacy Act of 1986. The Patriot Act significantly changed this and two other NSL statutes by dramatically loosening the standard for their use and by simplifying and decentralizing the FBI's approval process for issuing NSLs. Previously, the FBI could use NSLs only to obtain the records of suspected terrorists or spies themselves. The Patriot Act permits the FBI to use NSLs when the information sought is merely relevant to an authorized investigation of this sort. Moreover, prior to the September 11 attacks, only senior officials at FBI headquarters in Washington could approve the issuance of NSLs (with certain exceptions). The Patriot Act lowered this hurdle by granting FBI field office executives the authority to approve NSLs.

In late September 2004, in the case of John Doe et al. vs. John Ashcroft et al., a federal district court in New York held that 18 USC, Section 2709 violated both the First and Fourth Amendments. The court seemed especially concerned about the lack of transparency inherent in two aspects of the NSL process. First was the lack of judicial review, which the court found infringed on the plaintiff's Fourth Amendment rights against unreasonable search and seizure. The court objected to the FBI's issuing of NSLs without judicial oversight, and to the lack of a provision in the NSL statute

allowing the recipient of the subpoena to judicially challenge the request. Second was the concern about the permanency of the provision barring subpoenaed companies from disclosing NSLs. The court concluded that this infringed on the First Amendment rights of the internet access firm that brought the suit. The court also expressed its general concern about the potentially chilling effect of NSLs on internet use, as individuals could become fearful of government access to their records. In recognition of the importance of the issues at stake and the potential impact of its decision, the court granted the DOJ ninety days before the ruling would take effect. The DOJ has announced that it likely plans to appeal the decision.

Patriot Act Secrecy and Public Outcry

The FBI's techniques have come under a great deal of fire since the passage of the Patriot Act, and the New York ruling is likely to reinforce the perception that the bureau and DOJ are endangering privacy rights. The DOJ has repeatedly insisted that the Patriot Act plays an important role in the war on terror. In fact, Attorney General John Ashcroft traveled throughout the United States in summer 2003 to promote the legislation as an essential tool in finding and disrupting terrorist cells. Yet, Congress, the media, civil liberties organizations, and the public have all expressed concern that the DOJ has not provided sufficient information about its use of the act to allow them to reach the same conclusion regarding its merits.

The greatest public outcry about the Patriot Act has been directed at Section 215, which allows the DOJ and FBI to seek a federal court order giving them access to individuals' business records from third parties, including banks, credit card companies, phone companies, and, most controversially, libraries. Librarians and many others have expressed concern that this provision violates the First Amendment and could have a chilling effect on individuals' willingness to use public libraries. The DOJ has exacerbated these fears by keeping classified its semiannual reports to Congress on whether and how often it has requested or obtained such information. Librarians themselves are not permitted under the statute to reveal whether they have received such requests from the FBI. The DOJ has long insisted that Section 215 is essential to its counterterrorism efforts. In September 2003, however, the department finally conceded that it had not yet used Section 215. (In a recent speech to the American Bar Association, Deputy Attorney General James Comey stated that the DOJ had used it "a really, really small number" of times.) This fact has contributed to skepticism toward DOJ claims regarding the importance of this provision specifically, and the Patriot Act more generally.

Similarly, little is publicly known about how the DOJ and FBI have used NSLs, either before or since passage of the Patriot Act. In response to one lawsuit, the DOJ released a six-page document citing the instances in which it had used NSLs. Yet, every line of the document was redacted for national security reasons.

The DOJ's reluctance to provide information about its use of NSLs and Patriot Act provisions has helped create the public perception that the act is enveloped in secrecy and infringes on civil liberties. The New York federal court opinion is likely to reinforce this perception. Resistance to the Patriot Act also continues to mount at the state and local level. According to the Boston Globe, as of April 2004, 277 cities and towns and four states had passed resolutions, ordinances, and ballot initiatives requesting that Congress reconsider the legislation. Accordingly, Congress may become more reluctant to renew Patriot provisions that expire at the end of 2005, or even to support any part of the act. Some Senate and House members are already taking steps to roll back portions of the legislation. A bipartisan group of senators introduced the "Patriot Oversight Restoration Act of 2003," proposing that additional Patriot provisions expire in 2005. In July 2003, the House easily passed an amendment cutting off funding for the act's delayed notification searches.

Recommendations

The potential exists for a congressional overreaction in response to public pressure. For example, a wholesale repeal

of the Patriot Act, though unlikely, could have serious consequences for the FBI's ability to aggressively and successfully investigate international terrorist networks. Although a number of the act's provisions raise legitimate civil liberties concerns that must be addressed, many other provisions are essential to fighting terrorism and do not infringe on civil liberties unduly. Yet, the DOJ's ongoing secrecy in implementing the act will feed opposition to the legislation, dooming many of the necessary and reasonable provisions.

If the DOJ believes that tools such as NSLs are, in fact, essential to fighting international terrorism, it should do a far better job providing evidence that supports this contention. In particular, the DOJ could issue an unclassified version of its classified reports to Congress regarding its use of the Patriot Act. The department took a step forward in this regard in summer 2004, issuing a report that outlined instances when the Patriot Act has been used to fight terrorism. Hopefully this represents the beginning of a fundamental shift in the department's approach to the act.

In many cases, evidence indicating how particular provisions have been used may alleviate a great deal of public concern. Alternatively, of course, greater transparency may demonstrate that the public has a legitimate reason to be wary. Either way, more information would permit a better debate about how to take into account both liberty and security in ensuring that the FBI and DOJ have the tools necessary to track and neutralize suspected al-Qaeda networks such as the one in which Dhiren Barot may have been involved. Michael Jacobson recently joined The Washington Institute as a Soref fellow after serving on both the congressional and independent commissions investigating the September 11 attacks. ❖

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