

# **Federal Data Collection, Secure Flight, the Intelligence Reform and Terrorism Prevention Act, and the Reauthorization of the USA PATRIOT Act**

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## ABSTRACT

*In 2005, Congress began the process of reauthorizing the PATRIOT Act, the most sweeping expansion of powers American intelligence agencies had ever experienced. The federal government began reorganizing those agencies, to enable them greater oversight regarding the use of privately collected information, as well as facilitating a substantial increase in the sharing of that information. The Transportation Security Administration has partnered with the Terrorist Screening Center to create a pilot program that will change the way private information and personal security is handled by every airline operator in the country. In short, 2005 was a year of tidal changes among those that deal with government data collection.*

## I. INTRODUCTION

The purpose of this article is to look at the changes in federal law surrounding government data collection that occurred in 2005 and early 2006. Although the federal government is constantly changing the way it collects and uses information, this article will focus on the changes in three government projects: 1) Secure Flight, 2) the Intelligence Reform and Terrorism Prevention Act, and 3) the renewal of the USA PATRIOT Act.

Secure Flight was developed as the natural successor to CAPPs II and had a trial and subsequent revision during the summer of 2005. It was set to become fully operational in early 2006, although legal challenges and privacy concerns dramatically changed the way it collected and used data before being implemented. Ultimately, it was

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scrapped by the federal government.<sup>1</sup> The Intelligence Reform and Terrorism Prevention Act was passed in 2004.<sup>2</sup> While only small steps have been taken this year, they are significant in that they set up a foundation leading toward its full implementation, indicating how collected information will be shared between agencies for years to come. Finally, the PATRIOT Act has many provisions that were to sunset in 2005, having elapsed their four year authorization period.<sup>3</sup> In what is perhaps the most contentious debate in government data collection in 2005, the reauthorization of the PATRIOT Act has undergone more than twenty committee hearings in four committees. The congressional debates resulted in two very different bills that were unable to be resolved in conference committee before the December 31, 2005 sunset date, forcing a temporary extension through the third of February 2006.<sup>4</sup> The USA PATRIOT Act was ultimately reauthorized after a second extension, in March of 2006. Set against the backdrop of a government wiretapping scandal and a crisis of public trust in government, the debates over reauthorization are a harbinger of the future of congressionally approved government data collection.

## II. SECURE FLIGHT

This section will focus on the Secure Flight program. It begins by looking at how Secure Flight has evolved from previously failed systems that were designed to promote airline security. It continues by looking at the new developments Secure Flight has had in 2005, including testing postponements and logistics, and concludes with the ultimate failure of the Secure Flight program.

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<sup>1</sup> REPORT OF THE SECURE FLIGHT WORKING GROUP 32 (2005), [http://www.epic.org/privacy/airtravel/sfwg\\_report\\_091905.pdf](http://www.epic.org/privacy/airtravel/sfwg_report_091905.pdf).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, PUBL'N NO. RS21704, USA PATRIOT ACT SUNSET: A SKETCH CRS-2 (2005), *available at* [http://digital.library.unt.edu/govdocs/crs//data/2005/upl-meta-crs-6162/RS21704\\_2005Jan27.pdf](http://digital.library.unt.edu/govdocs/crs//data/2005/upl-meta-crs-6162/RS21704_2005Jan27.pdf).

<sup>4</sup> Pres. George W. Bush, Press Conference of the President (Dec. 19, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>.

## A. BACKGROUND

The Transportation Security Administration (“TSA”) currently screens passengers and baggage with the assistance of an automated Computer Assisted Passenger Prescreening System (“CAPPS”).<sup>5</sup> After September 11, 2001, Congress wanted to improve the way technology could assist in the screening of passengers to identify potential security threats. Accordingly, the Department of Homeland Security adopted a proposal for CAPPS II that would utilize a larger portion of data from airlines about their passengers including name, home address, date of birth, and home phone number.<sup>6</sup> CAPPS II would then analyze this data to create a risk assessment score that could be printed on the ticket at pick-up and would specify the appropriate level of screening for each individual passenger.<sup>7</sup> Attendants at the gate and screening points within the terminal would use these printed scores to determine the level and measure of security to which each passenger was subjected.<sup>8</sup> In the end, CAPPS II was never even tested.<sup>9</sup> After the GAO review<sup>10</sup> exposed broad privacy concerns, the test date for CAPPS II was delayed several times before Congress finally cut funding in 2003, effectively ending the CAPPS II program.<sup>11</sup> However, the idea of increased screening for passenger flights on commercial aircraft did not go the way of the CAPPS

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<sup>5</sup> U.S. GEN. ACCOUNTING OFFICE, Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges GAO-04-385 (2004), available at <http://www.gao.gov/new.items/d04385.pdf> [hereinafter GAO-04-385] (overviews the CAPPS program and discusses the changes in and principle challenges to the implementation of CAPPS II).

<sup>6</sup> Press Release, Department of Homeland Security, Fact Sheet: CAPPS II at a Glance (Feb. 12, 2004), <http://www.dhs.gov/dhspublic/display?content=3162> (the official policy statement of CAPPS II from the Department of Homeland Security).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Eric Chabrow, *State of the Union: It Seems as if Government IT Projects are Doomed to Fail. Some are--but Uncle Sam is Learning, Too.*, INFO. WK., Nov. 28, 2005, <http://www.informationweek.com/story/showArticle.jhtml?articleID=174401550>.

<sup>10</sup> GAO-04-385, *supra* note 5.

<sup>11</sup> Chabrow, *supra* note 9.

programs, instead Department of Homeland Security officials proposed another way to enhance airline security, Secure Flight.<sup>12</sup>

Secure Flight has evolved to take the place of CAPPS II.<sup>13</sup> Administered by the TSA, its goal was to compare Passenger Name Records (“PNRs”) with name entries in the Terrorist Screening Database (“TSDB”),<sup>14</sup> maintained by the Terrorist Screening Center (“TSC”),<sup>15</sup> to better identify security risks while eliminating the false alarms that have frequently been triggered by terrorist watch lists.<sup>16</sup> The list currently contains as many as 80,000 names.<sup>17</sup> Secure Flight requires the submission of a limited amount of passenger information by aircraft operators that is to be used solely to compare passenger data with the TSDB.<sup>18</sup>

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<sup>12</sup> See Sayaka Kawakami & Sarah C. McCarty, *Privacy Year in Review: Privacy Impact Statements, Airline Passenger Prescreening, and Government Data Mining*, 1 ISJLP 219 (2005) (includes a more detailed discussion of CAPPS II and the evolution of Secure Flight). See also Leigh A. Kite, Note, *Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will a Redesigned CAPPS II System Meet the Constitutional Challenge*, 61 WASH. & LEE L. REV. 1385 (2004) (provides a discussion of the constitutional questions that Secure Flight fails to address).

<sup>13</sup> *Id.*

<sup>14</sup> Federal Bureau of Investigation, Counterterrorism – Terrorist Screening Center, <http://www.fbi.gov/terrorinfo/counterterrorism/tsc.htm> (last visited Sept. 30, 2006) (detailing the Terrorist Screening Center Database, what kind of information is stored, and answering other common questions the public may have regarding the safety of their personal information).

<sup>15</sup> Press Release, Department of Homeland Security, Fact Sheet: The Terrorist Screening Center (Sept. 16, 2003), <http://www.dhs.gov/dhspublic/display?content=1598> (detailing more general information about the Terrorist Screening Center and why the Department of Homeland Security believed it is necessary to secure commercial airline flights).

<sup>16</sup> Privacy Act of 1974: System of Records; Secure Flights Test Records, 69 Fed. Reg. 57,345 – 57,348 (Sept. 24, 2004), available at <http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/04-21479.htm>.

<sup>17</sup> Posting of Daniel J. Solove to Concurring Opinions, [http://www.concurringopinions.com/archives/2005/12/airline\\_screeni.html](http://www.concurringopinions.com/archives/2005/12/airline_screeni.html) (Dec. 10, 2005, 12:01 EST).

<sup>18</sup> Transportation Security Administration, Secure Flight Program, [http://www.tsa.gov/what\\_we\\_do/layers/secureflight/editorial\\_1716.shtm](http://www.tsa.gov/what_we_do/layers/secureflight/editorial_1716.shtm) (last visited Oct. 4, 2006) (detailing the security of all information collected in Secure Flight, not only in the data collection stage, but in who has access to the information. “Only TSA employees who have a ‘need to know’ to perform their duties associated with Secure Flight will be able to access the passenger data.”).

## B. DEVELOPMENTS IN 2005

Although TSA intended to test Secure Flight in 2004, privacy concerns and logistical delays forced the first tests to begin in early 2005.<sup>19</sup> In order to test Secure Flight, TSA ordered the release of passenger information from seventy-two airlines for the month of June 2004.<sup>20</sup> In addition to these records, the TSA wanted to use commercial data as a means of identifying passenger information that is inaccurate or incorrect.<sup>21</sup> TSA officials, in July 2005, said they would consider expanding the use of commercial data to include an attempt to identify sleeper cells,<sup>22</sup> but subsequently abandoned their plans to include the use of commercial data, citing privacy concerns.<sup>23</sup>

The choice to abandon the use of commercial data in Secure Flight could have resulted from a public outcry regarding the use of such data without adequate notification.<sup>24</sup> In July of 2005, a GAO report<sup>25</sup> found that the TSA obtained more than 100 million records from commercial data brokers and combined them with the PNRs from airline providers as part of the Secure Flight test.<sup>26</sup> According to the

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<sup>19</sup> Press Release, Transportation Security Administration, TSA to Test New Passenger Pre-Screening System (Aug. 26, 2004), [http://www.tsa.gov/press/releases/2004/press\\_release\\_0496.shtm](http://www.tsa.gov/press/releases/2004/press_release_0496.shtm) (TSA press release indicating tests on Secure Flight would begin in late 2004).

<sup>20</sup> 69 Fed. Reg. at 57,346-47.

<sup>21</sup> *Id.* at 57,347.

<sup>22</sup> Leslie Miller, *US to Test if Passenger Lists can ID 'Sleeper Cells,'* THE BOSTON GLOBE, July 25, 2005, [http://www.boston.com/news/nation/washington/articles/2005/07/24/us\\_to\\_test\\_if\\_passenger\\_lists\\_can\\_id\\_sleeper\\_cells/](http://www.boston.com/news/nation/washington/articles/2005/07/24/us_to_test_if_passenger_lists_can_id_sleeper_cells/).

<sup>23</sup> The Electronic Privacy Information Center, *Secure Flight*, <http://www.epic.org/privacy/airtravel/secureflight.html> (last visited March 1, 2006).

<sup>24</sup> Anita Ramasastry, *Secure Flight is Set to Take Off, But Will our Data Be Secure?: GAO Reports Correctly Highlight Weaknesses in the Proposed System*, FINDLAW, July 26, 2005, <http://writ.news.findlaw.com/ramasastry/20050726.html>.

<sup>25</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, AVIATION SECURITY: TRANSPORTATION SECURITY ADMINISTRATION DID NOT DISCLOSE USES OF PERSONAL INFORMATION DURING SECURE FLIGHT PROGRAM TESTING IN INITIAL PRIVACY NOTICES, BUT HAS RECENTLY TAKEN STEPS TO MORE FULLY INFORM THE PUBLIC, GAO-05-864R (2005), *available at* <http://www.gao.gov/new.items/d05864r.pdf>.

<sup>26</sup> Miller, *supra* note 22.

GAO, the TSA violated the Privacy Act when it “collected and stored commercial data records even though the TSA stated in its privacy notices that it would not do so.”<sup>27</sup> The TSA responded by claiming that there was no violation, although they retroactively expanded and clarified their earlier privacy notices to include the true scope of commercial data testing.<sup>28</sup> The TSA further ensured the public and security community that every measure had been taken to ensure the security of all data, including increased data security mechanisms, and limitations on who can access the system and its data.<sup>29</sup>

### C. THE FUTURE OF SECURE FLIGHT

As of early 2006, Secure Flight had yet to run a test with actual passengers. Just as the expected September 2005 test date approached, the Department of Justice issued a report strongly critical of the privacy and security measures, as well as the technological infrastructure of Secure Flight.<sup>30</sup> The Department of Justice report questions, in the most scathing terms, the TSC’s ability to proceed with the test smoothly given a still uncertain number of airlines participating and the variable amount of passenger data.<sup>31</sup> The technological concerns include the feasibility of real time data storage and manipulation from hundreds of airlines without causing a time delay or disrupting other crucial functions of airline operation, especially during peak hours.<sup>32</sup> Despite these concerns, TSA plans to

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<sup>27</sup> GAO-05-864R, *supra* note 25.

<sup>28</sup> Ryan Singel, *Secure Flight Hits Turbulence*, WIRED NEWS, June 15, 2005, [http://www.wired.com/news/privacy/0,1848,67875,00.html?tw=wn\\_story\\_related](http://www.wired.com/news/privacy/0,1848,67875,00.html?tw=wn_story_related).

<sup>29</sup> Transportation Security Administration, Secure Flight Program, [http://www.tsa.gov/what\\_we\\_do/layers/secureflight/editorial\\_1716.shtm](http://www.tsa.gov/what_we_do/layers/secureflight/editorial_1716.shtm) (last visited Oct. 4, 2006) (“It is important to note that the information collected by the aircraft operators and submitted to TSA will be used solely for the purpose of comparing a subset of the passenger reservation data to watch lists. No other use of the information is authorized.”).

<sup>30</sup> U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AUDIT DIVISION, REVIEW OF THE TERRORIST SCREENING CENTER’S EFFORT TO SUPPORT THE SECURE FLIGHT PROGRAM, (2005), <http://www.usdoj.gov/oig/reports/FBI/a0534/final.pdf> (the concerns of the Justice Department concluded with the recommendation that TSA reconsider the privacy implications of Secure Flight before performing any test of the system).

<sup>31</sup> *Id.*

proceed with a live passenger test of Secure Flight that will include two airlines and as many as 450 airports that have not yet been publicly identified.<sup>33</sup> TSA hopes to have the entire system not just tested but fully operational and running by the end of 2006.<sup>34</sup>

Following another TSA report<sup>35</sup> regarding the difficulties of management and implementation, all future planned tests of the program were scrapped. TSA has decided to spend some considerable time reevaluating the Secure Flight program and will make future recommendations upon completion of that review.<sup>36</sup>

### III. INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

On December 17, 2004, President Bush signed the Intelligence Reform and Terrorism Prevention Act (“IRTPA”).<sup>37</sup> Also known as the 9/11 Intelligence Bill, its purpose is to coordinate all of the intelligence gathering agencies under a single new Director of National Intelligence to ensure that the people responsible for making defense decisions have the best possible information.<sup>38</sup>

One of the elements of IRTPA is the mandate for the creation of a Privacy and Civil Liberties Oversight Board.<sup>39</sup> The Board is

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<sup>32</sup> Tony Kontzer, *Secure Flight Hits More Snags*, INFO. WK., Oct. 3, 2005, <http://www.informationweek.com/story/showArticle.jhtml?articleID=171202350>.

<sup>33</sup> Patty Donmoyer, *DOJ Assails Secure Flight*, BUS. TRAVELER NEWS, Sept. 19, 2005, [http://www.btnmag.com/businesstravelnews/headlines/frontpage\\_display.jsp?vnu\\_content\\_id=1001138323](http://www.btnmag.com/businesstravelnews/headlines/frontpage_display.jsp?vnu_content_id=1001138323).

<sup>34</sup> Kontzer, *supra* note 32.

<sup>35</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, AVIATION SECURITY: SIGNIFICANT MANAGEMENT CHALLENGES MAY ADVERSELY AFFECT IMPLEMENTATION OF TRANSPORTATION SECURITY ADMINISTRATION'S SECURE FLIGHT PROGRAM, GAO-06-374T (2006), *available at* <http://www.gao.gov/new.items/d06374t.pdf>.

<sup>36</sup> Alice Lipowicz, *TSA to Wrap Up Secure Flight Reassessment*, WASH. TECH., August 9, 2006, [http://www.washingtontechnology.com/news/1\\_1/daily\\_news/29101-1.html](http://www.washingtontechnology.com/news/1_1/daily_news/29101-1.html).

<sup>37</sup> President George W. Bush, President Signs Intelligence Reform and Terrorism Prevention Act (Dec. 17, 2004), <http://www.whitehouse.gov/news/releases/2004/12/20041217-1.html>.

<sup>38</sup> *Id.* (the purpose of the Act, according to the White House).

<sup>39</sup> H.R. REP. NO. 108-796 (2004), *available at* [http://www.gpoaccess.gov/serialset/creports/intel\\_reform.html](http://www.gpoaccess.gov/serialset/creports/intel_reform.html).

composed of five members appointed by the President with the Chair and Vice Chair subject to Senate approval.<sup>40</sup> The Board has been further granted the power to request assistance from the Attorney General when desiring access to information from persons other than federal departments and agencies.<sup>41</sup> No nominations were made to the Board in the early weeks of the 109<sup>th</sup> Congress, and the President's initial 2006 fiscal year budget contained no requests for funds for the panel although a later document requested \$750,000.<sup>42</sup> In an attempt to draw attention to the Privacy and Civil Liberties Board, a bipartisan group of Senators (Susan Collins (R-ME), Richard J. Durbin (D-IL), Patrick J. Leahy (D-VT), and Joseph I. Lieberman (D-CT)) sent a letter<sup>43</sup> to White House Chief of Staff Andrew Card in mid-May of 2005 asking for a timetable and details on how members would be selected.<sup>44</sup> The Senators wanted to ensure that IRTPA was being fully implemented to the extent designed by Congress, including implementation of a panel that might be critical of the privacy policies enforced by the executive. In response, on June 10, 2005, the White House announced that President George W. Bush nominated Carol Dinkins to be Chair, Alan Charles Raul to be Vice Chair, and Lanny Davis, Theodore Olsen, and Francis Taylor to serve as the remaining three members of the board.<sup>45</sup> The nominations of Dinkins and Raul were officially given to the Senate Judiciary Committee on September

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<sup>40</sup> HAROLD C. RELYEA, CONGRESSIONAL RESEARCH SERVICE, PUBL'N NO. RS22078, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: 109TH CONGRESS PROPOSED REFINEMENTS CRS-4 (2005), available at [http://digital.library.unt.edu/govdocs/crs/data/2005/upl-meta-crs-7238/RS22078\\_2005Jun14.pdf](http://digital.library.unt.edu/govdocs/crs/data/2005/upl-meta-crs-7238/RS22078_2005Jun14.pdf).

<sup>41</sup> *Id.* at CRS-4.

<sup>42</sup> *Id.* at CRS-5.

<sup>43</sup> See Press Release, Senate Committee on Homeland Security and Governmental Affairs, Senators Call on White House to Establish Privacy and Civil Liberties Oversight Board as Called for in the Intelligence Reform Act (May 13, 2005), [http://hsgac.senate.gov/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease\\_id=992&Month=5&Year=2005](http://hsgac.senate.gov/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease_id=992&Month=5&Year=2005).

<sup>44</sup> RELYEA, *supra* note 40, at CRS-5.

<sup>45</sup> *Id.*

28, 2005<sup>46</sup> and both were confirmed by the Senate on February 17, 2006.<sup>47</sup>

Representative Carolyn B. Maloney (D-NY) has subsequently made two important proposed changes to the Privacy and Civil Liberties Board. The first was in the form of an amendment to H.R. 3059, the Transportation, Treasury, Housing, and Urban Development appropriation bill, to increase the budget for the Privacy and Civil Liberties Oversight Board from \$750,000 to \$1.5 million.<sup>48</sup> The amendment remained in the bill upon passage on June, 30, 2005.<sup>49</sup> Second, Representative Maloney introduced H.R. 1310 in March of 2005.<sup>50</sup> The bill would make all five appointments subject to Senate approval, limit the partisan composition of the Board to not more than three members of any political party, and reconstitute the Board as an independent agency within the executive branch, entitling the Board to a greater degree of independence outside the jurisdiction of the President.<sup>51</sup> The bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security in April of 2005, and at the time of writing there were no hearings or votes scheduled to move it forward to the floor for an eventual vote.<sup>52</sup> Without any additional Congressional action, it seems likely that this second amendment will die in committee at the end of the 109<sup>th</sup> Congress.

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<sup>46</sup> U.S. Senate, Nominations in Committee, [http://www.senate.gov/pagelayout/legislative/one\\_item\\_and\\_teasers/nom\\_cmtec.htm](http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtec.htm) (last visited Feb. 13, 2006).

<sup>47</sup> *TLJ News from February 16-20, 2006: People and Appointments*, TECH LAW JOURNAL, Feb. 20, 2006. <http://www.techlawjournal.com/home/newsbriefs/2006/02d.asp>.

<sup>48</sup> RELYEA, *supra* note 40, at CRS-6.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> The Library of Congress, All Actions on H.R. 1310, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01310:@@X> (last visited Oct. 4, 2006) (information from Thomas on the current status of Representative Maloney's proposed amendments regarding the Privacy and Civil Liberties Oversight Board).

#### IV. USA PATRIOT ACT REAUTHORIZATION

The following section discusses the process taken to reauthorize the USA PATRIOT Act. First, it provides background regarding the circumstances and provisions surrounding the original enactment. Second, it describes those provisions that will lapse, or sunset, unless Congress explicitly reauthorizes them. Finally, this section discusses and summarizes the committee hearings by the Senate and House and concludes with the USA PATRIOT Act's eventual reauthorization.

##### A. BACKGROUND

The PATRIOT Act was signed into law on October 26, 2001, as a reaction to the need for increased security measures after the terrorist attacks of September 11, 2001.<sup>53</sup> A 352-page law, the PATRIOT Act amended more than fifteen statutes and went through four drafts in only five weeks before it was prepared in final form for passage.<sup>54</sup> Some of the changes effected by the PATRIOT Act were designed to be permanent, while others were designed to sunset, or lapse, unless they were renewed by December 31, 2005.<sup>55</sup> Those provisions that do not automatically sunset<sup>56</sup> are still subject to alteration by an act of Congress, and inevitably, the Reauthorization of the Patriot Act included subsequent changes to some of these provisions. The remainder of this article will look at the changes Title II of the PATRIOT Act has made to federal surveillance and data collection, especially regarding online information. First, it is important to understand what changed in 2001, that is, how the PATRIOT Act altered the world of government data collection. Second, this paper

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<sup>53</sup> Press Release, The White House, President Signs Anti-Terrorism Bill (Oct. 26, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011026-5.html> (providing the official remarks President Bush made at the signing of the PATRIOT Act).

<sup>54</sup> Electronic Frontier Foundation, EFF Analysis of the Provisions of the USA PATRIOT Act, [http://www EFF.org/Privacy/Surveillance/Terrorism/20011031\\_eff\\_usa\\_patriot\\_analysis.php](http://www EFF.org/Privacy/Surveillance/Terrorism/20011031_eff_usa_patriot_analysis.php) (last visited Oct. 31, 2001).

<sup>55</sup> DOYLE, *supra* note 3.

<sup>56</sup> For a federal summary of those provisions that sunset on December 31, 2005 see CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, PUBL'N NO. RS32186, USA PATRIOT ACT SUNSET: PROVISIONS THAT EXPIRE ON DECEMBER 31, 2005 (2004), *available at* <http://www.fas.org/irp/crs/RL32186.pdf>.

will briefly note what provisions of the PATRIOT Act are subject to the sunset provisions. Third, there will be an overview of the general hearings of both the House and Senate's Judiciary and Intelligence Committees. Finally, this note will examine the process of reauthorization.

## B. THE CHANGES IN 2001

The PATRIOT Act changed many parts of traditional surveillance authority. These changes included expanded government powers in the areas of wiretaps, search warrants, pen register/trap and trace orders, and the interception of electronic communication.<sup>57</sup>

Wiretaps for telephone conversations can only be issued for crimes listed under 18 U.S.C. § 2516.<sup>58</sup> Section 201 of the PATRIOT Act added the offense of terrorism as a crime for which the government could legally wiretap phones.<sup>59</sup> Section 202 adds felony violations to the Computer Fraud and Abuse Act,<sup>60</sup> allowing computer crimes to be listed under the definition of terrorist offenses in order to combat cyber-terrorism<sup>61</sup> as long as they fall under the expanded definitions of the Act.<sup>62</sup> Before the PATRIOT Act, the law required that law enforcement obtain an intercept order from a judge before they were permitted to tap electronic communication.<sup>63</sup> Section 209 of the PATRIOT Act allows police to use only a search warrant in order to get stored wire communications, like voicemail on a cell phone or answering machine messages.<sup>64</sup>

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<sup>57</sup> Electronic Frontier Foundation, *supra* note 54 (the EFF provide the general outline of this section by providing an easy breakdown grouping of the changes the PATRIOT Act brought to surveillance).

<sup>58</sup> *Id.*; see also SUSAN PRICE-LIVINGSTON, LAWS REGULATING SURVEILLANCE (2001), <http://www.cga.ct.gov/2001/rpt/olr/htm/2001-r-0770.htm>.

<sup>59</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>60</sup> 18 U.S.C. § 1030 (2006).

<sup>61</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>62</sup> 18 U.S.C. § 2332b(g)(5)(B) (2006).

<sup>63</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>64</sup> *Id.*

Search warrants must normally be obtained in the judicial district in which the search will take place.<sup>65</sup> Section 219 of the PATRIOT Act adds terror investigations to the list of situations covered by search warrants, and section 220 provides that once such a search warrant has been issued for terror investigations, it is valid nationwide.<sup>66</sup> Section 213 provides for the delayed notification for a “reasonable period” that can “be extended for good cause shown” of any search of any wire, electronic communication, or tangible property.<sup>67</sup> When paired, these new expansions permit a search order issued upon suspicion of terrorism in one jurisdiction to be valid indefinitely in any jurisdiction.<sup>68</sup>

Pen register/trap and trace orders monitor and trace the use of certain communication devices.<sup>69</sup> Section 216 of the PATRIOT Act modifies the Electronic Communications Privacy Act (“ECPA”)<sup>70</sup> to include routing and addressing information, providing the government with the tools to trace e-mail, monitor Web sites visited, and other online communication. In effect, broader pen register/trap and trace power allows the government to gather information not just from one individual but from all individuals that one individual communicates with, all under the auspices of a single court order. This allows the government to monitor entire cells of suspected terrorists and create more specifically targeted terrorist watch lists.<sup>71</sup>

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<sup>65</sup> FED. R. CRIM. P. 41.

<sup>66</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>67</sup> Posting of Mary DeRosa to Patriot Debates, *Section 213: “Sneak and Peek” Search Warrants a Summary*, <http://www.patriotdebates.com/section-213> (last visited Oct. 4, 2006); Posting of Heather MacDonald to Patriot Debates, *Sneak-and-Peek in the Full Light of Day*, <http://www.patriotdebates.com/213-2> (last visited Oct. 6, 2006) (the two authors provide two different perspectives on the PATRIOT Act, one in favor as written and one in favor of modification).

<sup>68</sup> *Id.*

<sup>69</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>70</sup> 18 U.S.C. §3121(c) (2006).

<sup>71</sup> Robert Ditzion, Note, *Electronic Surveillance in the Internet Age: the Strange Case of Pen Registries*, 41 AM. CRIM. L. REV. 1321, 1322 (2004) (provides an in-depth discussion of Pen/Trap Orders).

Sections 210 and 212 of the PATRIOT Act also amend the ECPA.<sup>72</sup> Section 210 allows records sought by a court order to include session time and duration of Internet usage, temporarily assigned network addresses, and form of payment including credit card and bank numbers.<sup>73</sup> Section 212 allows for more voluntary disclosure of content and customer records by an Internet provider to the government in emergency situations.<sup>74</sup>

Section 206 of the PATRIOT Act amends parts of the Foreign Intelligence Surveillance Act (“FISA”)<sup>75</sup> to authorize intercepts on any phones or computers that may be used by the principal of the search.<sup>76</sup> It also expands the class of persons that can be compelled to assist in the intercept from common carriers and landlords to any person.<sup>77</sup> Section 207 increases the duration of intercept orders and search warrants from 90 to 120 days.<sup>78</sup> Section 203 authorizes the sharing of foreign intelligence information gathered in criminal investigations with certain federal officials in an attempt to lower the barriers to information sharing.<sup>79</sup> Section 214 makes it easier to open pen

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<sup>72</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>73</sup> *Id.*

<sup>74</sup> *Cf.* Posting of Mary DeRosa to Patriot Debates, *Section 209, 212, and 220: Access to Wire and Electronic Communication*, <http://www.patriotdebates.com/sections-209-212-and-220> (last visited Oct. 4, 2006); Posting of James X. Dempsey to Patriot Debates, *Why Sections 209, 212, and 220 Should be Modified*, <http://www.patriotdebates.com/sections-209-212-and-220> (last visited Oct. 4, 2006) (the two authors provide two different perspectives on the PATRIOT Act).

<sup>75</sup> 50 U.S.C. §1805 (2006).

<sup>76</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>77</sup> *Cf.* Posting of Mary DeRosa to Patriot Debates, *Rolling Surveillance Authority Under FISA*, <http://www.patriotdebates.com/section-206> (last visited Oct. 4, 2006); Posting of James X. Dempsey to Patriot Debates, *Why Section 206 Should be Modified*, <http://www.patriotdebates.com/section-206> (last visited Oct. 4, 2006) (the two authors provide two different perspectives on the PATRIOT Act).

<sup>78</sup> Electronic Frontier Foundation, *supra* note 54.

<sup>79</sup> *Cf.* Posting of Mary DeRosa to Patriot Debates, *Section 203: Authority to Share Criminal Investigative Information*, <http://www.patriotdebates.com/section-203> (last visited Oct. 4, 2006); Posting of Kate Martin to Patriot Debates, *Why Sections 203 and 905 Should be Modified*, <http://www.patriotdebates.com/section-203> (last visited Oct. 4, 2006) (the two authors provide two different perspectives on the PATRIOT Act).

register/trap and trace orders under FISA, while section 215 substantially increases the authority under FISA to acquire business records, including individual records.<sup>80</sup>

Section 223 of the PATRIOT Act provides relief for those who subsequently discover law enforcement or intelligence officials have improperly disclosed information about them.<sup>81</sup> It provides for administrative discipline and civil action with a \$10,000 recovery limit.<sup>82</sup> While the PATRIOT Act increases the ability of government to collect data, especially on those suspected of terrorism, the act also adds significant protections and remedies for those who have been targeted illegally. However, there is some criticism that the number of persons that would be able to successfully qualify for the civil remedy is greatly limited.<sup>83</sup>

### C. THE SUNSET PROVISIONS

The Congressional Research Service has produced a concise summary of each of the provisions subject to sunset in their report, "US Patriot Act Sunset: A Sketch," which contains brief descriptions of how each of the provisions has been used since 2001.<sup>84</sup>

The temporary provisions are: sections 201 (wiretapping in terrorism cases), 202 (wiretapping in computer fraud and abuse felony cases), 203(b) (sharing wiretap information),

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<sup>80</sup> Cf. Posting of Mary DeRosa to Patriot Debates, *Section 215: Access to Business Records under FISA ("Libraries Provision")*, *Section 214: Pen Register and Trap and Trace Authority under FISA*, <http://www.patriotdebates.com/sections-214-and-215> (last visited Oct. 4, 2006); Posting of Andrew C. McCarthy to Patriot Debate, *Why Sections 214 and 215 Should be Retained*, <http://www.patriotdebates.com/sections-214-and-215> (last visited Oct. 4, 2006) (the two authors provide two different perspectives on the PATRIOT Act).

<sup>81</sup> Cynthia Ryan, *The USA PATRIOT Act Helps Law Enforcement Meet the Anti-Terrorism Challenge*, 21 DEL. LAW. 6 (2003).

<sup>82</sup> These civil protections are accomplished by amending 18 U.S.C. §§ 2520 and 2707 for administrative discipline and 18 U.S.C. § 2712 for civil actions.

<sup>83</sup> Nicholas Dranias, *The PATRIOT Act of 2001 Versus the 1976 Church Committee Report: An Unavoidable Clash of Fundamental Policy Judgments*, 17 CBA REC. 28, 31 (2003) (pointing out that it would be difficult to argue for heightened judicial scrutiny as a resident alien whose rights were violated by the PATRIOT Act).

<sup>84</sup> DOYLE, *supra* note 3, at CRS-2-6.

203(d) (sharing foreign intelligence information), 204 (Foreign Intelligence Surveillance Act (FISA) pen register/trap & trace exceptions), 206 (roving FISA wiretaps), 207 (duration of FISA surveillance of non-United States persons who are agents of a foreign power), 209 (seizure of voicemail messages pursuant to warrants), 212 (emergency disclosure of electronic surveillance), 214 (FISA pen register/trap and trace authority), 215 (FISA access to tangible items), 217 (interception of computer trespasser communications), 218 (purpose for FISA orders), 220 (nationwide service of search warrants for electronic evidence), 223 (civil liability and discipline for privacy violations), and 225 (provider immunity for FISA wiretap assistance).<sup>85</sup>

Most of these provisions were discussed above. These provisions include the most contentious additions of data collection the PATRIOT Act authorized, particularly expanded powers of wiretapping.<sup>86</sup>

#### D. COMMITTEES ON REAUTHORIZATION

The process for reauthorization began in the House of Representatives, with the first hearings beginning in September of 2004 and continuing throughout 2005.<sup>87</sup> In 2005, among the House and Senate's Judiciary and Intelligence Committees, Congress held more than twenty committee hearings on various aspects of the PATRIOT Act. Of these four divisions, the House Judiciary and the Senate Intelligence Committee hearings had the most influence in the eventual shaping of each chamber's respective bills. This next section outlines some of the more important committee hearings and testimony, with brief summaries of their conclusions.

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<sup>85</sup> *Id.* at CRS-2.

<sup>86</sup> Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1308 (2004).

<sup>87</sup> *Proceedings of the 98th Annual Meeting of the American Association of Law Libraries Held in San Antonio, Texas July 16-20, 2005*, 97 LAW LIBR. J. 735, 758 (2005).

The process of reauthorization requires both the House and the Senate to approve the provisions that are scheduled to sunset. In practice, both chambers took up debate on a full replacement bill that changed, or at least proposed changes, to many provisions of the original PATRIOT Act, including those that were to sunset at the end of 2005. The remainder of this section looks at the committee history of the most important of these hearings.

### 1. THE SENATE JUDICIARY COMMITTEE HEARINGS

The Senate Judiciary Committee held three of Congress' hearings on the reauthorization of the Patriot Act in 2004-2005.<sup>88</sup> The first hearing, held in late 2004, was a review of counter-terrorism legislation and upcoming proposals, which included the PATRIOT Act.<sup>89</sup> The second and third hearings spoke directly to the question of reauthorization.<sup>90</sup>

The first hearing, held on September 22, 2004, was a "Review of Counter-Terrorism Legislation and Proposals, including the USA PATRIOT Act and the SAFE Act."<sup>91</sup> The hearing included statements from Senators Patrick Leahy (D-VT) and Orrin Hatch (R-UT), as well as testimony from Deputy Attorney General James Comey, Former Representative Bob Barr, and Associate Deputy Attorney General and Chief Privacy Officer Dan Collins.<sup>92</sup>

Senator Hatch's remarks focused on the bipartisan nature of the issue of national security and illustrated the need to review and

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<sup>88</sup> U.S. SENATE, Committee on the Judiciary: All Hearings, *available at* [http://judiciary.senate.gov/schedule\\_all.cfm](http://judiciary.senate.gov/schedule_all.cfm) (last visited March 1, 2006) (provides a list of all hearings the Senate Judiciary Committee has had since 2001, including the three hearings on the reauthorization of the Patriot Act in 2004-2005); Ken Wainstein, *Ask the White House*, Jan. 4, 2006, <http://www.whitehouse.gov/ask/20060104.html> (stipulating that the total number of hearings held by Congress on the renewal of the PATRIOT Act was twenty-three).

<sup>89</sup> Wainstein, *supra* note 88.

<sup>90</sup> *Id.*

<sup>91</sup> *A Review of Counter-Terrorism Legislation and Proposals, Including the USA PATRIOT Act and the SAFE Act* (2004), <http://judiciary.senate.gov/hearing.cfm?id=1312> (a webcast of the hearing is available on the site).

<sup>92</sup> *Id.*

supplement existing anti-terror laws to strengthen national defense.<sup>93</sup> Senator Hatch cited the 9/11 Commission Report,

Many of the act's provisions are relatively noncontroversial, updating America's surveillance laws to reflect technological developments in a digital age. Some executive actions that have been criticized are unrelated to the Patriot Act. The provisions in the act that facilitate the sharing of information among intelligence agencies and between law enforcement and intelligence appear, on balance, to be beneficial. Because of concerns regarding the shifting balance of power to the government, we think that a full and informed debate on the Patriot Act would be healthy.<sup>94</sup>

Senator Hatch added that he hoped the hearings would continue the debate over the PATRIOT Act in a "constructive fashion."<sup>95</sup>

Senator Leahy's remarks were much more critical, specifically scolding the Attorney General for his failure to appear before the Committee.<sup>96</sup> Senator Leahy also linked the PATRIOT Act debate to the 9/11 Commission Report, asking the representatives from the Department of Justice present at the hearing to explain how the increased executive power granted in the PATRIOT Act "actually materially enhances security" and "whether there is 'adequate supervision of the Executive's use of those powers to ensure protection of civil liberties,' and 'that there are adequate guidelines and oversight to properly confine its use.'"<sup>97</sup>

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<sup>93</sup> *A Review of Counter-Terrorism Legislation and Proposals, including the USA PATRIOT Act and the SAFE Act: Hearing Before the S. Comm. on the Judiciary*, 108<sup>th</sup> Cong. (2004), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1312&wit\\_id=51](http://judiciary.senate.gov/member_statement.cfm?id=1312&wit_id=51) (statement of Senator Orrin Hatch, Chairman, S. Judiciary Committee).

<sup>94</sup> NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *What to Do? A Global Strategy* (2004), available at [http://www.9-11commission.gov/report/911Report\\_Ch12.htm](http://www.9-11commission.gov/report/911Report_Ch12.htm) (Chapter 12 in the 9/11 Commission Report).

<sup>95</sup> *A Review of Counter-Terrorism Legislation and Proposals*, *supra* note 93.

<sup>96</sup> *A Review of Counter-Terrorism Legislation and Proposals, including the USA PATRIOT Act and the SAFE Act: Hearing Before the S. Comm. on the Judiciary*, 108<sup>th</sup> Cong. (2004), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1312&wit\\_id=2629](http://judiciary.senate.gov/member_statement.cfm?id=1312&wit_id=2629) (statement of Senator Patrick Leahy, Ranking Member, S. Judiciary Committee).

<sup>97</sup> *Id.*

Deputy Attorney General Comey's testimony spoke to the importance of the PATRIOT Act in providing all the tools necessary to the government to provide an effective counter-terrorism strategy.<sup>98</sup> He compared the use of the PATRIOT Act to a toolbox, explaining that, "[h]aving served as a prosecutor, I've used many of those tools and know how valuable they are . . . I certainly would not want to take that out of America's toolbox."<sup>99</sup> He continued by providing examples where tools provided by the PATRIOT Act have helped actually prevent terrorism.<sup>100</sup> These examples included the removal of the wall between intelligence and law enforcement that helped arrest members of an Oregonian terror cell known as the "Portland Seven,"<sup>101</sup> and the use of delayed notification search warrants to prevent narco-terrorism<sup>102</sup> in *United States v. Al Odah*.<sup>103</sup>

Former Representative Barr's testimony focused primarily on general support for the PATRIOT Act, followed by lengthy support for the Security and Freedom Enhancement Act<sup>104</sup> ("SAFE Act").<sup>105</sup> He concluded generally that the PATRIOT Act needs minor revisions to secure civil liberties.<sup>106</sup>

Chief Privacy Officer Collins' testimony focused on laying out the constitutional arguments for the PATRIOT Act and justifying how the

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<sup>98</sup> *A Review of Counter-Terrorism Legislation and Proposals, including the USA PATRIOT Act and the SAFE Act: Hearing before the S. Comm. on the Judiciary*, 108<sup>th</sup> Cong. (2004), available at [http://judiciary.senate.gov/testimony.cfm?id=1312&wit\\_id=3279](http://judiciary.senate.gov/testimony.cfm?id=1312&wit_id=3279) (statement of James Comey, Deputy Attorney General).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Al Odah v. United States*, 321 F.3d 1134 (2003).

<sup>104</sup> The Security and Freedom Enhancement Act of 2005, S. 737, 109<sup>th</sup> Cong., (2005), available at <http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c109ENd6sQ:e929:>

<sup>105</sup> *A Review of Counter-Terrorism Legislation and Proposals, including the USA PATRIOT Act and the SAFE Act: Hearing before the S. Comm. on the Judiciary*, 108<sup>th</sup> Cong. (2004) available at [http://judiciary.senate.gov/testimony.cfm?id=1312&wit\\_id=2874](http://judiciary.senate.gov/testimony.cfm?id=1312&wit_id=2874) (statement of Former Georgia Representative Bob Barr).

<sup>106</sup> *Id.*

PATRIOT Act protects the right to privacy while helping law enforcement.<sup>107</sup> Specifically, he noted that privacy is not a zero-sum game, remarking that “[s]ome critics seem to operate from the implicit premise that anything that helps law enforcement is necessarily a reduction in civil liberties and a loss of freedom. This sort of thinking does not make much sense either from a law enforcement perspective or from a civil liberties perspective.”<sup>108</sup> He goes on to make the case that “privacy is not always the most important value,” and to emphasize the importance of technological neutrality, the idea that transactions protected or conducted by using new technologies should not result in a loss of privacy.<sup>109</sup>

The second hearing, held on April 5, 2005, spoke directly to “[o]versight of the USA Patriot Act.”<sup>110</sup> The hearing included statements from Senators Russ Feingold (D-WI), Charles Grassley (R-IA), and Patrick Leahy (D-VT), as well as testimony from the Director of the Federal Bureau of Investigation (“FBI”) Robert S. Mueller III and the Attorney General Alberto Gonzalez.<sup>111</sup>

All three Senators made brief remarks that differed from each other a great deal. Senator Feingold voted against the PATRIOT Act in 2001 but has proposed some changes to the PATRIOT Act that he feels have merit and should be debated.<sup>112</sup> Senator Grassley opposed any review of the PATRIOT Act until a full debate had been had and he was eager to examine how the PATRIOT Act has helped fight terrorism and what challenges the Act has presented so it could be

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<sup>107</sup> *A Review of Counter-Terrorism Legislation and Proposals, including the USA PATRIOT Act and the SAFE Act: Hearing before the S. Comm. on the Judiciary*, 108<sup>th</sup> Cong. (2004), (statement of Dan Collins, Deputy Attorney General & Chief Privacy Officer), available at [http://judiciary.senate.gov/testimony.cfm?id=1312&wit\\_id=689](http://judiciary.senate.gov/testimony.cfm?id=1312&wit_id=689).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Oversight of the USA PATRIOT Act: Hearing Before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at <http://judiciary.senate.gov/hearing.cfm?id=1439> (a webcast of the hearing is available on the Web site).

<sup>111</sup> *Id.*

<sup>112</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1439&wit\\_id=85](http://judiciary.senate.gov/member_statement.cfm?id=1439&wit_id=85) (statement of Sen. Russ Feingold, Member of the S. Comm. on the Judiciary).

reformed accordingly.<sup>113</sup> Senator Leahy urged caution and was skeptical regarding the reauthorization of any of the sun-setting provisions.<sup>114</sup>

FBI Director Mueller focused his testimony on the need to renew all the PATRIOT Act's provisions in danger of sun-setting, contending that each has helped federal law enforcement preserve American security.<sup>115</sup> Section 201 brought wiretapping into the 21<sup>st</sup> century, section 202 updated the criminal law, sections 203(b) & (d) helped different agencies work together and share information.<sup>116</sup> Mueller concluded with a request for more authority in the form of administrative subpoenas.<sup>117</sup> He believed the FBI should be granted administrative subpoena authority for terrorist investigations.<sup>118</sup> He claimed administrative subpoenas could supplement both the current use of National Security Letters ("NSLs")<sup>119</sup> and FISA orders for business records to allow the FBI to work more effectively and

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<sup>113</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1439&wit\\_id=1011](http://judiciary.senate.gov/member_statement.cfm?id=1439&wit_id=1011) (statement of Sen. Charles Grassley, Member of the *S. Comm. on the Judiciary*).

<sup>114</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1439&wit\\_id=2629](http://judiciary.senate.gov/member_statement.cfm?id=1439&wit_id=2629) (statement of Sen. Patrick Leahy, Ranking Minority Member of the *S. Comm. on the Judiciary*).

<sup>115</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/testimony.cfm?id=1439&wit\\_id=608](http://judiciary.senate.gov/testimony.cfm?id=1439&wit_id=608) [hereinafter *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary, Mueller*] (statement of Robert Mueller, Director of the FBI).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, PUBL'N NO. RS22122, ADMINISTRATIVE SUBPOENAS AND NATIONAL SECURITY LETTERS IN CRIMINAL AND INTELLIGENCE INVESTIGATIONS: A SKETCH (2005), available at <http://www.fas.org/sgp/crs/natsec/RS22122.pdf> (administrative subpoenas vest power in agencies to compel testimony or documents; these are often used as a means of lifting the wall between domestic and foreign intelligence. National Security Letters vest certain government officials with this same power to compel testimony and documents and are often used as a means to get around the privacy exemptions to follow money trails or trace electronic communication).

respond more quickly to address and disrupt terrorism organizations.<sup>120</sup>

Attorney General Alberto Gonzales had a similar message. He said, "I am here today primarily to convey one simple message: all provisions of the USA PATRIOT Act that are scheduled to sunset at the end of this year must be made permanent."<sup>121</sup> He remarked that he was willing to work with any congressperson on changes or additions to the Act but was firmly resolved that he "will not support any proposal that would undermine the ability of investigators and prosecutors to disrupt terrorist plots and combat terrorism effectively."<sup>122</sup> The bulk of Attorney General Gonzalez's testimony dealt with the improvement in combating terrorism provided by the PATRIOT Act, including the increased intelligence sharing.<sup>123</sup> Like FBI Director Mueller, he went section-by-section outlining the benefits of each provision in fighting terrorism and improving intelligence.<sup>124</sup>

The third hearing, which was held on May 10, 2005, also spoke directly to "[o]versight of the USA Patriot Act."<sup>125</sup> The hearing included statements from Senator Patrick Leahy (D-VT); testimony from former Representative Bob Barr; Georgetown Law Professor David Cole; Deputy Attorney General Daniel P. Collins; the Executive Director of the Center for Democracy and Technology, James X. Dempsey; Attorney and Senior Fellow at the Foundation for Defense of Democracies, Andrew C. McCarthy; and Managing Director of the Harbour Group, Suzanne E. Spaulding.<sup>126</sup>

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<sup>120</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary, Mueller, supra* note 115.

<sup>121</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005) (statement of Alberto Gonzales, U.S. Attorney General), available at [http://judiciary.senate.gov/testimony.cfm?id=1439&wit\\_id=3936](http://judiciary.senate.gov/testimony.cfm?id=1439&wit_id=3936).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Continued Oversight of the USA PATRIOT Act: Hearing Before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at <http://judiciary.senate.gov/hearing.cfm?id=1493> (a webcast of the hearing is available on the Web site).

<sup>126</sup> *Id.*

Senator Leahy's statement focused on how Congress tried to balance the need to react while ensuring protection of civil liberties in the days following the terrorist attacks of September 11, 2001.<sup>127</sup> As the Senate revisited those moments, Senator Leahy admitted changes needed to be made, and he was glad that the Attorney General was on the record as being open to changes to the PATRIOT Act.<sup>128</sup> While Senator Leahy targeted his remarks to respond to testimony heard during the previous hearing on reauthorization, Former Representative Barr and Deputy Attorney General Collins offered the same written testimony at the May 10, 2005 hearing on reauthorization and the September 22, 2004 hearing on reforming the laws that deal with terrorism.<sup>129</sup>

Georgetown law professor David Cole made three points regarding the PATRIOT Act renewal debate.<sup>130</sup> First, the committee should not have been confined to the four corners of the document itself but ought to have "consider[ed] the impact of executive initiatives outside the Act that have raised serious civil liberties issues."<sup>131</sup> Second, the worst violations of civil liberties in the PATRIOT Act were not provisions subject to sunset, but rather "those addressing immigration and material support to 'terrorist organizations.'"<sup>132</sup> Finally, according to Cole, the provision subject to sunset that raised the most civil liberties questions was section 218, which broke down the wall between law enforcement and foreign intelligence.<sup>133</sup>

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<sup>127</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1493&wit\\_id=2629](http://judiciary.senate.gov/member_statement.cfm?id=1493&wit_id=2629) (statement of Sen. Patrick Leahy, Ranking Minority Member on the *S. Comm. on the Judiciary*).

<sup>128</sup> *Id.*

<sup>129</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/testimony.cfm?id=1493&wit\\_id=4256](http://judiciary.senate.gov/testimony.cfm?id=1493&wit_id=4256) (statement of Former Rep. Bob Barr); *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/testimony.cfm?id=1493&wit\\_id=4258](http://judiciary.senate.gov/testimony.cfm?id=1493&wit_id=4258) (statement of Dan Collins).

<sup>130</sup> *Oversight of the USA PATRIOT Act: Hearing before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005), available at [http://judiciary.senate.gov/testimony.cfm?id=1493&wit\\_id=4257](http://judiciary.senate.gov/testimony.cfm?id=1493&wit_id=4257) (statement of Georgetown Law Professor David Cole).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

## 2. THE SENATE COMMITTEE ON INTELLIGENCE HEARINGS

Many of the hearings before the Senate Committee on Intelligence were closed with no transcript or summary; however, given the contentious nature of the USA PATRIOT Act, the Committee on Intelligence held three open meetings on the issue of reauthorization.<sup>134</sup>

The first hearing was held on April 19, 2005.<sup>135</sup> There were three witnesses; Gregory T. Nojeim from the American Civil Liberties Union (“ACLU”), James X. Dempsey from the Center of Democracy and Technology, and Heather MacDonald from the Manhattan Institute for Policy Research.<sup>136</sup>

Nojeim’s testimony focused on the balance between the protection of civil liberties and ensuring national security.<sup>137</sup> Specifically he asked the Committee to remember four things: 1) that no sunset provision ought to be renewed unless it can be shown that it “actually materially enhances national security” with “adequate supervision” of the executive’s power “to ensure protection of civil liberties,” 2) there must be additional “guidelines and oversight” to protect its use, 3) Congress should “undertake a broader review of anti-terrorism powers” that includes reexamining those provisions of the PATRIOT Act and other laws that are not subject to the sun setting provision, 4) finally, Congress should “resist efforts by the Executive Branch to evade searching review of its existing powers” and should instead focus on a review of those powers.<sup>138</sup>

Mr. Dempsey’s testimony focused on reviving the balance of power by supporting the judiciary.<sup>139</sup> He pointed out that in an ever

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<sup>134</sup> *HEARINGS: 109<sup>th</sup> Congress*, 109<sup>th</sup> Cong. 1 (2005) available at <http://intelligence.senate.gov/hr109.htm>.

<sup>135</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. 1 (2005), available at <http://intelligence.senate.gov/0504hr/050419/witness.htm>.

<sup>136</sup> *Id.*

<sup>137</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. 1 (2005), available at <http://intelligence.senate.gov/0504hr/050419/nojeim.pdf> (testimony from Gregory Nojeim).

<sup>138</sup> *Id.* at 3-4.

<sup>139</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. 1 (2005), available at <http://intelligence.senate.gov/0504hr/050419/dempsey.pdf> (testimony from James Dempsey).

increasing electronic age, domestic intelligence agencies ought not be vested with “extra-judicial powers.”<sup>140</sup> Dempsey provided several specific examples of “egregious and counterproductive abuses of Civil Liberties . . . [including: ] [t]he torture at Abu Ghraib . . . [t]he detention of US citizens in military jails without criminal charges . . . [t]he detention of foreign nationals in Guantanamo . . . [the] rendition of detainees to other governments known to engage in torture . . . [and the] abuse of the material witness law to hold individuals in jail without charges.”<sup>141</sup> His testimony went on to use these examples to advocate for a much stronger judicial oversight of intelligence gathering and protection of civil liberties.<sup>142</sup>

Heather MacDonald’s testimony was concerned primarily with how the PATRIOT Act had been misperceived by the public.<sup>143</sup> She posited that the PATRIOT Act’s provisions were to blame for this misunderstanding and urged Congress to consider corrections that would correct the misconceptions of Americans. She couched her testimony under four broad themes: “[h]ide the judge” (proponents need to explain that the limited circumstances in which judgments are made behind closed doors are protected by a series of checks and balances that ensure fair review), “[c]reate new rights” (there needs to be a better response to critics who create new rights and then claim those rights were violated), “[c]onceal legal precedent” (the government needs to make it clear that there is legal precedent for many of the expansions of power in the PATRIOT Act), and “[r]eject secrecy” (government should be more open with its deliberations and policies, not less, to make people feel more secure about the changes to the laws).<sup>144</sup>

The second hearing was held on April 27, 2005.<sup>145</sup> The only recorded testimony are the statements made by the three witnesses: a

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<sup>140</sup> *Id.* at 1.

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.* at 3-13.

<sup>143</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. 1 (2005), available at <http://intelligence.senate.gov/0504hr/050419/macdonald.pdf> (testimony from Heather MacDonald).

<sup>144</sup> *Id.* at 2-10.

<sup>145</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. (2005), available at <http://intelligence.senate.gov/0504hr/050427/witness.htm>.

joint statement by Attorney General Alberto Gonzales and Director of the FBI Robert S. Mueller<sup>146</sup>, and a separate statement from the Director of the Central Intelligence Agency (“CIA”), Porter Goss.<sup>147</sup> The statements both emphasized the testimony before the Senate Committee on the Judiciary and focused on the continued need of every sun setting provision to maintain a strong national security posture, while simultaneously discounting and defending against the protests by civil libertarians.<sup>148</sup>

The third hearing was held on May 24, 2005.<sup>149</sup> This hearing consisted of two panels.<sup>150</sup> The first panel consisted only of Ms. Valerie Caproni, General Counsel for the FBI, and the second of Former Associate Deputy Attorney General David Kris and Former Associate Deputy Attorney General and Chief Policy Officer Daniel Collins from the Justice Department, Senior Counsel and Director Joe Onek from the Liberty and Security Initiative at the Constitution Project, and Associate Director James Dempsey from the Center of Democracy and Technology.<sup>151</sup>

### 3. HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE

The Permanent Select Committee on Intelligence in the House of Representatives held many hearings in connection with the reauthorizations of the PATRIOT Act but has recorded only two of those open hearings (held on May 11<sup>th</sup> and May 19<sup>th</sup>) with a collection

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<sup>146</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. (2005), available at <http://intelligence.senate.gov/0504hr/050427/statement.pdf> (joint statement by Alberto Gonzales and Robert Mueller).

<sup>147</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. (2005), available at <http://intelligence.senate.gov/0504hr/050427/goss.htm> (statement by CIA Director Porter Goss).

<sup>148</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, *supra* notes 143, 145.

<sup>149</sup> *Open Hearing: USA PATRIOT Act: Hearing before the S. Comm. on Intelligence*, 109<sup>th</sup> Cong. (2005), available at <http://intelligence.senate.gov/0505hr/050524/witness.htm>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

of documentation.<sup>152</sup> The House Intelligence Committee is chaired by Congressman Peter Hoekstra (R-MI),<sup>153</sup> and the ranking minority member is Jane Harman (D-CA).<sup>154</sup> These two figures, along with the remainder of the committee,<sup>155</sup> have taken the lead in learning about the PATRIOT Act, making their recommendations to the rest of Congress and taking the lead in congressional negotiations.<sup>156</sup> The remainder of this section will briefly summarize the testimony at those two hearings.

The first hearing was held on May 11, 2006 and had only one witness, James B. Comey, Deputy Attorney General.<sup>157</sup> In his testimony, Deputy Attorney General Comey emphasized the need for full reauthorization of the PATRIOT Act in the aftermath of September 11, 2001, and how the current administration is using all legal tools now available to fight the war on terror.<sup>158</sup> Correspondingly, he argued that the weakening of any of these currently lawful tools jeopardizes national security.<sup>159</sup> His testimony went through the PATRIOT Act's provisions that were due to sunset section by section, methodically analyzing how each provision was an

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<sup>152</sup> U.S. House of Representatives, Permanent Select Committee on Intelligence, Open Hearings, <http://intelligence.house.gov/Reports.aspx?Section=3> (last visited Aug. 21, 2006).

<sup>153</sup> U.S. House of Representatives, Permanent Select Committee on Intelligence, Members: Peter Hoekstra, <http://intelligence.house.gov/Members.aspx?Rank=1> (last visited Oct. 4, 2006).

<sup>154</sup> U.S. House of Representatives, Permanent Select Committee on Intelligence, Members: Jane Harman, <http://intelligence.house.gov/Members.aspx?ID=5> (last visited Oct. 4, 2006).

<sup>155</sup> U.S. House of Representatives, Permanent Select Committee on Intelligence: Committee Members, <http://intelligence.house.gov/MemberList.aspx> (last visited Oct. 4, 2006).

<sup>156</sup> Pres. George W. Bush, President's Radio Address (Dec. 10, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051210.html>.

<sup>157</sup> U.S. House of Representatives, Permanent Select Committee on Intelligence, May 11, 2005 - Reauthorization of the USA PATRIOT Act, <http://intelligence.house.gov/Reports.aspx?Section=113> (last visited Oct. 4, 2006).

<sup>158</sup> *Statement of James B. Comey, Deputy Attorney General, United States Department of Justice, Before the U.S. House of Representatives Permanent Select Committee on Intelligence*, 109<sup>th</sup> Cong. (2005), available at <http://intelligence.house.gov/Media/PDFS/ComeyJStatement051105.pdf>.

<sup>159</sup> *Id.*

asset to national security and intelligence gathering.<sup>160</sup> For example, he contended that section 218 which eliminated barriers to communication between the various intelligence agencies has enabled a more streamlined intelligence community to apprehend and prosecute “the Portland Seven, Sami Al-Arian, the Virginia Jihad case, the Mohammed Ali Hasan Al-Moayad and Mohshen Yahya Zayed, the Arnaout case, and the Khaled Abdel Latif Durneisi case.”<sup>161</sup>

The second hearing was held on May 19, 2005, and included four witnesses: Professor Viet Dinh from Georgetown Law School, Associate Professor Richard Seamon from the University of Idaho Law School, Executive Director James X. Dempsey from the Center for Technology and Democracy, and National Security Policy Counsel, Tim Edgar, from the American Civil Liberties Union (“ACLU”).<sup>162</sup> Each witness issued a statement and appeared before the committee for questions and comments.

Viet Dinh’s testimony was strongly in favor of complete reauthorization and focused specifically on two provisions, 215 and 218.<sup>163</sup> Section 215 codified the requirement that businesses turn over records based on statements made to the FISA court, a court without an open record.<sup>164</sup> Dinh contended that although the press argued that the provision would require libraries and bookstores to turn over the reading lists of their members/customers, those words are never used in the PATRIOT Act, and there was never an instance where such a FISA request had been made to a library or bookstore.<sup>165</sup> Instead, he argued that section 215 provided a “targeted, judicially authorized, investigative tool.”<sup>166</sup> Section 218 allowed intelligence agencies to work together and share information regarding key suspects and

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 8.

<sup>162</sup> U.S. House of Representatives, Permanent Select Committee on Intelligence, May 19, 2005 - Reauthorization of the USA PATRIOT Act, <http://intelligence.house.gov/Reports.aspx?Section=116>.

<sup>163</sup> *Testimony of Viet D. Dinh, Professor of Law, Georgetown University Law Center, Before the House Permanent Select Committee on Intelligence, 109<sup>th</sup> Cong. (2005), available at* <http://intelligence.house.gov/Media/PDFS/Dinhtestimony.pdf>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

persons of interest.<sup>167</sup> He admitted that there are concerns that there is not enough of an opportunity to rebut this evidence before it has been submitted and a warrant issued by a FISA court but counters that the administrative procedures in place and the PATRIOT Act's original protections are sufficient to protect the accused.<sup>168</sup>

James X. Dempsey's testimony is almost identical to his previous testimony before the Senate Committees.<sup>169</sup> Unlike James X. Dempsey's broad testimony, Richard Seamon focused his testimony on section 218 and the need to broaden it to ensure the goals of the PATRIOT Act could continue to be fully implemented.<sup>170</sup> He explained that as an assistant Solicitor General for six years, he was a qualified expert on matters of security policy and explained that the *In re Sealed Case*<sup>171</sup> demonstrated the intent behind section 218; the different intelligence agencies working together, were thwarted by the FISA Court decision.<sup>172</sup> The Court held that "the government cannot use FISA surveillance to get evidence of 'ordinary crimes' by a suspected terrorist, even if the government reasonably believes that the arrest and prosecution of the terrorist for those crimes is necessary to protect against a planned terrorist attack."<sup>173</sup> He argued that the recent FISA decision brought up questions of probable cause that needed to be corrected in order to ensure that the government needed a warrant in the FISA court before sharing and gathering evidence of a potential or suspected crime.<sup>174</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Statement of James X. Dempsey, Executive Director, Center for Democracy & Technology, before the House Permanent Select Committee on Intelligence, 109<sup>th</sup> Cong. (2005), available at <http://intelligence.house.gov/Media/PDFS/DempseyTestimony.pdf>. See also Electronic Frontier Foundation, *supra* note 54.*

<sup>170</sup> *Hearing on Information Sharing under the PATRIOT Act, 109<sup>th</sup> Cong. (2005), available at <http://intelligence.house.gov/Media/PDFS/SeamonTestimony.pdf> (testimony of Richard Seamon).*

<sup>171</sup> *In re Sealed Case*, 310 F.3d 717 (U.S. Foreign Intelligence Surveillance Ct. of Review 2002).

<sup>172</sup> *Hearing on Information Sharing under the PATRIOT Act, supra* note 170.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

Finally, Tim Edgar from the ACLU testified against the PATRIOT Act both broadly and specifically on behalf of the 400,000 members his organization.<sup>175</sup> His testimony was the longest statement submitted to the House Permanent Select Committee on Intelligence. Like Dinh's testimony, Edgar went through every provision of the PATRIOT Act that was set to sunset in 2005 but built his argument with general concerns over a lack of privacy and potentials for abuse of overly broad powers granted to the intelligence gathering community.<sup>176</sup>

Although the four witnesses before the committee felt very differently about both the broad picture of the Act and the renewal of specific provisions, they served an important role in presenting to Congress the merits and concerns of various constituencies regarding renewal. Ultimately, Congress made permanent most of the PATRIOT Act's provisions, but the most contentious among those discussed by the panel were narrowed or renewed while subjected to another four year sunset provision.<sup>177</sup>

#### E. PROBLEMS WITH REAUTHORIZATION: THE FINAL PUSH

Although the Senate was more unwilling than the House to permanently extend provisions of the PATRIOT Act, it appeared willing to extend the sunset provisions through the end of President Bush's term.<sup>178</sup> That willingness changed with the accusations that the Bush Administration took part in domestic spying through wiretaps. In response to the scandal, more than forty Senators, led by a bipartisan group consisting of Senators Russ Feingold (D-WI) and Larry Craig (R-ID) came together to block long-term or permanent

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<sup>175</sup> *Testimony at a Hearing on the USA PATRIOT Act (2005)*, available at <http://intelligence.house.gov/Media/PDFS/EdgarTestimony.pdf> (testimony of Tim Edgar from the ACLU).

<sup>176</sup> *Id.*

<sup>177</sup> U.S. Department of Justice, Fact Sheet: USA PATRIOT Act Improvement and Reauthorization Act of 2005 (March 2, 2006), [http://www.usdoj.gov/opa/pr/2006/March/06\\_opa\\_113.html](http://www.usdoj.gov/opa/pr/2006/March/06_opa_113.html).

<sup>178</sup> Charles Babington, *Domestic Spying Issue Inflames Debate Over Patriot Act Renewal*, WASH. POST, Dec. 18, 2005, at A09, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/12/17/AR2005121701113\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/12/17/AR2005121701113_pf.html).

reauthorization.<sup>179</sup> With more than forty Senators united to uphold a filibuster of full reauthorization of the PATRIOT Act and bolstered by claims of civil libertarians in the wake of the President's wiretapping disclosure, a compromise was necessary to prevent the Act from lapsing.<sup>180</sup>

The Bush Administration claimed that "there is undeniably an important and legitimate privacy interest at stake with respect to the activities described by the President. However, that concern must be balanced against the government's compelling interest in the security of the nation."<sup>181</sup> Senators from both parties criticized the President's use of domestic wiretaps without a warrant, primarily because FISA<sup>182</sup> provides for the legal use of domestic wiretaps through a FISA Court order.<sup>183</sup> The FISA Court is made up of seven judges from different circuit courts who are appointed by the Chief Justice of the Supreme Court.<sup>184</sup> While acknowledging that it occasionally takes several days to obtain a wiretap order to conduct surveillance, Congress pointed out that FISA allows for the retroactive approval of wiretap requests.<sup>185</sup>

With the December 31, 2005, expiration date for the PATRIOT Act's sunset provisions quickly approaching, the President felt the need to compromise. The deadline created many factors that needed to be balanced in order to reach a solution including the administration's desire to renew the PATRIOT Act<sup>186</sup> and a vocal

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<sup>179</sup> The Associated Press, *Senate Rejects Reauthorization of USA Patriot Act*, MSNBC.COM, Dec. 16, 2005, <http://www.msnbc.msn.com/id/10485860/>.

<sup>180</sup> *Id.*

<sup>181</sup> *White House Defends Wiretap Use*, CBS NEWS, Dec. 22, 2005, <http://www.cbsnews.com/stories/2005/12/22/politics/main1160120.shtml>.

<sup>182</sup> 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, and 1861-62 (2006).

<sup>183</sup> Edward Epstein, *Bush Defends Eavesdropping, Blasts Senators on Patriot Act*, SAN FRANCISCO CHRON., Dec. 19, 2005, at A1, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/19/MNG9JGAFEV10.DTL>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Pres. George W. Bush, Press Conference of the President (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html> (President Bush called upon Congress to ensure the full reauthorization of the PATRIOT Act for reasons of national security).

majority that would not fully reauthorize the provisions for another four years.<sup>187</sup> This majority included at least forty Senators adamant to filibuster the House of Representative's version of reauthorization.<sup>188</sup> To further complicate the process of reauthorization, both chamber of Congress wanted to adjourn for the winter holiday.<sup>189</sup> In the end, both the House and Senate agreed to an extension of all sunset provisions until February 3, 2006.<sup>190</sup> The Senate originally pushed for a six month extension, which would have allowed the Bush Administration more time to work out compromises regarding the more controversial aspects of the PATRIOT Act, but the House of Representatives insisted upon a one-month extension, believing that a shorter deadline after the holiday would preserve more of the sunset provisions and the changes approved by the House.<sup>191</sup> The one-month compromise was passed by Congress on December 22, 2005.<sup>192</sup> Up against another deadline, the White House continued at the dawn of 2006 to push for the full reauthorization of the PATRIOT Act.<sup>193</sup>

#### F. REAUTHORIZATION

Having passed a very short thirty-four day extension, the reauthorization of the PATRIOT Act immediately occupied both the House and Senate upon returning from their short winter holiday adjournment.<sup>194</sup> Although both chambers worked diligently, it was

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<sup>187</sup> The Associated Press, *supra* note 179.

<sup>188</sup> *Id.*

<sup>189</sup> Associated Press, *House Votes to Extend PATRIOT Act: Anti-Terror Law Scheduled to Expire Friday; House Renews Through March*, MSNBC.com, Feb. 1, 2006, <http://www.msnbc.msn.com/id/11119720/>.

<sup>190</sup> Elaine Quijano, *PATRIOT Act Gets One-Month Extension: Congress has Until February to Agree on Controversial Powers*, CNN.COM, Dec. 23, 2005, <http://www.cnn.com/2005/POLITICS/12/22/patriot.act/>.

<sup>191</sup> United Press International, *House Insists on 1-Month PATRIOT Extension*, BAVENET.COM, Dec. 23, 2005, <http://pub3.bravenet.com/news/198439835/31183/1>.

<sup>192</sup> Quijano, *supra* note 190.

<sup>193</sup> Pres. George W. Bush, *President Discusses Use and Reauthorization of USA PATRIOT Act* (Jan. 3, 2006), <http://www.whitehouse.gov/news/releases/2006/01/20060103.html>.

<sup>194</sup> *Id.*

impossible for them to agree on a compromise in conference committee by the February 3, 2006, date requiring both chambers to agree to an additional extension. Like the original authorization and the first reauthorization, the House passed their extension first, on February 1 by voice vote.<sup>195</sup> The Senate ran up to the deadline before passing an additional extension through March 10, 2006, on February 2, 2006, by a vote of 95-1.<sup>196</sup> Russ Feingold (D-WI) was the lone absentee.<sup>197</sup> Detailed reports from the conference committee do not exist to provide insight on the most contentious issues that prevented a compromise in the initial extension period.<sup>198</sup> However, the most controversial issues relate directly to the powers of search and seizure and the power to demand business records by submitting to the FISA Court, an affidavit attesting that the records are related to an ongoing investigation.<sup>199</sup> In order to obtain final passage of the reauthorization, two bills were added together: the reauthorization and Senate Bill 2271, providing for increased security from terrorism and a law relating to methamphetamines.<sup>200</sup>

Upon the passage by the Senate, President Bush supported the newly compromised bill:

I applaud the Senate for voting to renew the Patriot Act and overcoming the partisan attempts to block its passage. The terrorists have not lost the will or the ability to attack us. The Patriot Act is vital to the war on terror and defending our citizens against a ruthless enemy. This bill will allow our law enforcement officials to continue to use the same tools against terrorists that are already used against drug

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<sup>195</sup> The Associated Press, *House Votes to Extend PATRIOT Act*, MSNBC.COM, Feb. 1, 2006, available at <http://www.msnbc.msn.com/id/11119720/>.

<sup>196</sup> U.S. Senate Roll Call Votes 109<sup>th</sup> Congress: Vote on H.R. 4659 (February 2, 2006), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00011](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00011).

<sup>197</sup> *Id.*

<sup>198</sup> The Associated Press, *supra* note 179.

<sup>199</sup> *Id.*

<sup>200</sup> Wendy J. Keefer, *The Patriot Act, Reauthorized*, JURIST, July 26, 2006, <http://jurist.law.pitt.edu/forumy/2006/03/patriot-act-reauthorized.php>.

dealers and other criminals, while safeguarding the civil liberties of the American people.<sup>201</sup>

The USA PATRIOT Improvement and Reauthorization Act maintains most of the same security measures along with many small tweaks that allow law enforcement to fight terrorism and increase security.<sup>202</sup> The remainder of this section will first look at the changes that were made to the provisions designed to sunset at the end of 2005, and then tackle the new measures in the bill.

The reauthorization of the PATRIOT Act retained in full and made permanent fourteen of the sixteen provisions that were originally designed to sunset at the end of 2005.<sup>203</sup> The two remaining provisions were also renewed in full, but subject to another four year sunset provision.<sup>204</sup> The two provisions, sections 206 and 215 both deal with FISA: “the authority to conduct ‘roving’ surveillance under the Foreign Intelligence Surveillance Act (FISA) and the authority to request production of business records under FISA.”<sup>205</sup>

There are many new provisions added to the original PATRIOT Act designed to close loopholes and add new means to address security.<sup>206</sup> The first deals with methamphetamine production.<sup>207</sup> The new bill makes it more difficult to obtain in bulk the ingredients necessary for the production of methamphetamine and requires retailers to keep the ingredients behind the counter or in locked display

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<sup>201</sup> Press Release, President Applauds Senate for Voting to Renew Patriot Act (Mar. 2, 2006), <http://www.whitehouse.gov/news/releases/2006/03/20060302-18.html>.

<sup>202</sup> White House, Policies in Focus: USA PATRIOT Act, <http://www.whitehouse.gov/infocus/patriotact/> (last visited Oct. 4, 2006).

<sup>203</sup> U.S. Department of Justice, Fact Sheet: USA PATRIOT Act Improvement and Reauthorization Act of 2005 (March 2, 2006), [http://www.usdoj.gov/opa/pr/2006/March/06\\_opa\\_113.html](http://www.usdoj.gov/opa/pr/2006/March/06_opa_113.html).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Fact Sheet: Safeguarding America: President Bush Signs Patriot Act Reauthorization (March 9, 2006), <http://www.whitehouse.gov/news/releases/2006/03/20060309-7.html>.

<sup>207</sup> President Bush Signs USA PATRIOT Act: Anti-Meth provisions take aim at Methamphetamine Production, Trafficking, and Use (March 9, 2006), <http://www.whitehousedrugpolicy.gov/NEWS/press06/030906.html>.

cases.<sup>208</sup> Finally, it increases the penalties for selling or sneaking methamphetamine in the United States.<sup>209</sup> To enforce these provisions, the bill also authorized \$99,000,000 a year to combat methamphetamine hot spots and created a new DEA classification for the use of methamphetamine that allows the agency to better enforce and target the enforcement of methamphetamine abuse.<sup>210</sup>

Second, the White House claims the recently reauthorized version of the PATRIOT Act also provides three new ways to safeguard the nation, it streamlines legal protection through the appointment of an Assistant Attorney General for National Security, tackles terrorism financing, and protects mass transportation.<sup>211</sup> A new Assistant Attorney General for National Security allows the Department of Justice to organize its terrorist security activities under the leadership of a single individual.<sup>212</sup> The successful transition of the new organization requires an appointment for a new Assistant Attorney General for National Security, additional funding, and hiring for the department.<sup>213</sup> It increases the penalty for terrorist financing and makes it more difficult for “hawalas” (money transfers through informal networks rather than directly to terrorist organizations or cells).<sup>214</sup> Finally, the Act attempts to protect transportation by

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<sup>208</sup> *Id.* (much of the increase is associated with the new internationalization of the crimes involved, including extending enforcement on the border of Mexico).

<sup>209</sup> *Id.* (penalties now include up to an additional 20 years in prison when a child resides or is present where methamphetamine is abused, and reduces the threshold for the amount of the drug to be necessary to qualify as a ‘kingpin’ under existing drug laws and increases the maximum sentence of those persons to up to life imprisonment).

<sup>210</sup> *Id.* (also provides an additional \$20,000,000 for 2006 and 2007 that creates a drug endangered child response team and coordinates the state local and federal response efforts. The act also specifically increases penalties for the use of methamphetamine by pregnant women and uses 3 year grants to support local efforts to prevent methamphetamine abuse by pregnant and parenting women).

<sup>211</sup> Policies in Focus: USA PATRIOT Act, *supra* note 202.

<sup>212</sup> Fact Sheet: Department of Justice to Create National Security Division (March 13, 2006), [http://www.usdoj.gov/opa/pr/2006/March/06\\_opa\\_136.html](http://www.usdoj.gov/opa/pr/2006/March/06_opa_136.html) (the DOJ requests \$10,000,000 in reorganization costs that include the construction of up to 225 new offices, and an increase in the budget of \$67,000,000 to fund the new department).

<sup>213</sup> *Id.*

<sup>214</sup> Fact Sheet: The USA Patriot Act-A Proven Homeland Security Tool (Dec. 14, 2005), [http://www.dhs.gov/xnews/releases/press-release\\_0815.shtm](http://www.dhs.gov/xnews/releases/press-release_0815.shtm) (includes an extended list of

increasing penalties for attacks on land and water based transportation systems, and airline facilities.<sup>215</sup> These standards expand the scope of the intent provisions and increase the number of terrorist crimes for which the death penalty can be proscribed.<sup>216</sup>

The USA PATRIOT Improvement and Reauthorization Act of 2005 was signed by the President on March 9, 2006.<sup>217</sup> At the signing, he established high hopes for the prospect of ensuring security through the expanded and largely reauthorized provisions: “[t]he bills will help us continue to fight terrorism effectively and to combat the use of the illegal drug methamphetamine that is ruining too many lives.”<sup>218</sup>

## V. CONCLUSION

Since September 11, 2001, the collection of information by the government has been seen by many as increasingly necessary to the national security of the United States. However, in no year since 2001 has such adamant debate taken place over the collection of data by the government in so many spheres of information collection and gathering.

In 2005, Congress began the process of reauthorizing the PATRIOT Act, the most sweeping expansion of powers American intelligence agencies have ever experienced. The federal government began reorganizing those agencies to enable them greater oversight regarding the use of privately collected information, as well as increased sharing of that information. The Transportation Security Administration partnered with the Terrorist Screening Center to create a pilot program that would have changed the way private information

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examples of cases when the PATRIOT Act’s funding provisions have been successful in eliminating up to \$25,000,000 in illicit donations. It also includes a more detailed description of the changes the renewal bill has made that help the security regime fight terrorism by limiting its funding from the United States).

<sup>215</sup> Fact Sheet: Safeguarding America: President Bush Signs Patriot Act Reauthorization, *supra* note 206.

<sup>216</sup> Policies in Focus: USA PATRIOT Act, *supra* note 202.

<sup>217</sup> President Signs USA PATRIOT Improvement and Reauthorization Act (March 9, 2006), <http://www.whitehouse.gov/news/releases/2006/03/20060309-4.html>.

<sup>218</sup> President's Statement on H.R. 199, the "USA PATRIOT Improvement and Reauthorization Act of 2005, (March 9, 2006), <http://www.whitehouse.gov/news/releases/2006/03/20060309-8.html>.

and personal security is handled by every airline operator in the country. Secure Flight was an evolution of the CAPPs and CAPPs II programs and today is in need of significant revisions given a resurgent concern about privacy and the nature of data collection. The program, however, is one that will be reviewed and inevitably will return in another evolved form because of the government's concern regarding terrorists access to aviation after September 11<sup>th</sup>. The year of 2005 was a year of tidal changes among those that deal with government data collection.

In the end, 2005 will not have the last word on any of these issues. Congress continued to debate the PATRIOT Act through March 2006 and probably will continue to debate, for decades to come, about the proper regulation of intelligence agencies under the PATRIOT Act. The President will continue to tweak the federal intelligence agencies from crisis to crisis as the security needs of the country change. But regardless of where the future of these debates will eventually lead, the issues of data collection faced by the United States in 2005 and resolved with the reauthorization of the PATRIOT Act in March of 2006, will have their place in those discussions.