



“Reauthorizing the USA PATRIOT Act: Ensuring Liberty and Security”
A Summary of the Senate Judiciary Committee Hearing¹

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On September 23, 2009 the Senate Judiciary Committee held a hearing to examine three key provisions of the USA PATRIOT Act (“Patriot Act”) that are set to expire or “sunset” on December 31, 2009. These provisions created three new powers for investigating suspected terrorists: roving wiretaps, “lone wolf” measures, and orders to seize any “tangible thing” pertaining to a person connected to a suspect in a terror investigation. The “tangible thing” provision (Section 215 of the original Patriot Act) is also known as the “library provision” because of the possibility that it could be used to subpoena information from a library about what someone is reading, either in books or at Internet terminals provided by the library. This provision has been at the heart of some library organizations’ criticisms of the Patriot Act.²

Committee member attendance was heavily one-sided. Sen. Jeff Sessions (R-AL) was the only Republican at the hearing. Midway through the hearing Sen. Sessions pointed out that the rest of his colleagues were busy with health care legislation being debated in the Finance Committee. On the Democratic side, Chairman Patrick Leahy (D-VT), Sen. Richard Durbin (D-IL), Sen. Dianne Feinstein (D-CA), Sen. Russ Feingold (D-WI), Sen Tom Harkin (D-IA), Sen. Sheldon Whitehouse (D-RI), Sen. Amy Klobuchar (D-MN), and Sen. Al Franken (D-MN) were in attendance. Several members left and returned throughout.

Senators Leahy and Feingold have each introduced bills that would reauthorize these provisions, but with substantial modifications to address some of the civil liberties concerns the provisions have raised.³ Sen. Leahy’s bill deals primarily with the three “sunsetting” provisions, while Feingold’s bill goes further, making changes to several other parts of the Patriot Act. The two senators said they would be working together on this issue. It is possible a single compromise bill will emerge that contains measures from both drafts. Two witnesses – Lisa Graves of the Center for Media and Democracy and Suzanne Spaulding of Bingham Consulting Group – endorsed both bills. Witnesses from the Department of Justice were non-committal, saying they had not had time to formulate an opinion on these specific proposals.

The Democrats on the panel appeared to agree that at least the roving wiretaps and Section 215 should be reauthorized. Several members of the committee expressed

¹ More information about the hearing, including written statements from the witnesses and from some committee members, is available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4062>.

² The Campaign for Reader Privacy, for example, is focused entirely on this provision. See <http://www.readerprivacy.org/index.jsp>.

³ Sen. Leahy’s bill is S. 1692 and Sen. Feingold’s is S. 1686. Both are available via the Library of Congress’s Thomas site, <http://thomas.loc.gov>.

support for creating additional safeguards to protect civil liberties. Sen. Feinstein expressed concern that the safeguards in the two bills proposed so far may impede terror investigations. The “lone wolf” provision came in for more fundamental criticism from some witnesses on the second panel, but it was unclear what the committee members thought of it. The government claims it has never used the “lone wolf” powers. Sen. Sessions used his opening statement and his questioning to defend the Patriot Act as a balanced statute that simply gives the government the same powers to investigate suspected terrorists that the law already gives prosecutors who investigate ordinary criminals.

The first panel of witnesses consisted of two officials from the Department of Justice. David Kris, Assistant Attorney General for the National Security Division, explained that the Department favors reauthorization of all three provisions. Inspector General Glenn Fine described some of the results of his Office’s oversight efforts. Fine explained that they had found hundreds of cases of abuse of the National Security Letter (“NSL”) power (which allows the government to demand information with lower evidentiary standards than a typical warrant). The Office has done two reports on Section 215, which is used much less frequently than the NSL power, and found no illegal use. They did find that despite identical First Amendment protections in Section 215 and the NSL provisions, in two cases the F.B.I. gained access to information using NSLs after courts denied their requests for Section 215 orders due to First Amendment concerns.

Because the D.O.J. witnesses were fairly guarded in their remarks, the Senators’ questions revealed more about their own positions than those of the witnesses. Sen. Leahy emphasized the importance of sunsets to force Congress and the government to revisit controversial policies. Sen. Feingold emphasized ongoing oversight of the use of these powers. Sen. Durbin devoted all of his questions to libraries, asking whether the government had a specific policy for dealing with information requests to libraries, and asking whether there was anything in the law to assure innocent library patrons that the government won’t secretly seize their records. Mr. Kris replied that the government had no specific policy about libraries and would not want to make libraries a “safe zone” where bad actors knew their activities would be absolutely immune to investigation. Senator Whitehouse pursued a technical legal criticism about the “presumption” that Section 215 creates in favor of government access in some cases, indicating that he favored reauthorization with modifications.

The second panel was comprised of three private sector observers with extensive experience in government. Of these, only one (a former Bush administration national security official) endorsed reauthorization without significant reform. In questioning, however, even that witness said it could be possible to improve the provisions with some changes. Senators Feingold and Whitehouse probed these witnesses on the extent of the power granted by Section 215 and whether that power should be more limited.

Witness List

Panel I

The Honorable David Kris
Assistant Attorney General
National Security Division
U.S. Department of Justice
Washington, DC

The Honorable Glenn Fine
Inspector General
U.S. Department of Justice
Washington, DC

Panel II

Suzanne E. Spaulding
Principal
Bingham Consulting Group
Washington, DC

Kenneth L. Wainstein
Partner
O'Melveny & Myers LLP
Washington, DC

Lisa Graves
Executive Director
Center for Media & Democracy
Washington, DC