

Four More Years: PATRIOT Provisions Renewed

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1) House and Senate Renew PATRIOT Act With No Modifications

On May 26, the House and Senate renewed three controversial provisions of law related to the USA PATRIOT Act that were set to expire the next day. The renewal was passed in the form of an amendment to an unrelated bill, S. 990, that itself temporarily extended authorities of the Small Business Administration. Despite efforts by individual Senators to introduce modifications to the Act's intelligence authorities, the final bill simply renewed the expiring provisions until June 1, 2015 without changes.

Congress passed the PATRIOT Act (Pub. L. 107-56) just a few weeks after 9-11. A few of the Act's controversial provisions were subject to a "sunset," meaning they would expire after a specified number of years unless reauthorized by Congress. Since 9/11, Congress has consistently renewed the sunset provisions, often after blustery debate.

Two of the three renewed provisions are part of PATRIOT itself Section 215 orders for tangible things (business records) and Section 206 orders for roving wiretaps - while the third is part of the Intelligence Reform and Terrorism Prevention Act (Pub. L. 108-458) allowing for surveillance of "lone wolf" suspects, which has never been used. Despite the Justice Department's endorsement of legislative proposals to increase oversight of the provisions' use, Congress again extended those provisions without altering them.

During the renewal debate this year, Senators Wyden and Udall raised concerns that secret domestic surveillance programs may be based on unorthodox legal interpretation of these provisions, particularly Section 215.

Although the renewed provisions are significant and deserving of Congressional scrutiny, especially given the Wyden-Udall concerns, CDT believes Congress should also address other troubling provisions in PATRIOT, particularly those covering the use of National Security Letters (NSLs), which do not sunset. CDT and other civil liberties advocates have repeatedly called attention to the problems raised by NSLs, which are extraordinary devices that FBI officials issue without judicial approval tens of thousands of times per year to force banks, telephone companies, Internet service providers, and other businesses to disclose detailed and potentially sensitive records about their customers. The Department of Justice's own Inspector General found in 2007 that the FBI had repeatedly abused the NSL power from 2002 to 2006 by circumventing PATRIOT's already minimal standards for NSL issuance. In 2010, a Washington Post article further revealed that these abuses were approved at high levels of the FBI chain of command.

Congress has repeatedly considered limitations on the use of NSLs, and Senator Leahy has once again introduced a bill, S. 1125, with new civil liberties protections against NSL abuses. Most important, S. 1125 would place a sunset on the use of NSLs, which are currently a permanent feature of PATRIOT. Although CDT believes even stronger checks on the use of NSLs are necessary, S. 1125 represents a step in the right direction.

[POLITICO on PATRIOT Renewal](#) [1]

[PATRIOT Sunsets Extension Act of 2011 \(Amendment to S. 990\)](#) [2]

[DoJ testimony before the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, 2011](#) [3]

2) National Security Letters Increasingly Used on Americans

NSLs are literally letters that enable the government to obtain broad personal data on individuals. To issue an NSL under current law, the FBI investigator merely needs to claim to a supervisory FBI official that the information it seeks is relevant to a national security investigation. "Relevance" is a very low standard, especially when there is no independent assessment by a judicial officer, and national security investigations can be very broad because they are not limited to illegal acts.

Before the PATRIOT Act, NSLs could be used only to obtain information pertaining to a suspected spy, terrorist, or other agent of a foreign power. This "agent of a foreign power" (AFP) standard was intended to focus government resources on those most likely to warrant surveillance, restricting the government's ability to vacuum up personal information on Americans significantly removed from the target of investigations. The PATRIOT Act eliminated the AFP standard. In essence, the Act allowed FBI agents to get records on any relevant person, even if that person was not suspected of any involvement in terrorism and had no connection to a suspected terrorist.

Over the nearly ten years since PATRIOT's passing, the FBI has issued tens of thousands of NSLs a year, with an increasing focus on Americans. According to the Justice Department's recent report to Congress, in 2010 the FBI made 24,287 NSL requests relating to 14,212 American persons. Although the total number of NSLs issued similar to 2008 numbers after a dip in 2009, the figure of NSLs relating to 14,212 Americans is up drastically from 6,114 and 7,225 in 2009 and 2008 respectively. This suggests a disturbing swing toward increased surveillance of Americans without meaningful oversight by an impartial judicial officer.

[Assistant Attorney General Report on FISA Applications in 2010](#) [4]

[CDT's Greg Nojeim blog post on abuse of NSLs](#) [5]

3) Proposed Senate Bill Would Add Civil Liberties Protections

S. 1125, the current NSL reform bill, codifies several administrative controls previously endorsed and implemented by the Attorney General and the law enforcement community. Despite the modest nature of these proposals, CDT believes that they are worth enacting into law.

S. 1125 would introduce a sunset on the NSL authorities, setting their expiration at December 31, 2013. While this would not in and of itself eliminate the possibility for further abuses like those described in the Inspector General's report, a sunset would at least create incentives to further address the problems with NSLs as they stand.

The new bill would also introduce a number of other modest changes, including:

- A change to the standard for issuance of an NSL requiring that the FBI write an internal "statement of specific facts" reasonably showing relevance to an investigation before it can issue that NSL. This is current FBI practice, but the law has not previously required it.
- A change to the information-handling requirements for information obtained by an NSL requiring minimization. Again, this change maps onto procedures adopted in 2010 by the FBI but is not currently required by law.
- A codification of the Second Circuit's 2008 decision in *Doe v. Mukasey*, which provided a process for the recipient of an NSL to challenge the nondisclosure or "gag" order imposed by

the letter.

- A requirement for public reporting on the aggregate number of NSLs issued each year. The Inspector General would also be required to produce an audit of NSL use from 2007 to 2011, as well as orders for tangible things under Section 215 of PATRIOT or Section 501 of FISA and the use of pen registers and trap and trace devices under Section 402 of FISA. This audit would cover the period since the previous Inspector General's report revealed widespread abuse of NSL authority.

Such proposed changes to the existing law are helpful in calling further attention to the explosion in number and expansion of focus of NSLs. Unfortunately, many of these changes represent restatements of existing FBI practice, and therefore only modestly increase the checks on NSL abuse. Given that Congress continues to reauthorize expiring PATRIOT provisions without modification, however, CDT believes the best step Congress can take in the immediate term is to pass S. 1125.

[S. 1125 on Thomas.loc.gov](#) [6]

[CDT Chart Comparing previous congressional proposals, 2009](#) [7]

4) **Senators Raise Concerns on DOJ's Interpretation of PATRIOT**

During floor debate on PATRIOT renewal, Senators Wyden and Udall raised concerns about the Department of Justice's classified interpretation of PATRIOT intelligence authorities. The Senators are privy to this interpretation as members of the Intelligence Committee, and they believe that the DOJ's secret interpretation is seriously at odds with congressional and public understanding of the law. The Senators introduced an amendment calling upon the Attorney General to publish a report in the Federal Register that details, without describing specific surveillance programs, the Department's legal interpretations and analysis necessary to understand the United States Government's official interpretation of FISA. (Because Section 215 of the PATRIOT Act modified FISA, this may be aimed in part at clarifying the reach of Section 215.)

In the past, the Obama and Bush administrations have intervened with classified briefings when Congress has considered tightening standards on NSLs and Section 215 orders for tangible things. Members of Congress who are briefed on secret surveillance programs are constrained from fully voicing their concerns, but Wyden and Udall's amendment picks up on objections made by Senators Feingold and Durbin during the PATRIOT debate in 2009. Congress has now repeatedly renewed expiring provisions without confronting these concerns.

Although the bill to which Wyden and Udall offered their amendment was tabled in favor of the simple four-year extension, CDT believes that further scrutiny should be paid to the Justice Department's interpretation of the law. We are pleased to see that Sen. Dianne Feinstein, chair of the Senate Intelligence Committee, promised to look into the Wyden/Udall concerns. We look forward to a public report by the intelligence committee.

[Wyden Udall Amendment text](#) [8]

[Video of Udall-Wyden-Feinstein colloquy](#) [9]

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[7] <http://cdt.org/report/comparison-chart-patriot-law-s-1692-and-hr-3845>

[8] <http://wyden.senate.gov/newsroom/press/release/?id=f9f288a5-d438-4e30-8c62-7071f1f0d33b>

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