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## **PATRIOT ACT REAUTHORIZATION S. 1038** **LEGISLATIVE BULLETIN**

### **Summary:**

Three provisions of the Foreign Intelligence Surveillance Act of 1978 will expire at 12:01 a.m. this Friday, May 27. Two were enacted by the USA PATRIOT Act, which was signed into law on October 26, 2001, in the wake of the September 11 terrorist attacks: the authority for roving wiretaps and Section 215 orders, commonly known as the business records provision. A third, on the authority to conduct surveillance against "lone wolves," was enacted in the Intelligence Reform and Terrorism Prevention Act of 2004. In the last Congress, these authorities were extended twice: first from December 31, 2009 to February 28, 2010, and then to February 28, 2011. On February 15, 2011, Congress passed another short-term extension of the three provisions, which are now set to expire on May 27, 2011.

S. 1038, The PATRIOT Sunsets Extension Act of 2011, is cosponsored by Leaders Reid and McConnell, and reauthorizes the three expiring provisions for four years, until June 1, 2015. The reauthorization of these provisions is expected to receive bipartisan support on the Senate floor.

### **Legislative Background:**

The following three provisions of the USA PATRIOT Act will expire Friday, May 27, 2011:

#### ***"Roving Wiretaps"***

Section 206 of the USA PATRIOT Act authorizes roving wiretaps in relation to foreign intelligence collection that permit electronic surveillance of a person, without specifying the phone or computer, if that person demonstrates an intent to evade surveillance – for example, by switching cell phones on a regular basis. Long used in criminal investigations, roving wiretaps are court-approved and may cover any communications device that the target uses or may use. Like roving criminal wiretaps, roving wiretaps under FISA do not require the government to ascertain where the targeted communication will take place. In short, the government may obtain an order to conduct surveillance that specifies a target (though not necessarily by name) but not a specific device to tap, although the order must provide a description of the target if a name is not known. According to the Department of Justice, the government has sought roving surveillance authority in fewer than 20 cases per year between 2001 and 2010, on average. In testimony in 2009, FBI Director Mueller argued, "With the new technology, it is nothing to buy four or five cell phones at the same time and use them serially -- to avoid coverage. And the roving wiretaps are used in those circumstances, where we make a case that is going to happen. And we've got approval for it. It's

essential, given the technology and the growth of technology that we've had." [Senate Judiciary Committee, 9/16/09]

### ***Access to Business Records and Tangible Things***

Section 215 of the USA PATRIOT Act allows the government to seek court-ordered production of "any tangible thing," including business records, in intelligence investigations. The provision both expanded the scope of materials that may be sought and lowered the standard for a court to issue an order compelling their production. Before Section 215 was enacted, an applicant was required to have "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." However, the USA PATRIOT Act changed Section 215 to require "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to a [foreign intelligence, international terrorism, or espionage investigation.]" CRS, [3/2/10](#); CRS, [May 20, 2011](#).]

Section 215 has been described as the "library records" provision because of concerns raised by librarians about disclosing library records under this provision. Under a 2005 amendment, if library records were sought under the USA PATRIOT Act, the application would need to be approved by one of three high-ranking FBI officers. [CRS, [3/2/10](#)].

### ***"Lone Wolf"***

Section 6001(a) of the Intelligence Reform and Terrorism Protection Act permits surveillance against a so-called "lone wolf," a non-U.S. person engaged in "international terrorism" for whom the government does not have evidence of ties to a foreign terrorist group. This provision was enacted in 2004, and its supporters cite the case of Zacarias Moussaoui, in which FBI agents allegedly had insufficient evidence of his affiliation with a foreign terrorist organization and therefore could not get a court order to access his computer. However, a report issued by Senators Specter, Leahy and Grassley in 2003 concluded that key FBI personnel working on the Moussaoui case misunderstood the FISA legal requirements. Specifically, the FBI believed it could not establish probable cause to believe Moussaoui was acting on behalf of a foreign power. However, the FBI later admitted in testimony before Congress that the FBI agent in charge of the investigation did not understand that probable cause was the standard, what probable cause meant in this context, or the legal definition of an agent of a foreign power. [CRS, [3/2/10](#); Statement of Assistant Attorney General David Kris, [9/23/09](#); Senate Judiciary Committee Report on S.193, at page12, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt13/pdf/CRPT-112srpt13.pdf>].

In September 2009, a U.S. Department of Justice official stated that the so-called "lone wolf" provision had never been used, and the Department recently confirmed that it still has not been used. The Department nonetheless asked that the provision be extended. [Statement of Assistant Attorney General David Kris, [9/23/09](#)]

### **Key Roll Call Votes:**

On February 27, 2010, President Obama signed H.R. 3961 (Public Law [111-141](#)), a one-year extension of several expiring provisions of the Patriot Act. Three provisions were extended: FISA roving wiretaps; Section 215 FISA business records orders; and the "lone wolf" provision in FISA. [Public Law [111-141](#); CRS, [3/2/10](#)]

### **Key Roll Call Votes:**

Final Senate Passage: Passed 86-12, Senate Vote 19, [2/15/11](#)

Final House Passage: Passed 279-143, House Vote 66, [2/17/11](#)

In February 2011, Congress cleared a short-term, extension of expiring Patriot Act provisions, through May 27, 2011. ([PL112-3](#))

Key Roll Call Votes:

Final Senate Passage: Passed by unanimous consent, 2/24/10

Final House Passage: Passed 315-97, House Vote 67, [2/25/10](#)

In December 2009, Congress cleared a short-term, 60-day extension of expiring Patriot Act provisions as part of H.R. 3326, the fiscal 2010 Defense appropriations bill ([PL 111-118](#)).

Key Roll Call Votes:

Final Senate Passage: Passed 88-10, Senate Vote 384, [12/19/09](#)

Final House Passage: Passed 395-34, House Vote 985, [12/16/09](#)

In March 2006, the Senate voted to reauthorize the 16 expiring provisions of the USA PATRIOT Act. While the bill made 14 provisions permanent, it put a 2009 expiration date on the provisions allowing “roving wiretaps” and access to business records. The vote came after the Bush administration agreed to allow three minor changes to the package, including a change that would allow recipients to challenge the gag order on a business records request.

Key Roll Call Votes:

Final Senate Passage: Passed 89-10, Senate Vote 29, [3/2/06](#)

Motion to invoke cloture on changes to the reauthorization bill: Passed 69-30, Senate Vote 23, [2/28/06](#)

In February 2006, the Senate voted to extend 16 expiring provisions of the USA PATRIOT Act for five weeks, though March 10.

Key Roll Call Votes:

Final Senate Passage: Passed 95-1, Senate Vote 11, [2/2/06](#)

In December 2005, the Senate agreed to extend the 16 expiring provisions of the USA PATRIOT Act by six months. The compromise came just days after Senate Democrats, with the support of four Republicans, “blocked a vote to renew the act in hopes of winning stronger civil liberties provisions in the new law.” [Knight Ridder, 12/22/05]

Key Roll Call Votes:

Motion to invoke cloture on reauthorization: Rejected 52-47, Senate Vote 358, [12/16/05](#)

House vote on reauthorization: Passed 251-174, House Vote 627, [12/14/05](#)

The Intelligence Reform and Terrorism Prevention Act of 2004, which passed in December 2004, included the so-called “lone wolf” provision.

Key Roll Call Votes:

Final Senate Passage: Passed 89-2, Senate Vote 216, [12/8/04](#)

Final House Passage: Passed 336-75, House Vote 544, [12/7/04](#)

The initial USA PATRIOT Act was signed into law in October 2001.

Key Roll Call Votes:

Final Senate Passage: Passed 98-1, Senate Vote 313, [10/25/01](#)

Final House Passage: Passed 357-66, House Vote 398, [10/24/01](#)