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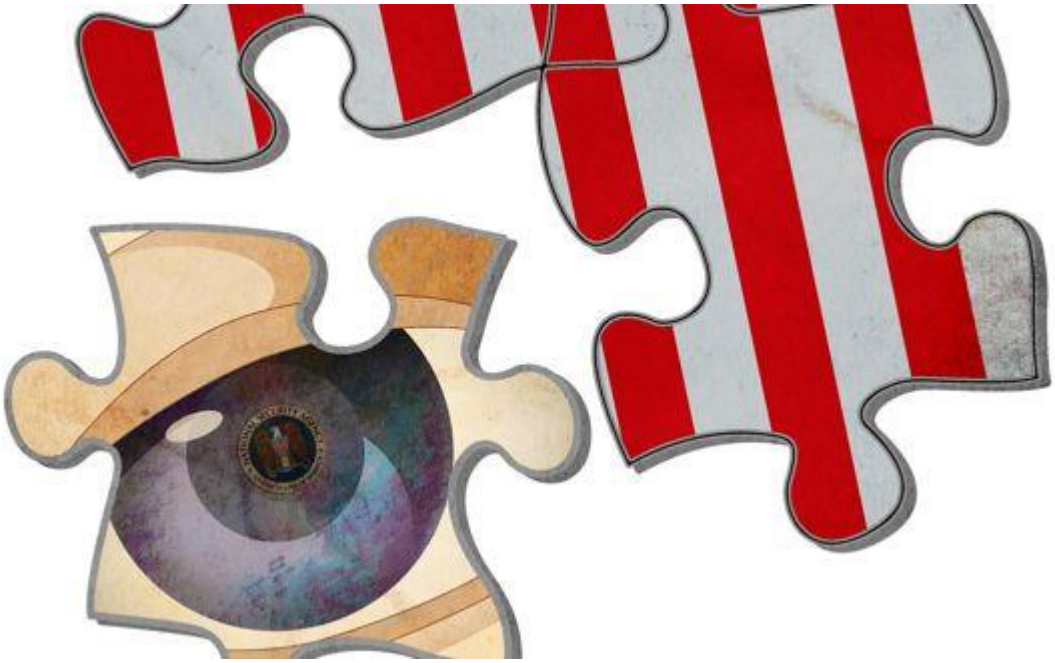
Saving the Fourth Amendment

The provision for collection of bulk data must be allowed to expire

By former Judge Andrew P. Napolitano - - *Wednesday, May 27, 2015*



The Patriot Act has a bad pedigree and an evil history. In the fearful days immediately following Sept. 11, 2001, the Department of Justice quickly sent draft legislation to Congress that, if enacted, would have permitted federal agents to violate their oaths to uphold the Constitution by writing their own search warrants. The draft subsequently was revealed to have been written before Sept. 11, but that's another story.

The House Judiciary Committee reviewed the legislation and revised it so that it would meet Fourth Amendment norms. The revised version permitted federal agents to write their own search warrants for business records, but the warrants could be challenged by the custodian of the records or by the person whose records were being sought. Because the records were in the hands of a third party, they were in no danger of destruction.

The Fourth Amendment was written largely to assure that the general warrants British soldiers used to search the colonists' homes would never be lawful in the United States. General warrants were issued by secret courts in London based on the government's needs, not on evidence of wrongdoing. They authorized the bearer to search wherever he wished and seize whatever he found.

In order to protect the natural right to be left alone — privacy — the Framers enacted standards in the Fourth Amendment that required the government to produce evidence about the person whose records it wants — called probable cause — and present that evidence to a judge when it wants a search warrant. If granted, the Constitution requires that the warrant particularly describe the place to be searched or the person or thing to be seized.

After the House Judiciary Committee took all this into account in its redrafting of the proposed Patriot Act, the House Republican leadership and the George W. Bush White House pulled a fast one. They switched the painstakingly negotiated version of the Patriot Act for the original version and posted the original version on the House intranet, and leadership scheduled a vote within the hour of posting.

It is safe to say that no member of the House read the Patriot Act in that hour. It takes about 20 hours to read, as it is hundreds of pages in length, and it amends dozens of prior statutes that also must be read. Most House members clearly never knew what they were authorizing. The only negotiated provision that survived the switch was the sunset provision of Section 215.

Section 215 only authorizes the feds to write their own search warrants for business records and for surveillance of so-called lone-wolf terrorists no matter what telephone they may use. The Bush and Obama administrations secretly persuaded the secret Foreign Intelligence Surveillance Act (FISA) court that somehow Section 215 also permitted the National Security Agency (NSA) to acquire bulk data from telephone and computer use based on the government's needs, not based on probable cause.

Bulk data is undifferentiated as to persons. Rather, it is collected by zip code, area code or service provider customer base. Section 215 expires at the end of this month.

The U.S. Court of Appeals for the 2nd Circuit, the second-highest court in the land, declared the collection of bulk data under Section 215 to be illegal. The court ruled that the language of Section 215 does not authorize bulk data collection, and no section of the Patriot Act does. That court gave Congress until June 1 to clarify the language. If Congress fails to do so by June 1, the court will entertain applications to bar the NSA from collecting bulk data, and it indicated it would likely grant those applications.

Last week, the House voted to revise Section 215, and the Senate did not. Thus, it is likely to expire on Sunday night.

President Obama, who falsely claims to be opposed to the collection of bulk data, can stop it with his signature, but he has not done so. He claims to favor the House version of surveillance, which has ridiculously been dubbed the Freedom Act.

The Freedom Act would get the NSA's computer geeks physically out of the facilities of telecoms and computer servers, but would let them back in digitally with the FISA court's approval, and that approval is not conditioned on probable cause. Rather, it is to be granted whenever the NSA needs the data. In the 14 years of all this spying, the NSA has made more than 34,000 requests of the FISA court; only 12 have been denied.

If Section 215 expires next week, the feds will need individualized search warrants in order to listen to phone calls. They already have been getting individualized search warrants for the phone calls and emails of potential lone-wolf terrorists, and for the business records of suspected terrorist groups and those whom they have successfully prosecuted for terrorist acts.

If all of the above is not enough to induce anyone in Congress faithful to the Constitution to reject extending Section 215, perhaps the findings of the inspector general of the Department of Justice itself will. Late last week, he released a report in which he found that the bulk collection of data has not stopped a single act of terror or aided a single federal terrorism prosecution since the Patriot Act became law on Oct. 26, 2001.

The government's bulk collection of data must go. It assaults freedoms, and it fails to enhance our safety.

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