

Background on Reauthorizing the PATRIOT Act

Introduction

As a candidate for President, Barack Obama criticized many of the Bush administration's choices to expand executive power at the expense of civil liberties. In a 2007 speech, Obama said the Bush administration had "[put] forward a false choice between the liberties we cherish and the security we demand." Obama pledged that, as President, he would "provide our intelligence and law enforcement agencies with the tools they need...without undermining our Constitution and our freedom."¹ Since taking office a year ago, however, the President has changed his position on many rule of law issues.

Despite campaigning on a platform of protecting civil liberties, and offers from Senate leaders to support that promise, the Obama administration recently pushed Congress to reauthorize the Patriot Act, the hastily-considered post-9/11 legislation that gave the executive branch sweeping powers to invade the privacy of law-abiding Americans through warrantless searches and wiretaps.² While willing to consider "modifications to provide additional protection for the privacy of law-abiding Americans," the administration has indicated its receptivity to reforms to the PATRIOT Act only "provided that they do not undermine the effectiveness of these important authorities."³

Below is a summary of the particular PATRIOT Act provisions considered by Congress, as well as a competing legislative proposal, opposed by the Obama administration, that would remedy recurring domestic spying abuses.

Expiring Provisions of the PATRIOT Act

Several controversial PATRIOT Act provisions were set to expire at the end of last year, before Congress approved a temporary, 60 day reauthorization to delay a final decision until February 2010.⁴

- One provision allows investigators to obtain "roving wiretap" court orders without any meaningful judicial review.
- Another provision involves increased authorities to seize "tangible things" deemed relevant to a terrorism investigation.
- Finally, the so-called "lone wolf" provision allows the government to get a court order to wiretap a suspect unconnected to any terrorist group.

The PATRIOT Act's authority for roving wiretaps aim to allow investigators to follow a target who switches phone numbers, rather than obtaining a new warrant for each number—but those provisions lack sensible safeguards to ensure their use only against legitimate suspects. In contrast to orders under

¹ Barack Obama, Speech at Woodrow Wilson Center, Council on Foreign Relations, August 1, 2007, *available at* <http://www.cfr.org/publication/13974>.

² The Patriot Act refers to the Uniting and strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (2001). The Act was reauthorized in 2006.

³ Letter from Assistant Attorney General Ronald Weich to Sen. Patrick Leahy, September 14, 2009, *available at* <http://judiciary.senate.gov/resources/documents/111thCongress/upload/091-409WeichToLeahy.pdf>.

⁴ Charlie Savage, *Battle Looms Over the Patriot Act*, New York Times, September 19, 2009, *available at* <http://www.nytimes.com/2009/09/20/us/politics/20patriot.html>.

the Act, court orders for routine criminal investigations require that investigators identify either the person targeted or the telephone being used. Investigators are also normally required to ascertain that the targeted person is actually using the device before using the wiretap.⁵ The PATRIOT Act disposed of both of these safeguards, allowing investigators to obtain a roving wiretap based on a vague physical description, even without showing any relevance to national security.

Section 215 of the PATRIOT Act gave authorities the power to obtain court orders for seizing records and other “tangible things” allegedly related to national security investigations. Investigators can obtain a “Section 215 order” by simply alleging relevance to a national security investigation.⁶ However, the investigator’s justification for such an order can be based partly on activities protected by the First Amendment, such as reading books deemed to be indicative of, for instance, radicalization. Moreover, the Justice Department’s own Inspector General has documented repeated and recurring abuse of investigative authorities, including privacy violations affecting hundreds of thousands—if not millions—of Americans.

Finally, the “lone wolf” provision of the PATRIOT Act has reportedly never been invoked, yet government officials have claimed that it provides a crucial power necessary to enabling the nation’s defense. As with the various areas in which the FBI and other authorities have abused their powers under the PATRIOT Act (such as the National Security Letter authority, or “sneak & peek” searches), secrecy persists and precludes Congress from pursuing its oversight mandate.

Competing Legislation Opposed by the Obama Administration

Senator Russ Feingold, along with eight other Senators, proposed the Judicious Use of Surveillance Tools In Counterterrorism Efforts Act (the “JUSTICE Act”) to provide law enforcement authorities with the powers they need to combat violent extremism while also curtailing some of the dangerous authorities extended by the PATRIOT Act and other legislation, such as the Foreign Intelligence Surveillance Act (“FISA”) and related amendments supported by then Senator Obama in 2008.

For instance, the JUSTICE Act would enable better oversight of National Security Letters—tens of thousands of which are issued every year—by authorizing them only when actually relevant to a national security investigation.⁷ It would impose similar limits on the Section 215 authority that had been set to expire in 2009.

In addition, the JUSTICE Act would limit roving wiretaps by requiring authorities to name either the person or place being targeted. Similarly, it would prevent the use of warrantless wiretaps to conduct “bulk collection” of telecommunications unrelated to investigations.

The JUSTICE Act includes a series of other protections, including amendments to:

⁵ See 18 U.S.C. § 2518.

⁶ See 50 U.S.C. § 1861(501).

⁷ S. 1686, 111th Cong. (2009).

- the “sneak & peek” authority used almost exclusively in routine crime investigations unrelated to national security;
- the government’s unconstitutional power to silence recipients of records requests authorized by the PATRIOT Act;
- the provision allowing the government to prosecute law-abiding individuals for “material support” of humanitarian aid.

Unfortunately, despite support from the Senate leadership, and continued interest from the House, [the JUSTICE Act suffered an early defeat at the hands of the Obama administration](#), which lobbied the Senate and House Judiciary Committees in October 2009 to oppose the Act’s protections for civil liberties.

2010 Procedural Context

In early 2010, Congress will reconsider the PATRIOT Act provisions that, in December 2009, it reauthorized by a 60-day extension. Congressional leaders—including many who have previously voiced support for needed and long overdue restraints on executive power—anticipate reauthorizing the expiring PATRIOT provisions without imposing meaningful protections for civil liberties, or measures to ensure greater transparency.

It is in this context that BORDC invites you to [visit DC on February 3, 2010](#) to share your concerns with your congressional representatives.