ECPA AMENDMENTS AND PRIVACY IN A POST PETRAEUS WORLD

One of the issues making the rounds like wildfire today was a report from Declan McCullagh at CNET regarding certain proposed amendments to the Electronic Communications Privacy Act (ECPA). The article is entitled "Senate Bill Rewrite Lets Feds Read Your E-mail Without Warrants" and relates:

> A Senate proposal touted as protecting Americans' e-mail privacy has been quietly rewritten, giving government agencies more surveillance power than they possess under current law.
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> CNET has learned that Patrick Leahy, the influential Democratic chairman of the Senate Judiciary committee, has dramatically reshaped his legislation in response to law enforcement concerns. A vote on his bill, which now authorizes warrantless access to Americans' e-mail, is scheduled for next week.
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> Leahy's rewritten bill would allow more than 22 agencies — including the Securities and Exchange Commission and the Federal Communications Commission — to access Americans' e-mail, Google Docs files, Facebook wall posts, and Twitter direct messages without a search warrant. It also would give the FBI and Homeland Security more authority, in some circumstances, to gain full access to Internet accounts without notifying either the owner or a judge. (CNET obtained the revised draft from a source involved in the negotiations with Leahy.)

This sounds like the predictably craven treachery that regularly comes out of Senate,

indeed Congressional, legislation on privacy issues. And exactly what many had hoped would cease coming out of Washington after the public scrutiny brought on by the Petraeus/Broadwell/Kelley scandal. And, should these amendments make it into law, they may yet prove detrimental.

But there are a couple of problems here. First, as Julian Sanchez noted, those abilities by the government already substantially exist.

> Lots of people RTing CNET's story today seem outraged Congress might allow access to e-mail w/o warrant—but that's the law ALREADY!

Well, yes. Secondly, and even more problematic, is Pat Leahy vehemently denies the CNET report. In fact, Senator Leahy does not support broad exemptions for warrantless searches for email content. A source within the Judiciary Committee described the situation as follows:

> The CNET story reports as if the Chairman is offering an amendment to that end, which is not the case. What is pending before the committee is a substitute bill, HR 2471, that seeks to update pieces of the Electronic Privacy Communications Act and the Video Privacy Protection Act. The committee adopted that substitute in September, and will resume marking it up next week.

And that comports with the press release Senator Leahy issued later in the afternoon. Included in the press release is a section by section breakdown of what Leahy really has in mind trying to get out of committee and to the floor; it is not long and worth a look. While it does not go nearly far enough, there are some decent steps in Leahy's proposed ECPA Amendment. The Title I changes regarding video tapes will not do a lot in the ever more digital streaming world, but the Title II proposals by Leahy do

make some substantive improvements. It is, as they say, a start.

There should, however, be more, much more, added protection to citizen's electronic privacy. Here is a comprehensive report from the Congressional Research Service just a week and a half ago entitled *Federal Laws Relating to Cybersecurity: Discussion of Proposed Revisions* that demonstrates what the government is going to do to protect itself. But what will the government do to protect you?

You would think the entitled royalty of the Washington DC Beltway would have had a wake up call as to just how little privacy American citizens have in their electronic communications as a result of the broad spider webbing of information the FBI sucked in on potentates such as David Petraeus, Gen. John Allen and supposed security expert Paula Broadwell. Not just collecting the information, but backtracing it to specific computers, users, and whatever location the users were at any given time. But that is not really the case. As Adam Serwer said:

> If the director of the CIA can't keep his private life secret from the FBI, you can't either.

It is stunning what the government can get with effectively no process at all from providers; even more what they can get with common administrative bench subpoenas. All that is without a court supervised warrant. This report details the more than 300 different modalities of Federal administrative subpoena permitted by existing law. Couple that with an all too often rubber stamp traditional warrant process, and there is not much restraint on the government probing your deepest facets of electronic life.

The video above is a little longer than normal at 16 minutes, but it is a well paced look at Why Privacy Matters and has many people you will recognize in it. Privacy does matter.