

# Congress Rejects PATRIOT Act Re-Write, but Modest Improvements Still Possible

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Congress Rejects PATRIOT Act Re-Write, but Modest Improvements Still Possible

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### 1) House and Senate Committees Renew PATRIOT with Mostly Minor Changes

On November 5, the House Judiciary Committee completed its mark up and reported a PATRIOT Act reauthorization bill, H.R. 3845. The Senate Judiciary Committee completed its markup of companion legislation, S. 1692, in October. The next step for both bills are floor votes and then a process to reconcile the differences between them. The outlines of a final package are probably in the two bills reported by the Committees, but the full Congressional calendar suggests that there is not sufficient time for the process to wrap up this year.

PATRIOT is under discussion right now because two of the Act's amendments to intelligence authorities, and a third, related intelligence authority, are due to expire, or "sunset," on December 31 unless Congress renews them. The three expiring provisions, while important, are not as significant as other PATRIOT Act provisions that do not expire. One expiring provision has never been used and a second was rendered less important by intervening changes in related laws.

CDT and other civil liberties advocates urged Congress to restore checks and balances on the use of National Security Letters (NSLs), extraordinary devices that FBI officials issue tens of thousands of times per year, without judicial approval, to force banks, telephone companies, Internet service providers and other businesses to disclose detailed and potentially sensitive records about their customers. The Department of Justice's own Inspector General has found that the FBI repeatedly abused the NSL power.

The results of the Committees' action are modest and do not go as far as CDT believes necessary. Both bills slightly enhance protections for Section 215 orders seeking access to tangible things, which at least involve judicial authorization. The House bill contains somewhat more civil liberties protection than does the Senate bill, and because it would improve the NSL standard, is preferable to the approach the Senate took of largely leaving the current standard in place.

[Senate Committee Report on PATRIOT Reauthorization](#) [1]

[CDT chart comparing the House and Senate bills to current law](#) [2]

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### 2) The Risks of National Security Letters

NSLs are literally letters that enable the government to obtain broad personal data on individuals. To issue an NSL under current law, the FBI merely needs to claim (internally – that is, to itself) that the information it seeks is relevant to a national security investigation. “Relevance” is a very low standard, especially when there is not the independent assessment of a judicial officer. And national security investigations can be very broad, for they are not limited to illegal acts.

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

[Full analysis of NSLs, their abuse by the FBI, and CDT’s recommendations](#) [3]

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### 3) House Bill Offers More Significant Change to NSL Authority

The PATRIOT reauthorization bill that passed the Senate Judiciary Committee merely requires that the government assert relevance to an investigation to issue an NSL. This is the same as current law. The only improvement to the NSL standard the Senate Committee made is to require that the FBI write an internal “statement of specific facts” reasonably showing relevance before it can issue the NSL. The FBI already creates similar statements under its internal procedures for issuing NSLs. While requiring these statements by statute is somewhat helpful, it still leaves the standard that the government must meet very low and it leaves the whole process in the hands of the FBI.

The House Judiciary bill takes a different approach that could curtail the use of NSLs to obtain personal information about people two or three times removed from the target of an investigation. To issue an NSL, the House bill would require the government to write a statement of specific and articulable facts showing that the information sought pertains to an agent of a foreign power (AFP), is relevant to the activities of an AFP who is under investigation, or pertains to someone personally known to the AFP.

Tying the records sought to a suspected agent of a foreign power is an improvement. National security investigations have become so broad that they have lost their focus on terrorists and on terrorist groups and can become fishing expeditions. They can now involve collection of personal information about activities of Americans even when those activities are not closely related to the activities of a terrorist or terrorist organization. Use of an investigative power like an NSL that collects personal information about individuals should be predicated on an investigation that is at least solid enough to target a terrorist, a terrorist group or an agent of such a group. The House bill would require such focus, but still permit the FBI and other intelligence agencies flexibility to use NSLs in appropriate investigations.

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### 4) Obama Administration Uses Secret Briefings to Resist Strong Standards for FBI Investigations

In both the House and the Senate, the failure to include more substantial civil liberties protections was the result of Democrats weakening their own bills at the urging of the Obama Administration.

As a Senator, Barack Obama advocated in favor of the AFP standard. In 2005, Obama co-sponsored the SAFE Act and also signed on to a letter with other Senate colleagues supporting the “agent of a foreign power” standard for NSLs (and for orders under Section 215 of the PATRIOT Act). According to the 2005 letter, the AFP standard would provide the flexibility needed for intelligence investigations while still protecting innocent Americans from unnecessary surveillance. Yet during this current round of PATRIOT reauthorization, President Obama’s administration opposed even

changes that went less far than the ones he supported as a Senator.

The Obama Administration, like its predecessor, made its case with classified briefings and allusions to secret programs. When Members of Congress proposed that the FBI should prepare a statement of “specific and articulable facts” supporting its application for a Section 215 order seeking tangible things relevant to an investigation, the Administration said that such a requirement would “disrupt” a secret program, which it otherwise refused to describe. Apparently, some of the Members of Congress who have been briefed on the program were troubled by the implications of the Administration’s claims. During the Senate markup, Senators Feingold and Durbin expressed doubt that the “specific and articulable facts” standard would disrupt the program, and also suggested that it would be wise to end the program. During the House markup, Rep. Schiff seemed to allude to the program when he disagreed with another Judiciary Committee member’s assertion that Section 215 powers were not being abused. However, the Administration’s approach prevailed, and the amendment was watered down until the Administration was satisfied that its “program” would not be disrupted.

The changes in both the House and Senate bills are modest, with the House bill taking the better approach. Unfortunately, neither addresses the fundamental problem with NSLs, which is that they can be used to obtain sensitive and detailed records without judicial approval. CDT has long argued that, while NSLs should be available for less sensitive data such as subscriber identifying information, access to more detailed transactional data should be approved by a judge. That approach, which appeared in Senator Feingold’s JUSTICE Act (S. 1686) wasn’t even considered on this round. While the House bill would tighten the standard for issuing NSLs and thereby cut down on the use of NSLs to obtain records about people who have nothing to do with terrorists, other abuses of NSLs are likely to continue.

It seems unlikely that additional civil liberties protections will be added to the PATRIOT bills on the floor of the House or the Senate. Given that reality, the most important thing Congress could do would be to enact the House bill into law, with its stronger NSL standard.

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- [PATRIOT Act](#)
- [NSLs](#)

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