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ANALYSIS AIR DATE: June 16, 2005

House Vote Drops Patriot Act Provision

SUMMARY

A number of the Patriot Act's provisions expire at the end of 2005, including one allowing the FBI to search records, such as library and bookstore records, without probable cause. Despite a veto threat from the White House, the House of Representatives voted Wednesday to remove that provision.



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Transcript

KWAME HOLMAN: The U.S.A. Patriot Act was signed, sealed and delivered just six weeks after the Sept. 11 attacks. It gave federal law enforcers expanded search and surveillance powers in the hope they could prevent future terrorist attacks. But Congress also tacked expiration dates onto 16 Patriot Act

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provisions, and they're due to expire at the end of the year.

PRESIDENT GEORGE W. BUSH: Some people call these sunset provisions. It's a good name because letting that...those provisions expire would leave law enforcement in the dark.

KWAME HOLMAN: Last week President Bush picked Columbus, Ohio, to make his case to renew the Patriot Act. That's where, in 2003, the FBI arrested a Kashmir-born truck driver Iyman Farris who admitted to plotting with al-Qaida to blow up the Brooklyn Bridge.

PRESIDENT GEORGE W. BUSH: Since Sept. 11, federal terrorism investigations have resulted in charges against more than 400 suspects, and more than half of those charged have been convicted.

KWAME HOLMAN: But this week a Washington Post analysis showed only 39 of those convictions were for crimes related to terrorism or national security. The others mostly were for immigration violations and making false statements. So last week, at one of the dozen hearings the House Judiciary Committee has held on reauthorizing the Patriot Act, Deputy Attorney General James Comey argued many provisions have worked, such as delayed-notice search warrants, roving wire taps and information sharing among intelligence agencies.

JAMES COMEY: The bottom line, I believe, is that the Patriot Act is smart. It's ordinary in a lot of respects. It's certainly constitutional, and we ought to make permanent the provisions that have meant so much to the people that I represent.

KWAME HOLMAN: However, several members asked Comey about Section 215, which allows federal authorities to search library records. Florida Democrat Debbie Wasserman Schultz.

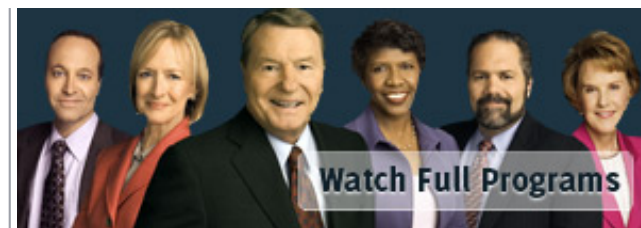
REP. DEBBIE WASSERMAN SCHULTZ: Why do we need to give special powers to the FBI in those investigations without at least first making the FBI show some proof that the person might be an agent of a foreign power?

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JAMES COMEY: They have to show, and we've always understood the statute to say this, but it's not explicit. So it's one of the things that we would support adding, that the records sought are relevant to a foreign intelligence or a foreign counterterrorism investigation.

KWAME HOLMAN: Last night, however, the House of Representatives, acting on a Justice Department spending bill, voted to strip the FBI of its authority to search library records. However, searches of Internet use at libraries would be permitted. The action still is subject to approval by the Senate and a possible veto by the White House.

JEFFREY BROWN: And we now join the debate over the Patriot Act with Ken Wainstein, United States attorney for the District of Columbia. He formerly held several positions at the FBI; and Greg Nojeim, associate director and chief legislative council for the ACLU, the American Civil Liberties Union. Welcome to both of you.

Greg Nojeim, starting with yesterday's vote, what's the argument against the current provision that allows searching library records?

GREG NOJEIM: Section 215 of the Patriot Act allows the FBI to, with a very minimal showing before a secret court, to get all manner of personal information about a person from third parties. It doesn't mention libraries, but it can be used to get library records, bookseller records, it could be used to get educational records, medical records. It could be used to get records about a person's DNA. It could even be used to force a party that had, for example, a key to your apartment, to provide the key to the FBI. We believe that when that kind of authority is given to the FBI, they ought to be subjected to reasonable checks and balances. Those checks and balances are not in the Patriot Act.

JEFFREY BROWN: Mr. Wainstein, what's the value of that provision?

KEN WAINSTEIN: It's a very important provision to the FBI and to law enforcement and to our national security effort. In many ways this provision is like many parts of the Patriot Act, where Congress recognized after 9/11 that we needed to give our national security investigators -- those people who are

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protecting us against international spies and international terrorists -- the same tools that our criminal investigators have had for years and decades.

This is an example of it. They are giving it -- in Section 215, Congress gave national security investigators, those people who are running down foreign spies and terrorists in our midst, the ability to obtain records just like criminal investigators can with grand jury subpoenas when they are investigating criminal cases, a vital tool that we need to use in order to track down terrorists.

There are checks and balances in the statute, a host of them. There is congressional oversight of our use of this provision, so there are many ways in which this -- which Congress made sure that we would use this provision responsibly, and in fact, it has been disclosed that we never, as of March of this year, never used it in a library or...

JEFFREY BROWN: I was going to ask you about that, the Justice Department said it had never even used this specific provision. But it's still important to keep.

KEN WAINSTEIN: We've used the provision.

JEFFREY BROWN: No, I'm sorry, the library part of it.

KEN WAINSTEIN: Well, it's interesting, people refer to Section 215 as the library provision, but that's a misnomer because it is a provision that allows us to get records to assist us in national security investigations. We've used it, I think the attorney general disclosed as of March of this year, I think 35 times. None of those times have been in libraries or bookstores.

JEFFREY BROWN: So the checks and balances part of this critique there, fill that out for us. What would you like to see done?

GREG NOJEIM: Under the statute as it's now written, the government can get all manner of personal information when it certifies to a secret court in a secret proceeding that's one-sided, that the information is sought for an intelligence investigation -- sought for.

That's not a standard. That's a rubber stamp. And the judge simply looks at the

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certification that the FBI has made, sees that they say that it's sought for the investigation, and then the statute requires that the judge issue the order. Again, that's simply a rubber stamp. What we're suggesting is that if the government can show that the information pertains to an agent of a foreign power, a terrorist or a spy, and that the information is relevant to that, well, then the judge should examine the evidence they have about that and decide whether they have proven that the information relates to a foreign power, and to -- or to a spy, and then they could get the information with such an order.

These orders are not like subpoenas. If a person receives a subpoena, a subpoena does not say that they can talk to no one about it. Section 215 order does. A subpoena doesn't prevent a person from talking to their lawyer about it. And yet a Section 215 order says you can't tell anyone you received this.

JEFFREY BROWN: What's your response on this standard?

KEN WAINSTEIN: The -- I think it is instructive to compare a Section 215 order with the grand jury subpoena. Every day, prosecutors in my office are issuing dozens, if not hundreds, of grand jury subpoenas in criminal cases seeking records: DMV records, records from telephone companies, what have you. And we issue that on the signature of an assistant United States attorney or in the states with a district attorney, there's no judicial oversight at all of this grand jury subpoenas, they have go out and have the force of law.

In the 215 context we have to go to a federal judge, and Greg says that it's a rubber stamp. I can tell you that these federal judges are not rubber stamps. They look at what we submit to them and ensure that what we have, that the records we're seeking are in fact relevant to an ongoing national security investigation.

And I would also want to add one other thing, that while the statute as currently written does not provide the recipient of the 215 order the opportunity to go to his attorney or his or her attorney and tell that person about the order where the Department has announced that it would be supportive of an amendment of the statute to allow a recipient to tell his or her attorney so that that person can challenge that order in court if he so wishes.

JEFFREY BROWN: Mr. Wainstein, now that the Patriot Act has been in place for several years, it's no longer an abstract debate. Based on experience, what has proven to be the most effective thing or things about it?

KEN WAINSTEIN: Well, the Patriot Act is interesting because it's nothing but a sort of collection of different provisions and authorities, and there are -- it's a variety of different provisions. And it's sort of hard to pick one that's the most important. They're all very important, as I say, a number of them are really intended to bring national security investigators -- give them the same authority that criminal investigators have.

But I'd say that one of the most important changes it affected was it brought down the wall that stood between national security investigations and criminal investigations as they relate to terrorists and spies. Prior to the Patriot Act -- and we saw this all too tragically prior to 9/11 -- criminal investigators running down on terrorists here in the United States or overseas were prohibited from talking to national security investigators, intelligence agents who were doing the same thing and that lack of coordination, that lack of information sharing really handicapped our efforts.

The Patriot Act lowered that wall so that we have the coordination across all our assets to go after terrorists and that's been tremendously important and we've seen that bear fruit in a number of different investigations and prosecutions of cells here in the United States.

JEFFREY BROWN: Have you not seen some successes brought about through the Patriot Act?

GREG NOJEIM: There have been abuses through the Patriot Act, including the provision which Mr. Wainstein referred to as bring down the wall. For example, the Portland, Oregon attorney, Brandon Mayfield, the fellow who was accused of having perpetrated the Madrid train bombings, he was searched, his home was searched, agents broke into his home secretly, they took 335 digital photographs, they took DNA samples from his home. They rifled through his personal papers and they did this with the powers that were granted under the Patriot Act.

Brandon Mayfield didn't commit that bombing; he was an innocent man and the government used the Patriot Act to get around the normal probable cause of crime standard that they would have had to show under prior law in order to search his home. They never had to go in front of a judge and say, "Look, Your Honor, we have strong evidence that this man did this crime. Look at our evidence." They never had to show evidence of crime. They went around it using the Patriot Act. That's one of the dangers of this law.

JEFFREY BROWN: So is this an example of abuse?

KEN WAINSTEIN: No, it's not. An abuse is a misuse of authority. In this case, there is a legitimate investigation of a person who was suspected of being involved in terrorism, there was a responsible and appropriate use of national security authorities, and at the end of the day the result of the case was that Mr. Mayfield was not charged with any criminal offenses or not shown to be a valid suspect of terrorist activities.

Bottom line, though, is that's not an abuse. In fact, the inspector general of the Department of Justice has been tasked by the Patriot Act to give a report, I think it's every six months, as to whether he in this case he has found any abuses of the Patriot Act. He has found none to date. Congress has provided on, I think, a biannual bases information about our use of Section 215, the one that was amended or for which an amendment passed the House last night, and Congress has not been able to identify an abuse of 215.

So while the story of Mr. Mayfield is an unfortunate story, it's not an example of abuse and all of the entities which have the authority to exercise oversight over the Department of Justice and our intelligence community have found no abuse of the Patriot Act.

GREG NOJEIM: But perhaps we differ on what an abuse might look like. I think it's an abuse when the government believes that a person has committed a crime and then breaks into their home without having to show a judge probable cause of crime in circumstances when there's not an emergency. That's what happened to Brandon Mayfield and that is an abuse of the authority in the Patriot Act. And Mr. Fine, the inspector general at the Department of Justice, is looking into

whether there was an abuse of the Patriot Act in that case. He's not yet reached a decision.

JEFFREY BROWN: The president has asked all of these provisions be made permanent. Do you agree with him?

KEN WAINSTEIN: Absolutely.

JEFFREY BROWN: Mr. Nojeim?

GREG NOJEIM: We believe that as Congress looks at whether to make the provisions permanent, it ought to look broadly at whether additional checks and balances ought to be put in place: Meaningful judicial review.

For example, on the secret searches, the sneak and peek warrants, we believe that that provision is overly broad and could be restricted to cases where the search really needs to be conducted secretly and that a person ought to get timely notice when that's possible to do.

So there are a lot of changes that could be made to restore these checks and balances, but the president isn't talking about it at all and the Department of Justice is conceding only over time, for example, they've conceded that a person should be able to talk to their lawyer when they receive a national security letter. They've conceded that a person ought to be able to challenge that letter in court. So we're looking for these places where these additional protections can be built into the law, and not as the president has called for, just the blind reauthorization.

JEFFREY BROWN: All right, Greg Nojeim and Ken Wainstein, thank you both very much.

GREG NOJEIM: Thank you.

KEN WAINSTEIN: Thank you.

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