

New Federal Initiatives Project

**Reauthorization of the
USA PATRIOT Act**

**By
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EDITOR'S NOTE: *The final paragraph below, appearing in italics, reflects the author's March 2010 update to the paper published in September 2009.*

The four paragraphs preceding the final paragraph below, also appearing in italics, and the corresponding first six endnotes reflect the author's January 2010 update to the paper.

Two significant provisions of the USA Patriot Act ("Patriot Act")¹ and a related counterterrorism authority will expire on December 31 of this year unless Congress reauthorizes them. Despite the impending expirations, legislative action to address the subject has just begun. The House and Senate Judiciary Committees each recently scheduled a first hearing on this subject, to be held on September 22 and 23, respectively. On September 17, Senators Durbin and Feingold introduced a bill to amend two of the expiring provisions and numerous other counterterrorism authorities. On September 14, the Department of Justice weighed in on behalf of the Administration, recommending to Congress that all three expiring provisions be reauthorized.

Background

Enacted shortly after the terrorist attacks of September 11, 2001, the Patriot Act contained a number of provisions expanding the government's authorities in counterterrorism investigations. Sixteen of these provisions were subjected to a sunset of Dec. 31, 2005.² Congress temporarily reauthorized all of these provisions until March 10, 2006, to allow further time for consideration of amendments to the expiring provisions.³ In March 2006, Congress reauthorized all 16 provisions, amending some of them to address concerns of the Act's critics.⁴ It extended 14 provisions permanently, but subjected two provisions to a sunset of Dec. 31, 2009.⁵ The Patriot Act reauthorization legislation also imposed a December 31, 2009, sunset⁶ on a related counterterrorism provision that had been enacted in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).⁷

Section 215 of the Patriot Act – FISA "business records" authority

Perhaps the best-known sunsetted provision is section 215 of the Patriot Act, which expanded the Foreign Intelligence Surveillance Act's (FISA) "business records" authority. FISA governs the use of various methods of surveillance (wiretaps and pen registers, for example) in international terrorism and counterespionage investigations. Section 215 amended FISA's provision for what amounts to a subpoena for records or other items.⁸ Prior to enactment of the Patriot Act, FISA narrowly limited the types of records the government could request⁹ and required the Government to provide "specific and articulable facts" supporting a reason to believe that the target was an agent of a foreign power.¹⁰ The Patriot Act eliminated these restrictions to allow the FBI to ask the FISA Court to order the production of any item relevant to a FISA investigation. Specifically, section 215 allowed the FBI Director to "make an application [to the FISA Court] for an order requiring the production of any tangible things (including books, records, papers, documents, and other items)..."¹¹ The recipient of a 215 order is generally barred from disclosing the order's existence.¹²

After its enactment, section 215 became quite controversial among some non-governmental organizations such as the American Civil Liberties Union and the American Libraries Association. Among other concerns, section 215's critics focused on the non-disclosure

requirement and on section 215's theoretical use to request sensitive categories of personal records, such as library circulation records. To address some of these concerns, the reauthorization legislation included several amendments to FISA's business records authority. For example, it required additional congressional oversight of the FBI's use of section 215,¹³ imposed additional procedural safeguards on the use of section 215 to seek certain sensitive records (such as medical or library records),¹⁴ and created a procedure for recipients of section 215 orders to seek to quash them in the FISA Court.¹⁵ Another bill enacted later in 2006 created a procedure allowing the recipient of a section 215 order to seek relief from the non-disclosure requirement one year after the order is issued.¹⁶

Leaders of the intelligence community have called section 215 an "invaluable" intelligence tool.¹⁷ Most recently, the Department of Justice recommended to Senator Leahy that the provision be reauthorized again, explaining that it is sometimes the only investigative tool available to obtain information important to a terrorism investigation.¹⁸ The specifics of section 215's use are understandably classified (though Congress has been briefed), but the Justice Department has stated that it has been used in practice "to support important and highly sensitive intelligence collection operations."¹⁹

Section 206 of the Patriot Act – FISA "roving" wiretap authority

Another provision of the Patriot Act scheduled to expire on December 31 is section 206, which created a "roving" wiretap authority under FISA. In a roving wiretap order, the court authorizes surveillance of multiple communication devices used by the same target. If, for example, the subject of a roving wiretap order frequently switches cell phones or cell phone providers, the government does not have to return to court to seek a new wiretap order every time he does so. Section 206 authorized the FBI to seek such an order in circumstances where the FISA Court finds that "the actions of the target of the application may have the effect of thwarting" surveillance.²⁰ A similar authority had long been available to criminal investigators under U.S. Code Title 18, but had not been available to FISA investigators prior to the Patriot Act.

Section 206, like section 215, became controversial in some quarters. To address privacy-related concerns, the Patriot Act reauthorization legislation amended the FISA roving wiretap authority to require the government to provide the court with greater specificity about the target and his actions thwarting surveillance and to report back to the court after beginning surveillance of a new communications device.²¹

According to the Department of Justice, Section 206 has proved to be "an important intelligence-gathering tool in a small but significant subset of FISA electronic surveillance orders."²² For example, it can be a critical tool in cases where the target of surveillance has engaged in counter-surveillance activities, such as buying disposable cell phones or multiple calling cards.²³ The Justice Department cited the proliferation of communications technologies and service providers and the ability of international terrorists and spies to take advantage of them as reasons to reauthorize section 206.²⁴

Section 6001(a) of IRTPA – “Lone Wolf” Terrorists

FISA contains numerous provisions requiring that the target of surveillance be either a “foreign power” or an “agent of a foreign power.” These terms are defined by the statute. Prior to 2004, the definition of “agent of a foreign power” did not encompass an individual person who could not be linked to a foreign nation or other foreign organization. Section 6001(a) of IRTPA brought these so-called “lone-wolf” terrorists within FISA’s ambit by defining “agent of a foreign power” to include a non-U.S. person who “engages in international terrorism or activities in preparation therefore.”²⁵

IRTPA subjected this amendment to the Patriot Act’s sunset provision – December 31, 2005.²⁶ The Patriot Act reauthorization bill extended the provision to December 31, 2009.²⁷ The Department of Justice recently recommended that this provision be reauthorized again, although it has not been used to date.²⁸ As the Department noted, the provision was inspired by the case of Zacarias Moussaoui and could prove to be the only legal means of surveillance in cases, for example, where a “known international terrorist affirmatively severed his connection with his group, perhaps following some internal dispute,” or where a terrorist “‘self-radicalizes’ by means of information and training provided by a variety of international terrorist groups via the Internet.”²⁹

Legislative Status

The House and Senate Judiciary Committees recently announced hearings on reauthorization of the expiring provisions. The House Judiciary Committee Subcommittee on the Constitution will hold a hearing on the subject on September 22,³⁰ and the Senate Judiciary Committee will hold a hearing the next day entitled, “Reauthorizing the USA PATRIOT Act: Ensuring Liberty and Security.”³¹

On September 14, 2009, the Department of Justice sent Senator Leahy a letter recommending that all three expiring provisions be reauthorized, though it did allow that it was willing to consider “modifications to provide additional protection for the privacy of law abiding Americans” so long as they “do not undermine the effectiveness of these important authorities.”³² In fact, legislation containing privacy-related modifications to these provisions has already been introduced. On September 17, Senators Feingold and Durbin introduced legislation, the Judicious Use of Surveillance Tools In Counterterrorism Efforts (JUSTICE) Act, to modify a number of Patriot Act and other counterterrorism authorities.³³ As the Feingold-Durbin bill indicates, Patriot Act reauthorization legislation is considered by many to be a potential vehicle for amendments to a wide range of terrorism authorities, not just the expiring provisions. For example, in addition to amending sections 206 and 215 of the Patriot Act, the JUSTICE Act would amend several other Patriot Act authorities, repeal the provision that Congress recently enacted granting telecommunications providers immunity from suit, and make several amendments to the National Security Letter (NSL) statutes.³⁴

Little time remains before the sunsets on December 31, and there are other major issues, such as health care reform, currently occupying Congress’s time. Because of the calls for amendments described above, the reauthorization process is likely to involve a number of hearings and

extensive debate. Even the Department of Justice has said that it believes “that the best legislation will emerge from a careful examination of these matters.”³⁵ Therefore, it would not be surprising to see Congress temporarily reauthorize the provisions (as it did with the 16 Patriot Act provisions that had been scheduled to expire in 2005), before enacting permanent legislation in 2010.

January 2010 Update

Neither the House nor Senate has passed legislation to reauthorize the three expiring provisions. However, all three provisions were temporarily extended until February 28, 2010, by section 1004 of the Fiscal Year 2010 Department of Defense Appropriations Act,³⁶ which President Obama signed on December 19, 2009.³⁷

The House and Senate Judiciary Committees have each favorably reported bills that would address the expiring provisions and make numerous other amendments to national security authorities.

In the House, H.R.3845, the "USA PATRIOT Act Amendments of 2009," was voted out of the Judiciary Committee on November 5, 2009. The bill would repeal the “lone wolf” authority altogether. It would extend the FISA roving wiretap authority (section 206 of the PATRIOT Act) and the FISA business records authority (section 215 of the PATRIOT Act) for four years, until December 31, 2013, but would make several amendments to those provisions. The bill also contains numerous amendments to the national security letter statutes, the criminal delayed-notice search warrant statute, and the criminal and FISA pen register/trap-and-trace authorities.³⁸ Chairman John Conyers, Jr. of the Judiciary Committee declined to hold a hearing on this bill. Ranking Member Lamar S. Smith and the other Committee Republicans convened a “forum” (effectively a shadow hearing) on November 3, 2009, at which witnesses expressed concerns about this legislation’s potential detrimental effects to national security.³⁹

In the Senate, S. 1692, the "USA PATRIOT Act Sunset Extension Act of 2009," was voted out of the Judiciary Committee on October 13, 2009. That bill would extend all three expiring provisions until December 31, 2013. It would impose a new sunset of December 31, 2013, on all of the national security letter statutes. In addition, it contains substantive amendments to the national security letter statutes, the criminal delayed-notice search warrant statute, the FISA business records authority, and the FISA pen register/trap-and-trace authority.⁴⁰ The Judiciary Committee held a hearing on the legislation on September 23, 2009.⁴¹

The House and Senate have not taken final action on various bills that would amend the three expiring provisions and other counter-terrorism authorities. Instead, on February 24, 2010 and on February 25, 2010, respectively, the Senate and House passed bills extending all three expiring provisions without amendment for one year – to February 28, 2011. President Obama signed the legislation into law on February 27, 2010. See <http://www.whitehouse.gov/the-press-office/bills-signed-law-president>; http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3961enr.txt.pdf.

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Related Links

American Association of Law Libraries statement on PATRIOT Act reauthorization
http://www.aallnet.org/aallwash/DayonHill_Section215.pdf

ACLU Releases Comprehensive Report On Patriot Act Abuses (3/11/2009)
<http://www.aclu.org/safefree/patriot/38979prs20090311.html>

House Conservatives seek Patriot Act Extension
http://www.house.gov/list/hearing/az02_franks/thehill_franks_patriotact_mar122009.html

“Obama’s Patriot Act Stance: Practical, A Broken Pledge, or a Non-Issue?”
By Heather Horn on September 17, 2009 9:47a.m., *The Atlantic Wire*
<http://www.theatlanticwire.com/opinions/view/opinion/Obama%27s+Patriot+Act+Stance:+Practical,+A+Broken+Pledge,+or+a+Non-Issue%3F-1040>

Re: Liber(al)tarianism, Obama, & the Patriot Act by [Andy McCarthy](#), September 17, 2009, *National Review Online*
<http://corner.nationalreview.com/post/?q=ZDUxMDFjYjEwOTM2ODU5Y2Y2ZWZWM2NDBINzgyNTQ1MzY>

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, P.L. 107–56 (2001).

² *See id.* at § 224.

³ *See* P.L. 109-160 (2005) (reauthorizing the provisions until February 3, 2006); P.L. 109-170 (2006) (reauthorizing the provisions until March 10, 2006).

⁴ *See* USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, Public Law 109-177 (2006).

⁵ *See id.* at § 102.

⁶ *See id.* at § 103.

⁷ P.L. 108-458 (2004), § 6001.

⁸ *See* 50 U.S.C. § 1861.

⁹ Prior to enactment of the Patriot Act, the statute allowed the FBI to seek a FISA Court order for production of records only from “a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility.” 50 U.S.C. 1862(a) (2001 version of the U.S. Code).

¹⁰ *See id.* at §1862(b)(2)(B).

¹¹ P.L. 107-56, §215.

¹² *Id.*

¹³ *See* P.L. 109-177, at §106(h).

¹⁴ *See id.* at § 106(a)(2).

¹⁵ See *id.* at § 106(f). According to the Department of Justice, no recipient of a section 215 order has ever taken advantage of this procedure. See Letter from Ronald Weich, U.S. Assistant Attorney General for Legislative Affairs, to U.S. Senator Patrick Leahy, Sep. 14, 2009, at 4.

¹⁶ See USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, P.L. 109-178 (2006), at § 3.

¹⁷ “A Review of the FBI’s Use of Section 215 Orders for Business Records in 2006,” Office of the Inspector General, U.S. Department of Justice, March 2008, at 57; *id.* at A-1 (letter from Director of National Intelligence John M. McConnell to Inspector General Glenn Fine); *id.* at A-4 (letter from FBI Director Robert Mueller to Inspector General Glenn Fine).

¹⁸ See Letter from Ronald Weich, *supra*, at 3-4.

¹⁹ See *id.* at 4.

²⁰ P.L. 107-56, at § 206.

²¹ See P.L. 109-177, at §§ 108(a)(2), 108(b)(4).

²² See Letter from Ronald Weich, *supra*, at 1.

²³ See *id.*

²⁴ See *id.* at 1-2.

²⁵ See P.L. 108-458, at § 6001(a); 50 U.S.C. § 1801(b)(1)(C).

²⁶ See P.L. 108-458, at § 6001(b); P.L. 107-56, at § 224.

²⁷ See P.L. 109-177, at §103.

²⁸ See Letter from Ronald Weich, *supra*, at 4.

²⁹ See *id.* at 4-5.

³⁰ See http://judiciary.house.gov/hearings/hear_090922.html.

³¹ See <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=4062>.

³² See Letter from Ronald Weich, *supra*, at 1.

³³ Bill summary available at <http://feingold.senate.gov/record.cfm?id=317927>.

³⁴ The NSL statutes are some of the most likely targets of amendments during the reauthorization debate. NSLs are a form of administrative subpoena available in national security investigations to seek limited categories of documents, including certain financial records, certain subscriber records from telecommunications providers, and consumer credit reports. See 18 U.S.C. § 2709; 12 U.S.C. § 3414; 15 U.S.C. § 1681u; 15 U.S.C. § 1681v; 50 U.S.C. § 436. Although NSLs have existed since long before the Patriot Act, the Act did expand the existing NSL statutes and create one new NSL authority. See Pub. L. 107-56, §§ 358(g), 505. Since the Patriot Act’s enactment, NSLs have been the subject of significant controversy. In particular, the non-disclosure requirements attached to NSLs have been the subject of extensive public debate, several subsequent legislative amendments, and constitutional litigation. See, e.g., P.L. 109-177, §§ 115-119 (amendments enacted by the 2006 Patriot Act reauthorization legislation); *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) (constitutional challenge to 18 U.S.C. § 2709’s non-disclosure requirement). An additional source of controversy was a 2007 Department of Justice Inspector General report finding that the FBI had misinformed Congress about the number of NSLs it had issued and had violated statutory provisions and internal guidelines limiting the use of NSLs. See “A Review of the Federal Bureau of Investigation’s Use of National Security Letters,” Office of the Inspector General, U.S. Department of Justice, March 2007.

³⁵ See Letter from Ronald Weich at 1.

³⁶ The text of the legislation is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3326enr.txt.pdf.

³⁷ See <http://www.whitehouse.gov/the-press-office/statement-press-secretary-hr-3326>.

³⁸ The Committee report is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr382p1.111.pdf.

³⁹ *Video of that forum is available at:* <http://www.c-span.org/Watch/Media/2009/11/03/HP/A/25609/House+Judiciary+Republican+Members+on+Patriot+Act+Amendments.aspx>.

⁴⁰ *The Committee report is available at:* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr092.111.pdf.

⁴¹ *A webcast of the hearing is available at:*
<http://judiciary.senate.gov/hearings/hearing.cfm?id=4062>.