112TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 112–79
Part 1

FISA SUNSETS REAUTHORIZATION ACT OF 2011

MAY 18, 2011.—Ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1800]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1800) to temporarily extend expiring provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 relating to access to business records and roving wiretaps and to permanently extend expiring provisions of the Intelligence Reform and Terrorism Prevention Act of 2004 relating to individual terrorists as agents of foreign powers, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

99–006

Purpose and Summary

H.R. 1800 reauthorizes three provisions of the Foreign Intelligence Surveillance Act (FISA) that are scheduled to sunset on May 27, 2011. Under the bill, the business records provision, as enacted by Section 215 of the USA PATRIOT Act, and the roving wiretaps provision, as enacted by Section 206 of the USA PATRIOT Act, are authorized until December 31, 2017. The FISA lone wolf definition, enacted by Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), is permanently authorized.

Background and Need for the Legislation

In response to the terrorist attacks on September 11, 2001, Congress passed, and the President signed into law, the USA PATRIOT Act. That act, which amended FISA, was intended to ensure that law enforcement agencies and the intelligence community have the tools they need to stop and deter future terrorist attacks.

The Section 215 business records authority allows the Federal government to seek approval from the FISA Court of orders granting the government access to any tangible items (including books, records, papers, and other documents) in foreign intelligence, international terrorism, and clandestine intelligence cases. This authority is similar to the widely-used grand jury subpoena authority in criminal investigations. However, business records, which by definition reside in the hands of a third party, do not implicate the Fourth Amendment.

There are numerous protections written into FISA to ensure that the business records authority is not misused. Under Section 215, only an Article III FISA judge can issue an order for business records; an investigation of a U.S. person cannot be based solely on activities protected by the First Amendment; the records must be for a foreign intelligence or international terrorism investigation; and minimization procedures must be used. In addition, requests for certain records—including library circulation, book sales, and firearms sales records—must first be approved by the FBI Director, the Deputy Director, or the head of the FBI's National Security Division.

The Section 206 roving wiretap provision authorizes FISA Court orders for multipoint or "roving" wiretaps in foreign intelligence investigations. A "roving" wiretap applies to an individual and allows the government to a use a single wiretap order to cover any communications device that the target uses or may use. Without roving wiretap authority, investigators would be forced to seek a new court order each time they need to change the location, phone, or computer that needs to be monitored. Roving wiretap authority has been available for criminal investigations since 1986.

In order to use a roving wiretap, intelligence agents must first establish, and the FISA Court must approve, all of the criteria for a traditional wiretap. These include probable cause that the target of the surveillance is a foreign power or agent of a foreign power and probable cause that the device is being used or about to be used by a foreign power or agent of a foreign power. Then the agents must also show, and the FISA Court must also agree, that the actions of the target may have the effect of thwarting their

identification. Once a roving warrant is approved, the government must also notify the FISA Court within 10 days after beginning surveillance on a new phone or computer.

The "lone wolf" provision is a definitional change intended to address the growing threat from individual offenders. The provision allows the government to track a foreign national who engages in acts to prepare for a terrorist attack against the U.S. but is not affiliated, or cannot immediately be shown to be affiliated, with a foreign terrorist organization. The lone wolf definition cannot be used to investigate U.S. persons, and only applies in cases of suspected international terrorism.

To date, the government has never used the lone wolf provision, which critics use as justification to let the provision expire. This provision, however, is a crucial tool against the growing threat of individual foreign terrorists working alone in the United States. Some critics also argue that the government can use Title III criminal wiretaps to monitor lone wolf terrorists. Criminal wiretaps, however, are ill-suited for use in intelligence operations for a number of reasons. First, criminal wiretaps are authorized under the presumption that the information collected will be used as evidence in a trial and turned over to targets when they become defendants in a criminal case. By contrast, FISA wiretaps are used to collect foreign intelligence information that may never be used in an Article III criminal trial. Second, unlike criminal wiretaps, FISA wiretaps protect the sources and methods of the government surveillance. This is crucial when dealing with matters of national security. Third, criminal wiretaps require "live minimization" to ensure that the government does not improperly surveil protected activities. However, live minimization is impossible in foreign intelligence collection because most of the information captured by FISA wiretaps is in a foreign language. Information collected under FISA is recorded live, but is later translated by linguists at the intelligence agencies. Under this approach, there is no opportunity for the government to "minimize" information as it is collected.

Attorney General Eric Holder and FBI Director Robert Mueller both requested in hearings before the Committee on the Judiciary that Congress reauthorize these three provisions. The Committee also received letters in support of reauthorizing the three expiring provisions from the FBI Agents Association, the Society of Former Special Agents of the Federal Bureau of Investigation, Inc., the Federal Law Enforcement Officers Association, the Sergeants Benevolent Association (Police Department, City of New York), the National Association of Assistant United States Attorneys, the National District Attorneys Association, the National Fraternal Order of Police, the Major County Sheriffs' Association and Keep America Safe.

Hearings

The Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held three hearings on the USA PATRIOT Act on March 9, 2011, March 30, 2011, and May 11, 2011. Testimony was received from: Mr. Todd Hinnen, U.S. Department of Justice; Mr. Robert S. Litt, Office of the Director of National Intelligence; Professor Nathan Sales, George Mason University; Mr. Julian Sanchez, Cato Institute; Mr. Kenneth Wainstein,

O'Melveny & Myers, LLP; Mr. Michael German, American Civil Liberties Union; Mr. Patrick Rowan, McGuireWoods LLP; The Honorable Bob Barr, former Member of Congress; Mr. Bruce Fein, Campaign for Liberty; and Sergeant Ed Mullins, Sergeant Benevolent Association of New York City. Additional materials were submitted by: the American Civil Liberties Union, Keep America Safe, the Federal Law Enforcement Officers Association, the Federal Bureau of Investigation Agents Association, the Cato Institute, the Sergeants Benevolent Association of New York City, the Society of Former Special Agents of the FBI, the National Association of Assistant United States Attorneys, and the Association of State Criminal Investigative Agencies. The Committee on the Judiciary held no legislative hearings on H.R. 1800.

Committee Consideration

On May 12, 2011, the Committee met in open session and ordered the bill H.R. 1800 favorably reported without amendment, by a roll call vote of 22 to 13, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 1800.

1. An amendment by Mr. Conyers to prohibit an application for a 215 business record order requiring the production of library and bookseller records. Defeated 10-17.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy			
Mr. Ross			
Ms. Adams		X	
Mr. Quayle			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Waters			
Mr. Cohen			
Mr. Johnson			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Total	10	17	

2. An amendment by Ms. Jackson Lee to extend the lone wolf, roving wiretap, and business records provisions until December 31, 2014. Defeated 11-20.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen			
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Total	11	20	

3. An amendment by Ms. Jackson Lee to require the President to submit a report to relevant congressional committees on FISA court secrecy. Defeated 11-20.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen			
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Total	11	20	

4. An amendment by Mr. Nadler to raise standards for the collection, pursuant to section 215, of personally identifiable records held by libraries and booksellers. Defeated 11-21.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Total	11	21	

5. An amendment by Mr. Johnson to require that, if a FISA target's identity is not known, that the surveillance application to describe the target "with particularity." Defeated 11-18.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Total	11	18	

6. An amendment by Ms. Chu to allow petitions to challenge nondisclosure to be brought immediately and makes other changes to the procedures for Sec. 215 nondisclosure orders; and an amendment to institute annual Audits by the Inspector General to Congress for years 2006-2007. It also institutes an annual unclassified report by the Attorney General on how the powers under this act are used. Defeated 12-19.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence			
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Total	12	19	

7. An amendment by Mr. Quigley to permit the Attorney General to ban the sale of firearms to any individual who, based on in-

formation collection under FISA, is or has been engaged in terrorist acts, if the Attorney General also has a reasonable suspicion that the firearm would be used in connection with terrorism. Defeated 11-21.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Total	11	21	

8. Motion to order the bill favorably reported without amendment. Approved 22-13.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King			

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz		X	
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman		X	
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez		X	
Total	22	13	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1800, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 18, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1800, the "FISA Sunsets Reauthorization Act of 2011."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1800—FISA Sunsets Reauthorization Act of 2011.

CBO estimates that implementing H.R. 1800 would have no significant costs to the Federal Government. Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any effects would be insignificant for each year.

CBO has determined that the provisions of H.R. 1800 are either excluded from review for mandates under the Unfunded Mandates Reform Act because they are necessary for national security or they contain no intergovernmental or private-sector mandates as defined by that act.

The Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458) and the USA PATRIOT Improvement and Reauthorization Act of 2005 (Public Law 109–177) expanded the powers of Federal law enforcement and intelligence agencies to investigate and prosecute terrorist acts. H.R. 1800 would extend or make permanent certain provisions of those acts that would otherwise expire later this month.

Because those prosecuted and convicted under H.R. 1800 could be subject to civil and criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Collections of civil fines are recorded in the budget as revenues. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

On March 31, 2011, CBO transmitted a cost estimate for S. 193, the USA PATRIOT Act Sunset Extension Act of 2011, as reported by the Senate Committee on the Judiciary on March 17, 2011. The two bills contain similar provisions to extend the Federal Government's current authority to investigate terrorist acts. However, S. 193 also would require audits and reports by the Department of Justice (DOJ) and the intelligence community and would rescind unobligated balances from the DOJ's Assets Forfeiture Fund. The cost estimates reflect the differences between the two bills.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1800 authorizes Section 215 business records and Section 206 roving wiretap authority until December 31, 2017, and permanently authorizes FISA's lone wolf definition.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1800 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1: Short Title

Section 1 provides that H.R. 1800 may be cited as the "FISA Sunsets Reauthorization Act of 2011."

Section 2: Extension of Sunsets of Provisions Relating to Access to Business Records, Individual Terrorists as Agents of Foreign Powers, and Roving Wiretaps

Section 2 temporarily extends the authorization of Section 215 business records collection and roving wiretaps until December 31, 2017. Section 2 also permanently extends the authorization for the lone wolf provision.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005

* * * * * * *

TITLE I—USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT

* * * * * * *

SEC. 102. USA PATRIOT ACT SUNSET PROVISIONS.

(a) * * *

(b) SECTIONS 206 AND 215 SUNSET.—

(1) IN GENERAL.—Effective [May 27, 2011] *December 31, 2017*, the Foreign Intelligence Surveillance Act of 1978 is amended so that sections 501, 502, and 105(c)(2) read as they read on October 25, 2001.

* * * * * * *

INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

* * * * * * *

TITLE VI—TERRORISM PREVENTION

Subtitle A—Individual Terrorists as Agents of Foreign Powers

SEC. 6001. INDIVIDUAL TERRORISTS AS AGENTS OF FOREIGN POWERS.

[(a) IN GENERAL.—Section] *Section* 101(b)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(b)(1)) is amended by adding at the end the following new subparagraph:

"(C) * * *

* * * * * * *

[(b) SUNSET.—

[(1) IN GENERAL.—Except as provided in paragraph (2), the amendment made by subsection (a) shall cease to have effect on May 27, 2011.

[(2) EXCEPTION.—With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in paragraph (1) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which the provisions cease to have effect, such provisions shall continue in effect.]

* * * * * * *

Dissenting Views

INTRODUCTION

H.R. 1800 is a missed opportunity. This legislation deals with three surveillance powers set to expire on May 27, 2011—the "lone wolf" definition for individual terrorist suspects, the "Section 215" business records collection power, and the roving wiretap authority. Members on both sides of the aisle have expressed serious concerns with each of these provisions, but the bill addresses none of these misgivings. It makes no substantive changes to the PATRIOT Act whatsoever. The Majority could have worked to reach consensus and craft a compromise that improves the underlying law. Instead, they chose to ignore differing opinions and push through a bill that does not make a single correction or adopt even those amendments that enjoy bipartisan support.

CONCERNS ABOUT H.R. 1800 AND THE EXPIRING PROVISIONS OF THE USA PATRIOT ACT

The USA PATRIOT Act raises serious questions about the proper balance between individual liberty and government authority. The three specific surveillance powers that expire on May 27 are not the most controversial portions of the law, but they do raise significant concerns.[1] Reauthorization would have provided an important opportunity for Congress to reevaluate and improve these authorities. H.R. 1800 instead extends the expiring provisions without addressing any of the concerns that have been raised.

Concerns regarding Section 215

Relevance is too broad a standard. Section 215 allows the government to seize virtually any record or information from any person or business in the United States simply by showing the information is "relevant" to a national security investigation.[2] In addition, the statute says that certain categories of information are "presumptively relevant"—including any information that "pertains" to a person "in contact with, or known to, a suspected agent of a foreign power." Under Section 215, information can be collected about any innocent American, who is not suspected of terrorism or anything else, simply if it is relevant to an investigation of some other person or group. This includes highly personal information such as library records and reading history, medical records, and social networking information.

Ranking Member Conyers and Rep. Nadler each offered amendments that would provide specific protections to libraries and booksellers. The Conyers amendment would have prohibited intelligence agencies from making a Section 215 demand for "library circulations records, library patron lists, book sales records, [and] book customer lists." The limitation would have applied only to Section 215; all of these records would have remained available to law enforcement via normal criminal investigation processes. Notably, the Ranking Member—joined by Rep. Nadler, Rep. Ron Paul, and Rep. Walter Jones—introduced an identical amendment to the Continuing Resolution debated on the House floor this past February. At that time, 32 Republicans—including Reps. Adams and Chaffetz—voted in favor of the proposal.[3] At the markup, Reps. Adams and Chaffetz reversed their position, and the amendment was defeated by a party line vote.

Rep. Nadler offered a modified version of this amendment. Under his proposal, library and bookseller records are only available under Section 215 with "a statement of specific and articulable facts showing . . . reasonable grounds to believe that the records sought are relevant to an authorized investigation to obtain foreign intelligence information," and that the records have a sufficient nexus to a suspected terrorist or foreign agent. The amendment would have raised the Section 215 standard from mere "relevance" and provided a basic layer of protection to the privacy of individual citizens. Simply put, "Americans do not want the government look-

[1] The issues raised below relate to unclassified uses of these authorities. Committee members have been briefed on classified matters that also raise civil liberties questions. Those concerns, of course, may not be aired in this public report.

[2] 50 U.S.C. § 1861(b)(2).

[3] H.R. 1, Roll Call Vote 95, 112th Cong., Feb. 18, 2011.

ing into what they read."[4] Nonetheless, the amendment was again defeated on a party vote.

"Presumptive Relevance" is unreasonable. The Section 215 statute makes certain categories of information "presumptively relevant"—including any information that "pertains" to a person "in contact with, or known to, a suspected agent of a foreign power."[5] This presumption—which cannot be challenged or rejected by the Court—is sweeping. For example, if the child of a foreign diplomat ("an agent of a foreign power") attended a birthday party at a classmate's home, the Section 215 presumptive relevance standard could enable the FBI to obtain any information that "pertains" to that classmate's family, including bank records, drivers license files, or workplace personnel files. Similarly, if a suspect of a terrorism investigation viewed a person's public Facebook page, or responded to a classified advertisement, the FBI could likely use a Section 215 order to collect all of that person's online records.

Intelligence operations are not the same as ordinary criminal investigations. Although the Section 215 authority is similar to the subpoena power held by grand juries, the procedural checks that deter abuse in the criminal context do not necessarily apply in the intelligence context. First, evidence seized with a criminal subpoena is intended for use in court, whereas Section 215 orders may be used for long term intelligence gathering with no expectation of courtroom proceedings. Thus, while the exclusionary rule and criminal discovery obligations deter abusive or overreaching use of subpoenas in the criminal context, there is no comparable deterrent to abuse in intelligence operations. In addition, Section 215 orders come with powerful nondisclosure (or "gag") rules which can prevent the subject of a Section 215 order from ever knowing their private information has been taken by the government. In markup, Rep. Chu offered an amendment that would have limited these gag orders and given citizens an immediate right to challenge the legality of a Section 215 order in a court of law. The amendment was defeated on party lines.

The Justice Department Inspector General has identified problems with the use of Section 215 orders. Recent reports published by the DOJ Inspector General have identified a number of improper or otherwise problematic 215 orders.

- In one case, the FBI obtained a Section 215 order for information regarding a telephone line that was not actually used by the subject of the investigation. According to the Office of the Inspector General, "this resulted in the FBI receiving unauthorized information, which is called 'over collection,' between March 2005 and October 2005."[6]
- In another case, the FBI was collecting information about a certain telephone line. During this time, the phone company assigned the number to a different person, but failed to inform the FBI of this fact for several weeks. As a result, the FBI used its Section 215 authority to collect information about an innocent person who was not connected to the in-

[4] *Markup of H.R. 1800, FISA Sunsets Reauthorization Act of 2011,* H. Comm. on the Judiciary, 112th Cong., May 12, 2011 (remarks of Rep. Sensenbrenner) (unofficial transcript).

[5] 50 U.S.C. § 1861(b)(2)(i)-(iii).

[6] DOJ Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records,* at page xii (March 2007).

vestigation.[7] There is no suggestion that the over collection here was intentional, but that does not necessarily lessen the personal intrusion.

- In April 2005, the FBI learned that a source, who had provided significant information about the target of a Section 215 order, had changed his mind and no longer believed that the target was involved with a particular terrorist group. However, this changed information was not reported to the FISA court until January 2006, prompting the court to demand an explanation of the failure to timely report this information.[8]

The Justice Department's Inspector General is currently conducting a review of the use of Section 215. It is irresponsible to pass an unprecedented 6-year extension of this authority without the benefit of the information contained in the forthcoming audit.

Concerns regarding Roving Wiretaps

The risk of tapping the wrong person is too high in the FISA context. Roving wiretap authority is commonly used in the criminal context and is not especially controversial. However, FISA authorizes the government to obtain roving power by providing a "description of the target" if the person's identity is not known. This loose standard increases the likelihood that the wrong person will accidentally be targeted for FISA wiretapping.

This concern is heightened in the intelligence context where the lack of notice to the suspect and the focus on intelligence gathering, rather than eventual prosecution, create poor incentives and undermine deterrents to abuse.

In markup, Rep. Johnson offered an amendment that would have required law enforcement to describe the target "with particularity" before a warrant may for a roving wiretap. The amendment would have merely codified current practice—the Department of Justice has testified that it already provides the court with sufficient detail to describe a target with particularity.[9] The government has, in essence, conceded that this assurance of privacy will have no impact on its operational flexibility. Nonetheless, the Majority defeated the amendment on party lines.

Concerns Regarding Lone Wolf Surveillance

FISA powers are not necessary to investigate individual lone actors. FISA brings extraordinarily intrusive search and surveillance powers to bear on the targets of national security investigations, including inside the United States. Those intrusions are justified in part on the grounds that the target is a foreign government or terrorist group or other significant power. But lone wolf brings these powers to bear on single individuals if they are suspected of "acts in preparation" for international terrorism.

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[7] DOJ Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records,* at page xii (March 2007).

[8] DOJ Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records,* at page xiii (March 2007).

[9] *Hearing on the Reauthorization of the PATRIOT Act,* H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security, March 9, 2011 (testimony of Acting Attorney General Todd Hinnen, Department of Justice, National Security Division).

FISA's constitutionality depends in part on the fact that its search and seizure powers apply in grave national security matters, rather than in ordinary criminal investigation. In 2009, national security law expert Suzanne Spaulding testified that allowing FISA powers to be used via lone wolf in what may be rather mundane criminal investigations puts the constitutionality of FISA at risk. [10]

Lone Wolf has never been used. The executive branch has *never* used the lone wolf provision. Without this authority, they would retain ample means under our robust criminal investigatory system to deal with single individuals suspected of terrorist acts or preparation therefore. We appreciate that some Members feel we should retain the lone wolf provision even though it has not proven necessary during the last 7 years of heightened terror threats. The record of non-use suggests, however, that—at a minimum—a new sunset is needed to ensure effective oversight and reporting to Congress on this novel power. Making this provision permanent when it has no track record is simply reckless.

THE MAJORITY HAS BEEN UNWILLING TO NEGOTIATE OR COMPROMISE

On March 30, 2011, in a subcommittee oversight hearing on the "Permanent Provisions of the PATRIOT Act," Ranking Member Conyers began his opening statement with a fair and uncontroversial request:

> [W]e come here today to request of you that we have another meeting on this subject without the distinguished witnesses that are here where we can discuss some of the unclassified and classified materials that would be the subject of such a meeting. I am fully aware that the month after next we are going to have to dispose of this matter, and I think that this would be a very important meeting in terms of reaching some kind of consensus about where we are. . . . I would like this discussed here today, of course, but I would like us to meet with the Committee in a non-public hearing on that issue.[11]

In past months, Committee Democrats have sought opportunities to discuss the PATRIOT Act. Each time, the Majority was unwilling to meet or unwilling to discuss substantive changes to the underlying law.

H.R. 1805—A Better Vehicle for Consensus

There is a better way to craft legislation. A responsible legislative effort based on winning broad support—rather than forcing through a controversial bill on party line votes—would have allowed consideration of concerns raised by members of both parties but that fall outside the narrow scope of H.R. 1800.

To this end, Ranking Member Conyers introduced H.R. 1805, the "USA PATRIOT Sunset Extension Act of 2011." The bill is cosponsored by Rep. Dutch Ruppersberger, Ranking Member of the House

[10] Testimony of Suzanne Spaulding before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, at 11–15, September 22, 2009.

[11] *Hearing on the Permanent Provisions of the PATRIOT Act,* H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security, March 30, 2011 (remarks of Ranking Member John Conyers, Jr.).

Permanent Subcommittee on Intelligence. It represents a responsible effort to improve the expiring authorities while preserving their operational utility.

H.R. 1805 is the companion to S. 193, a bipartisan measure crafted by Senator Patrick Leahy and reported out of the Senate Judiciary Committee earlier this year.[12] It embodies an approach that has the ready support of the executive branch and the intelligence community. At a PATRIOT Act hearing before the Crime Subcommittee earlier this year, for example, General Counsel of the Office of the Director of National Intelligence stated that "I think the provisions in [S. 193] are examples of the kinds of provisions . . . that would provide enhanced protection for civil liberties without affecting operational utility." [13]

Unlike the Majority's bill, H.R. 1805 directly addresses many of the concerns raised by the use of the PATRIOT Act. It does not allow any of the expiring provisions to lapse. It includes reasonable 2½ year sunsets for all three authorities. It provides heightened protection for libraries and booksellers, but does not bar collection of even this sensitive information. It tightens standards for roving wiretaps, while allowing roving authority to still be used. It eliminates the overbroad presumption of relevance in Section 215, and requires a thorough statement of facts to be presented in support of all Section 215 applications—but does not otherwise heighten the basic Section 215 standard. And it fixes a number of constitutional and practical problems with Section 215 nondisclosure orders, while allowing appropriate secrecy to be maintained.

H.R. 1805 also strengthens National Security Letter processes, requiring creation and retention of better NSL records, improving NSL nondisclosure order practices, and placing a sunset on NSLs. The bill also coordinates a number of surveillance authorities sunsets so that the whole range of interrelated intelligence tools can be considered together in a comprehensive manner next time around, rather than in bits and pieces, year by year.

H.R. 1800 Follows Past Practice for the Majority

For a decade, House Republicans have promised open debate and compromise on the PATRIOT Act. Instead, the Majority has reneged on deals with House and Senate Democrats, walked away from the bargaining table, and created a hostile environment for Members and witnesses who disagree with the scope and reach of the bill.

In 2001, within days of the September 11 attacks, Attorney General John Ashcroft announced that the Justice Department would draft a bill outlining new powers needed for the federal government to fight terrorism. A subsequent hearing held on September 24, 2001, was so rushed that the Attorney General would not submit to a full round of questions by the members. Nonetheless, the Committee worked out a compromise with the Bush Administration. On October 3, 2001, the Committee reported out H.R. 2975 by a unanimous 36–0 vote.[14]

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[12] *See* S. Rep. 112–13 to accompany S. 193, "The USA PATRIOT Sunset Extension Act of 2011," April 11, 2011.

[13] *Hearing on the Reauthorization of the PATRIOT Act,* H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security, March 9, 2011 (response of Robert Lit to a question by Ranking Member Conyers).

[14] H.R. Rep. No. 236, 107th Cong., 2d Sess. (2001).

While H.R. 2975 was being prepared for floor consideration, and in the middle of the 2001 anthrax scare on Capitol Hill, the Administration reneged on its deal. Chairman Sensenbrenner introduced a new and more aggressive version of the bill that became the basis for the final PATRIOT Act. Compromise talks were abandoned. At no point was the Committee permitted to consider this version of the legislation.

This Congress, the Majority dropped H.R. 1800 late on a Friday afternoon, while the House was in pro forma session and members were in their districts. The bill ignores concerns raised by both members of both parties. It has never had the benefit of a legislative hearing. From this lack of notice, and from the lack of respect shown to differing opinions throughout this process, we can only conclude that the Majority cannot be expected to meaningfully negotiate—with members of either party—to resolve the many outstanding concerns we have with this legislation.

THERE IS STRONG BIPARTISAN OPPOSITION TO H.R. 1800

Opposition to this bill runs wide and deep across the political spectrum. Traditional defenders of civil liberties oppose the bill because it extends (or makes permanent) these surveillance authorities without any additional protections for privacy and civil liberties. These opponents include the American Civil Liberties Union and the Electronic Frontier Foundation.[15]

We have also seen a powerful new wave of conservative opposition to the overreaching government surveillance authorized by the PATRIOT Act. When the first PATRIOT Act reauthorization was brought to the floor this Congress, it was defeated on suspension, with 26 Republicans voting against.[16] Weeks later, Reps. Conyers, Nadler, Paul and Jones offered a bipartisan amendment to the Republican continuing budget resolution that would have protected libraries and booksellers from having their records seized, which received 32 Republican votes on the floor.[17]

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[15] The PATRIOT Act has long been opposed by civil liberties and law reform organizations. In 2005, for example, the following groups opposed re-authorization: The Center for Constitutional Rights, the American Conservative Union, American Immigration Lawyers Association, American Library Association, the Center for Democracy and Technology, Common Cause, Free Congress Foundation, Gun Owners of America, Lawyers' Committee for Civil Rights, National Association for the Advancement of Colored People (NAACP), National Association of Criminal Defense Lawyers, People for the American Way, the American-Arab Anti-Discrimination Committee, American Association of Law Libraries, American Baptist Churches USA, American Humanist Association, American Policy Center, Americans for Tax Reform, Arab American Institute, Asian Americans for Equality, Asian American Legal Defense & Education Fund, Association of American Physicians and Surgeons, Association of Research Libraries, Bill of Rights Defense Committee, Center for Human Rights and Constitutional Law, Center for Justice and Accountability, Center for National Security Studies, Chicago Committee to Defend the Bill of Rights, Commission on Social Action of Reform Judaism, Consumer Action, Doctors for Disaster Preparedness, Electronic Privacy Information Center, First Amendment Foundation, F.I.R.S.T. Project, Inc., Friends Committee on National Legislation, Hate Free Zone Campaign of Washington, Immigrant Defense Project of the New York State Defenders Association, Immigrant Legal Resource Center, International Institute of Boston, Japanese American Citizens League, Korean Resource Center, Latin American Integration Center, Lawyers Committee for Human Rights, League of United Latin American Citizens, Mennonite Central Committee U.S., Washington Office, Mexican American Legal Defense and Educational Fund (MALDEF), Multiracial Activist, National Asian Pacific American Legal Consortium, National Coalition Against Repressive Legislation, National Council of La Raza, National Employment Law Project, National Immigration Law Center, National Lawyers Guild, New York Immigration Coalition, Northwest Immigrant Rights Project, OMB Watch, Organization of Chinese Americans, Police Accountability Project, Presbyterian Church USA, Washington Office, and the Special Libraries Association. *See* Dissenting Views regarding H.R. 3199 (109th), House Report 109–174 at 444.

[16] Roll Call 26 on H.R. 514 (112th Congress) (February 8, 2011).

[17] Roll Call 95 on Amendment 524 to H.R. 1 (112th Congress) (February 18, 2011).

Since then, numerous Republicans and conservatives have spoken out against the approach reflected in this legislation. For example, our former Colleague Bob Barr of Georgia testified at a recent hearing before the Subcommittee on Crime, Terrorism, and Homeland Security that:

> "I understand the Chairman introduced legislation last week that would make the so-called 'lone-wolf' authority in the USA PATRIOT Act permanent; and would extend the Section 215 and roving 'John Doe' wiretap authorities in the Act for another 6 years, until 2017. I urge this committee to reject this approach tomorrow during its markup, and either amend these sections in order to bring them into full compliance with the letter and the intent of our Constitution, or else allow them to expire." [18]

Bruce Fein, a conservative scholar and former Reagan Administration official, also testified against the PATRIOT Act. Mr. Fein explained:

> "Despite the good intentions of its architects, the PATRIOT Act betrays bedrock constitutional principles. The individual is the center of the Constitution's universe. Aggrandizing government is the center of the PATRIOT Act. The Constitution salutes freedom and citizen sovereignty over absolute safety and citizen vassalage. The PATRIOT Act turns that hierarchy on its head." [19]

And Senator Rand Paul released a letter to his colleagues stating his opposition to extending these authorities. Senator Paul wrote:

> "The USA PATRIOT Act, passed in the wake of the worst act of terrorism in U.S. history, is no doubt well-intentioned. However, rather than examine what went wrong, and fix the problems, Congress instead hastily passed a long-standing wish list of power grabs like warrantless searches and roving wiretaps. The government greatly expanded its own power, ignoring obvious answers in favor of the permanent expansion of the police state. It is not acceptable to willfully ignore the most basic provisions of our Constitution—in this case the Fourth and First Amendments—in the name of 'security.'" [20]

The opposition to H.R. 1800 even has a strong base within the House Republican caucus. Citing a need "to evaluate, amend, improve, and potentially replace all provisions of the PATRIOT Act,

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[18] Prepared Testimony of Hon. Robert Barr at a "Hearing on the USA PATRIOT Act: Dispelling the Myths," before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary (112th Cong.) (May 11, 2011).

[19] Prepared Testimony of Bruce Fein at a "Hearing on the USA PATRIOT Act: Dispelling the Myths," before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary (112th Cong.) (May 11, 2011).

[20] Letter from Senator Rand Paul to Colleagues at 1–2 (February 15, 2011). Many other conservatives have opposed the bill. CATO Institute research fellow Julian Sanchez testified at a March 9, 2011, Judiciary Subcommittee hearing that "these emergency powers should not be made permanent until they are further tailored to ensure that the tools employed to investigate and apprehend terrorists are consistent with our Constitutional tradition of respect for the privacy and civil liberties of innocent Americans." And conservative lawyer John Whitehead of the Rutherford Institute recently published his opposition, arguing "the freedoms in the Bill of Rights are being eviscerated, and if they are not restored and soon, freedom as we have known it in America will be lost. Thus, whether it's a short-term or long-term scenario, Congress should not renew the USA Patriot Act, nor should President Obama sign it into law." Whitehead, *Renewing the Patriot Act: Who Will Protect Us From Our Government* (May 16, 2011).

not just the three provisions at issue here," Rep. Chaffetz stated: "I have at least three specific concerns, and look forward to incorporating your concerns with mine as I draft amendments during the hearing and markup process."[21] Indeed, Judiciary Republicans filed six amendments to H.R. 1800 in advance of the markup.[22] Some of these amendments were identical to proposals offered by the Minority; others were compromise measures that would have likely enjoyed substantial bipartisan support. All of these Republican amendments were withdrawn overnight.[23] Every Democratic amendment, even those closely resembling Republican proposals, was voted down along party lines.

The Committee favorably reported H.R. 1800 by a vote of 22–13, with Republican Jason Chaffetz of Utah voting against. The Majority may succeed in their attempt to push through another aggressive PATRIOT Act reauthorization—but they will face substantial and bipartisan opposition, and they will have missed an opportunity to reach consensus on this bill.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MAXINE WATERS.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
JUDY CHU.
TED DEUTCH.

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[21] Press Release, Rep. Jason Chaffetz, "Renewal of PATRIOT Act Provisions," Feb. 23, 2011 (*available at* http://chaffetz.house.gov/legislative-issues/2011/02/renewal-of-patriot-act-provisions.shtml).

[22] The Committee's rules permit members of both parties to review proposed amendments at least a day before markup begins. H. Comm. on the Judiciary, 112th Cong. Rules of Proc., Rule II(f). Rep. Issa "pre-filed" two amendments to H.R. 1800. Rep. Chaffetz pre-filed four amendments. The Majority did not permit the Committee to consider any of these proposals at markup.

[23] *See* John Bresnahan and Jake Sherman, "GOP Struggles for PATRIOT Act Votes," *Politico,* p. 1, May 12, 2001. "House Republican leaders are aggressively lobbying rank-and-file GOP lawmakers to pass a long-term extension of the PATRIOT Act, a Bush-era anti-terrorism law that has already provided Republicans with an embarrassing defeat early in their majority." *Id.*