

Background

Passed and signed into law just six weeks after the attacks on September 11, the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001” has been a focus of controversy since the day it was proposed. The 132-page Act includes many changes to existing law and new innovations. Among these changes are enhanced surveillance procedures and the relaxation of certain restrictions in the sharing of information among foreign and domestic intelligence and law enforcement agencies. For example, Section 215 of the Act allows the FBI to order any person or entity to turn over “any tangible things,” such as financial and library records, so long as the FBI specifies that the order is “for an authorized investigation... to protect against international terrorism or clandestine [secret] intelligence activities.” The FBI does not need to show probable cause or relevance to gain access to information from virtually any source including the names of books purchased at the mall to computer files and genetic records. Those served with Section 215 orders are prohibited from disclosing the fact to anyone else. This section will “sunset” (automatically end) on December 31, 2005, unless Congress acts to renew it. This unit will provide background on the USA PATRIOT Act and some of the controversy surrounding the enhanced surveillance procedures it features. It will explore how citizens need to find a balance between their desires to be both safe and free. It will introduce the idea of public policy—what it is and how to assess its costs and benefits. It will offer a model for assessing Section 215 and help students consider whether Congress should vote to renew it. (From: Constitutional Rights Foundation, Bill of Rights in Action, Fall 2003, Volume 19, Number 4, http://www.crf-usa.org/terror/patriot_act.htm.)

Facts

History of Section 215:

- Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA) to protect innocent people against invasions of privacy by the executive branch. The USA PATRIOT Act, passed in 2001, created significant holes in those protections, in particular through changes to what is now known as Section 215 (50 USC § 1861).
- The government's extreme interpretation of Section 215 was the first subject of the Snowden revelations that shocked the country, most notably the ‘bulk telephone metadata program,’ under which the government ordered major telephone providers to hand over records of all calls made by all customers.
- The USA FREEDOM Act of 2015 prohibited the untargeted collection of all records of all customers (i.e., ‘bulk’ collection), instituted certain transparency requirements, extended Section 215's sunset to December 15, 2019, and for the first time expressly permitted the programmatic collection of records up to two degrees away from a target.

What Section 215 does:

- The FBI and NSA still use Section 215 to warrantlessly collect vast quantities of information about people that are held by businesses, such as records of phone calls and financial transactions.
- The government uses Section 215 to collect “foreign intelligence information,” an extraordinarily broad term that includes information related to “the conduct of the foreign affairs of the United States.”

- The government may target US persons for surveillance under Section 215 to protect against international terrorism or clandestine intelligence activities.
- Section 215 orders do not require a warrant based on a showing of probable cause, but rather a statement of facts to the Foreign Intelligence Surveillance Court. It is similar to an administrative subpoena.

Issue

During times of threatened national security does the federal government have the power to expand its digital data collection from its citizens.

Considerations:

--Amendment 4

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

--Amendment 1

"The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual's religious practices. It guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely. It also guarantees the right of citizens to assemble peaceably and to petition their government. "

--Many foreign nations had agencies that monitored security issues within their own countries, the United States did not.

--Congress passed the Foreign Intelligence Surveillance Act 1978 to protect innocent people against invasions of privacy by the executive branch.

Arguments in Favor

1. It strengthened US measures to detect, prevent, and prosecute the financing of terrorism. Law enforcement and government officials could now use their crime fighting tools for the war on terrorism.
2. It expanded the government's surveillance authority with the goal of detecting terroristic threats.
3. Improved communication between agencies and expedited response times to potential times to potential threats.

4. Its goal was pursuing information that could save thousands and thousands of lives and protect our national security.
5. This (section 215) uses a strategy already used to fight organized crime and drug trafficking cases.

Arguments Against

1. Congress gave law enforcement officials permission to collect intelligence on legal citizens of the US, without probable cause.
2. It allowed government officials to target citizens not under criminal investigation. The NSA was collecting phone data in bulk.
3. It completely dismissed the probable cause requirement.
4. The First Amendment possible violations include the government demanding such records as library books checked out, purchases made from book sellers and footage of Americans protesting.
5. It vastly expands the FBI's power to spy on ordinary people living in the United States.

Outcome

The Patriot Act was originally set to expire in 2005. It was extended by Congress and President Bush in 2006. It was extended again under President Obama in 2011. A revised version (USA Freedom Act) was enacted in 2015. Finally, Section 215 came to an end in 2020 when Congress was unable to come to an agreement to renew it.

(information modified from The Missouri Bar Summer Institute 2022 Patriot Act Slideshow)