

Privacy, the Patriot Act and You

by Jim Malmberg

For many years, the Federal Government has been fighting a battle over individual privacy rights. Law enforcement has been on one side of the battle, along with the need to remain one step ahead of America's criminal element. On the other side of the battlefield has been a loose conglomeration of privacy activists, the federal courts and Congress.

All sides have always agreed that law enforcement organizations need to have the tools to monitor criminal activity. For this very reason, Congress long ago setup rules that allow the FBI and other organizations to gain access to electronic communications. Commonly referred to as wire tapping, federal law always required court oversight and the issuance of a search warrant. Such proceedings have traditionally been open to public scrutiny.

In the wake of 9/11 however, Congress and the White House moved rapidly to strengthen the tools available for electronic monitoring by law enforcement agencies and the CIA by passing the Patriot Act. While well intentioned, the act gave sweeping powers to these agencies, with virtually no oversight.

Under the Patriot Act, the FBI can now use FISA Courts to issue search warrants, also known as National Security Letters. FISA, or the Foreign Intelligence Surveillance Act, was enacted into law in 1978 as a means for the government to monitor foreign intelligence activity in the United States. FISA courts are overseen by federal judges but any resemblance to the federal court system is superficial at best. These courts routinely issue warrants with little more than a letter of request from the FBI or other agencies. Furthermore, these courts meet in secret, have no published orders, and rarely publish their opinions.

Probable cause is not a requirement for a warrant under FISA. While the government is required to use FISA predominantly for matters of intelligence gathering, any data gathered can be used in court for the purposes of criminal prosecution as well, even though a normal federal court would not have been able to issue a search warrant due to a lack of probable cause. Furthermore, anyone who goes to trial based on FISA gathered information faces the very real prospect of not being able to actually see the evidence gathered against them, or to cross examine those who gathered it.

By now, you are probably thinking that all of this is quite interesting but I don't see how it impacts my privacy. We're getting to that.

There is considerable evidence that the Justice Department is attempting to end run the Fourth Amendment's guarantees against unreasonable search and seizure by using FISA in cases where there is little or no evidence of foreign intelligence activity. And the evidence gathered can include e-mail messages, business records, medical records, and just about anything else you can think of.

So, how do you know that the government isn't looking at you? Well, the simple answer is that you don't.

Interestingly enough, the ACLU announced recently that they had filed a law suit challenging the constitutionality of the Patriot Act and National Security Letters issued thereunder. As ludicrous as it sounds, the ACLU was barred by certain provisions the Patriot Act from announcing the law suit until they got an "OK" from the presiding judge.

After the ACLU announcement, the Justice Department hauled the ACLU back into court accusing them of violating the

act by virtue of the content in their press release; which they were forced to change.

Specifically, the second paragraph of their April 28th release read, "The provision under challenge allows an FBI agent to write a letter demanding the disclosure of the name, screen names, addresses, e-mail header information, and other sensitive information held by 'electronic communication service providers.' " Justice Department lawyers stated that this paragraph, along with another that revealed the presiding judge's name, violated a secrecy order surrounding the suit. In other words, the Justice Department doesn't want anyone to know they're being challenged, who will be hearing the challenge, and would probably prefer than nobody ever hears the outcome of the challenge. It's all very interesting.

The reason that this impacts the privacy of everyone living in the United States is that under the Constitution, both federal and state courts have set very high standards for the issuance of search warrants. The government needs to have substantial evidence of wrong doing before it can receive such a warrant.

Under the Patriot Act, and through the Justice Department's use of the FISA courts, no such standards exist. Even so, evidence gathered through these proceedings can be used against US residents, even if they were not the target of the FISA order, and even if the evidence has nothing to do with national security matters.

Furthermore, not only is there no accountability for the gathering of so-called evidence but this also means that there is no accountability as to who will have access to it. This means that a wide variety of people within the government may be given access to very personal financial information – everything required to steal a person's identity. Just because the people with such access would probably work for the Justice Department or the Department of Homeland Security is no reason to assume that everyone with such access is honest or honorable.