Insider’s Guide to the USA Patriot Act

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Overview

• Presenter’s Background
• Why Change the Law?
• Major Changes in USA Patriot Act
• Calls for Reform
• Questions
Presenter’s Background

- Retired USAF Colonel & OSI Special Agent
- 25+ year career in federal law enforcement and CI
- 13 PCS moves
- Commanded 5 units, incl wing
- Senior Military Advisor to Henley-Putnam University
Why Change the Law?

- Terrorist attacks in September 2001 exposed gaps and loopholes in US laws that needed closing
- Key provisions in Patriot Act came from Clinton-era law passed after the 1995 Oklahoma City bombing
  - *Anti-Terrorism and Effective Death Penalty Act of 1996*
- USA Patriot Act grew from this 1996 law, and shored up loopholes in it
  - “Walls of separation”
- Additional enhancements
Major Changes in USA Patriot Act

- Obtaining Voice-mail and Other Stored Voice Communications
- Scope of Subpoenas for Electronic Evidence
- Clarifying the Scope of the Cable Act
- Emergency Disclosures by Communications Providers
- Authority for Delaying Notice of the Execution of a Warrant
- Single-Jurisdiction Search Warrants for Terrorism
- Nationwide Search Warrants for E-mail
- No Statute of Limitations for Certain Terrorism Offenses
- National Security Letters (NSLs)
Obtaining Voice-mail & Other Stored Voice Communications

• Previous Law
  – ECPA governed access to “stored electronic communication” (e.g. email)
  – Separate wiretap statute governed access to “stored wire communications” (e.g. voice mail)
  – Required two separate processes to obtain, yet data oftentimes comingled

• USA Patriot Act Changes
  – Brought stored wire communications access under ECPA authority
  – Law enforcement needs one warrant to obtain both email and voice mail
  – Simplified processes and improved search and seizure timeliness
Scope of Subpoenas for Electronic Evidence

- **Previous Law**
  - Subpoenas limited in scope
  - Could not obtain credit card details from ISPs
  - Old language pertained mostly to telephone companies, needed to be updated

- **USA Patriot Act Changes**
  - Expanded list of records obtainable with subpoena
  - Records of session times and durations, IP addresses
  - Subpoenas can be used to obtain “means and source of payment”
Clarifying the Scope of the Cable Act

• Previous Law
  – Two sets of laws regarding communication
  – "Cable Act" (47 USC) extremely restrictive access WRT cable television information
  – ECPA (18 USC) applying to telephone and Internet access
  – Cable companies now “bundle” communication services

• USA Patriot Act Changes
  – Enables law enforcement to obtain communication data from cable providers under ECPA
  – Protects cable television programming information under Cable Act
Emergency Disclosures by Communications Providers

- **Previous Law**
  - No provision allowing providers to disclose records in emergencies
  - Did not permit providers to disclose non-content records, yet allowed disclosure of content
  - ISPs needed ability to protect themselves from hackers

- **USA Patriot Act Changes**
  - “Righted” inherent inadequacies in both laws
  - Permits providers to disclose content and non-content records in emergencies
  - Provides better protection for providers from hacker threats
Authority for Delaying Notice of the Execution of a Warrant

• Previous Law
  – Delayed notice that warrant executed has been inconsistent
  – Various rules, practices, court decisions
  – Jurisdictions varied widely
  – Lack of uniformity hindered terrorism investigations

• USA Patriot Act Changes
  – Amended 18 USC to create uniformity
  – Court must find “reasonable cause” that notification would be adverse
  – Court must also establish “reasonable period” for notice of warrant’s execution
  – Flexible and evolving case law
Single-Jurisdiction Search
Warrants for Terrorism

- **Previous Law**
  - Warrants only issued for searches within the district that issued the warrant
  - Created delays and burdens for government in terrorism investigations spanning multiple districts

- **USA Patriot Act Changes**
  - Warrant may be issued by magistrate judge in any district in which terrorism activities occur
  - Executable in any location within or outside the district
  - Both international and domestic terrorism cases
Nationwide Search Warrants for E-mail

• Previous Law
  – Warrant required to disclose unopened email less than 6 months old
  – “Property” to be seized had to be obtained within the district of the court
  – Most ISPs located in Virginia and northern California, putting undue burden on these districts

• USA Patriot Act Changes
  – Warrants issued in any district can be used to obtain email from any region in U.S.
  – More efficient and timelier because courts can compel evidence directly
No Statute of Limitations for Certain Terrorism Offenses

• Previous Law
  – Most non-capital offenses had five-year statute of limitations
  – Most terrorism offenses had an eight-year statute of limitations

• USA Patriot Act Changes
  – Any offense contained within 18 USC § 2332b (terrorism section) now prosecuted without limitation of time
  – Law made retroactive, and offenses occurring before its enactment no longer have a time limitation
  – To ensure perpetrators of 9/11 terrorist attacks can be tried anytime in future
National Security Letters (NSL)

- **Previous Law**
  - FBI used NSLs mainly in counterintelligence investigations
  - Typically sought information pertaining to “foreign powers” or “foreign agents”

- **USA Patriot Act Changes**
  - Inserted language to focus on international terrorism as well as intelligence
  - Prohibited disclosure of the NSL to anyone
  - Established Attorney General reporting requirements to Congress
Calls for Reform

- Many groups opposed to USA Patriot Act in general, some against specific aspects
- Concerns about expanded government surveillance powers, impact on civil liberties
- Not all legislators supported original USA Patriot Act when it passed (but passage was overwhelming majority)
- Opposition increases every time Congress set to review “sunset” provisions, though all have been extended
- Most ardent opposition from ACLU
ACLU Concerns

- Many concerns, but large focus on 3 main areas
  - NSLs
  - "Material support" elements
  - FISA requirements
- Cites increased use of tools and alleged misuse
  - Increased use of NSLs
  - Increased use of FISA orders
  - Increased SARs
- Notes decreased prosecutions for terrorism
Parting Thoughts

• Wherever you stand on the issue, USA Patriot Act has changed the way US LEO and IC do business
• Concern and calls for reform are healthy, and appropriate for a democracy
• Congressional oversight, AG oversight, IG oversight, media oversight, all designed to keep government honest
• We’ve been safe since 9/11 – hard to ignore this fact, and only recently have we seen increase in terrorist attempts/inroads
Our Strength Remains...