

Draft Description of Manager's Amendment to USA PATRIOT Amendments Act of 2009 (H.R. 3845)

USA PATRIOT Act Related Amendments (Title I of House Bill)

FISA Roving Wiretaps (Sec. 101) in H.R. 3845:

Sunset of 2013. H.R. 3845 originally attempted to clarify Congressional intent that when using roving wiretap authority, the government must specifically describe its target to the court in order to avoid unintended surveillance of multiple unrelated targets. Although there have not been reported incidents of such abusive surveillance, experts have suggested that clarifying Congressional intent, without altering the authority to obtain roving wiretaps, is important to avoid possible abuses.

- **Manager's amendment:** The original language in H.R. 3845 accomplished this objective but also had unintended consequences by unintentionally altering other aspects of FISA wiretap authority not related to roving wiretaps. These unintended consequences occurred both because of the use of certain terms and the placement of this language in the part of the statute that governed a broad spectrum of FISA authorities beyond roving wiretaps. The manager's amendment uses different language to clarify Congressional intent to curtail possible abuses of roving wiretap authority and, at the same time, avoids these unintended consequences. It does so by adding the clarifying language to the part of FISA dealing only with roving wiretap authority. The new language specifies that, to obtain a roving wiretap, the government must show, based on specific facts, that the target is a foreign power, an agent of a foreign power, or a specific individual.

FISA § 215 Business Records/Access to Certain Tangible Things (Sec.103) in H.R. 3845:

(Libraries and Booksellers) Limits the use of Section 215 orders to obtain library or bookseller documentary materials that contain personally identifiable information concerning a patron. This general prohibition for certain types of library/bookseller records is not present in current law, and seeks to protect privacy and civil liberties concerns that are unique to certain types of library and bookseller records.

- **Manager's amendment:** Language in the original H.R. 3845 absolutely prohibits the government from acquiring records containing personal information about a patron from libraries and booksellers in an intelligence investigation via use of a § 215 order. This prohibition has the possible unintended effect of excluding library or bookseller "records" that would be attainable from other types of establishments in the same investigation (like a cyber café or a business that did not sell books) and may have nothing to do with materials an individual may be

reading. For example, the current H.R. 3845 language prohibits the use of a § 215 order to acquire records relevant to an authorized investigation that simply show whether an individual was even present at a library. The current H.R. 3845 language would also prohibit the government from obtaining records relevant to an authorized investigation about whether an individual purchased guns and ammunition from Walmart, for example, simply because Walmart also happens to sell books and magazines. To avoid these unintended consequences, and due in part to the Justice Department's suggestion, the manager's amendment defines bookseller information in a way that distinguishes between book and periodical-related transactions and transactions involving other types of goods. Moreover, if the government can provide a statement of specific and articulable facts showing that there are reasonable grounds to believe that the records are both relevant to an authorized investigation and pertain to a foreign power or agent of a foreign power, the change of language in the manager's amendment allows the government to access records containing personal information of a patron. This heightened standard, based on pre-PATRIOT Act language, provides a high degree of protection for actual library and bookseller information, allowing the government to acquire this information only when it can prove a very specific, particular need to the FISA Court.

Use of FISA Pen Registers and Trap and Trace Devices (Sec. 108) in H.R. 3845:

Requires the application for a FISA pen register or trap and trace device to contain a statement of specific and articulable facts relied upon by the applicant to justify the belief that the information likely to be obtained is foreign intelligence information not concerning a United States person, or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment. Current law only requires a certification by the applicant and does not require a statement of specific and articulable facts. H.R. 3845 thus ensures that the government is presenting a thorough statement of facts to the court. H.R. 3845 also amends current law by requiring the implementation of minimization procedures for pen registers and trap and trace devices, and by allowing FISA court judges to assess the government's compliance with these minimization procedures, thereby strengthening judicial oversight.

- **Manager's amendment:** Makes changes to language to account, more accurately, for how minimization procedures can be applied to the information

collected through the use of FISA pen/trap and trace devices. It specifically defines minimization in the context of FISA pen register and trap and trace devices, and provides that FISA judges should direct that minimization procedures be followed in appropriate circumstances.

National Security Letter Reform (Title II of H. R. 3845)

Sec. 204 (Modification of Standard) in H.R. 3845: Requires, before a national security letter can issue, that an official with the authority to issue such letter document and retain a statement of specific and articulable facts showing that there are reasonable grounds to believe that the information sought pertains to a foreign power or an agent of a foreign power. This new standard, requiring that the information sought pertain to a foreign power or agent of a foreign power, changes the current standard that only requires that the information sought is relevant to an authorized investigation.

- **Manager’s amendment:** More accurately defines types of documents the government can acquire under the “pertains to a foreign power or agent of a foreign power” standard. The manager’s amendment refines the language as to what records can be obtained by also allowing the acquisition of (1) records relevant to the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or (2) records that pertain to an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation. This new language responds to Department of Justice concerns and more specifically describes types of documents that the government should be able to acquire under NSLs, while preserving the objective of ensuring that the information requested is sufficiently linked to a foreign power or agent of a foreign power.

Sec. 206 (Disclosure for Law Enforcement Purposes) in H.R. 3845: Requires the Attorney General to authorize the use of any information acquired or derived from a national security letter in a criminal proceeding. Current law does not require such “use authority” for national security letters.

- **Manager’s amendment:** Requires the Attorney General or his designee at a level not lower than Section Chief of a division of the Department of Justice to authorize the use of any information acquired from a national security letter in any criminal proceeding. This amendment allows for more management-level individuals to authorize the use of information acquired through an NSL in a criminal investigation, thereby limiting the administrative burden on the Attorney General. Moreover, this amendment limits the authorization requirement to information actually acquired from an NSL, rather than that “derived from” an NSL, thereby eliminating some of the burden on the government to trace the

“downward stream” travel of information originally acquired through an NSL. The amendment responds IN PART to concerns raised by the Department of Justice while preserving the intent to provide additional safeguards concerning the use of information obtained through NSLs.

Sec. 208 (Minimization Procedures) on H.R. 3845: Requires the Attorney General to establish minimization and destruction procedures to ensure that information obtained pursuant to a national security letter regarding persons that are no longer of interest in an authorized investigation is destroyed. NSL minimization procedures are not required under current law.

- **Manager’s Amendment:** Makes changes to language to account, more accurately, for how minimization procedures can be applied to the information collected through the use of NSLs. It specifically provides that minimization includes procedures designed, in light of the purposes and techniques of NSLs, to significantly limit the retention and dissemination of nonpublicly available information on U.S. persons and to require that disseminated non-foreign intelligence information not identify U.S. persons except where necessary to understand or assess foreign intelligence information.

Manager’s Amendment Addition of Sec. [209] (Public Report on National Security Letters): Amends annual reporting requirement pertaining to NSLs with respect to three of the four NSL statutes referenced in 18 U.S.C. § 3511 to require a further break-down of the aggregate number of NSL requests currently reported under each statute, into the number of such requests made under each for information concerning 1) US persons, 2) non-US persons, 3) persons who are the subjects of authorized national security investigations, and 4) persons who are not the subjects of authorized national security investigations. Current law requires only reporting of the above categories in the aggregate. The amendment would not require a breakdown of these categories with respect to the number of requests for subscriber information under 18 U.S.C § 2709 (the fourth NSL statute). This provision is already included in the Senate Judiciary Committee-approved bill. This change in the law will provide Congress and the American public with more detailed information about the government’s use of NSLs.