

Government FISA Authorities Sunset – With No Clear Path For Reauthorization

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Privacy in Focus®

Lost amid the flurry of coronavirus (COVID-19) related legislative activity by Congress, was the sunset – or expiration – of several Foreign Intelligence Surveillance Act (FISA) provisions that trace back to the USA Patriot Act enacted after 9/11.

These include government surveillance authorities that have been hotly debated for years, including, the “business records” provision (also commonly referred to as “Section 215 of the USA Patriot Act of 2001”), the “roving wiretaps” provision, and the “lone wolf” amendment.

For years, the government has cited these authorities as critical for obtaining evidence relevant to ongoing terrorism and national security investigations. But in a surprising turn, the authorities have now expired, with no clear path to reauthorization.

Typically, whenever calls for FISA reforms have been made – even following the Edward Snowden leaks – Congress has pressed to maintain the status quo until reforms were adopted, often extending the authorities for limited periods of time.

With the authorities now expired, privacy advocates are likely to call for greater concessions to even begin discussions on reauthorizing the expired provisions.

How did this happen?

- Each of the relevant FISA authorities were set to originally expire in November 2019, but Congress briefly extended the

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reauthorization until December 2019 and then until March 15, 2020 because, while the intelligence community was calling for a permanent reauthorization of the authorities, privacy advocates – in both parties – were calling for greater reforms to FISA.

- Just before the March 15, 2020 sunset deadline, the House passed a compromise reform bill on a bipartisan 278 to 136 vote, which would have extended the authorities through 2023 and enacted multiple reforms to the FISA authorities and the FISA process.
 - The Attorney General publicly backed the House compromise bill, but the President threatened to veto it.
- Rather than proceed to vote on the House compromise bill backed by the Attorney General, the Senate opted instead to extend the authorities (in a separate bill) on March 16, 2020 for 2.5 months to allow for more debate and more possible changes to the FISA authorities (called for, notably, by Senators Mike Lee (R-UT) and Rand Paul (R-KY)).

Then, with the pressing all-hands-on-deck legislative activity to mitigate the COVID-19 pandemic during late March, the House reconvened to adopt COVID-19-related legislation, but opted not to take up the Senate's extension bill.

In other words, both chambers anchored their positions (the House passing its House compromise bill and the Senate passing its Senate extension bill), ultimately resulting in the expiration of the FISA authorities, notwithstanding concerns raised by the intelligence community that expiration should not be an option.

And now, with lawmakers feverishly working (remotely) on additional COVID-19 related legislation, and continuing to grapple with the Congressional calendar while adhering to physical distancing, it is unclear how, if at all, these FISA authorities will be reauthorized.

What is more, the Justice Department's Inspector General issued a report at the end of March reviewing FBI surveillance procedures under FISA. The report may further dim the prospects of any reauthorization without greater reforms.

This is certainly a debate worth watching, particularly as the tech sector and government continue to size up options related to other law enforcement priorities. End-to-end encryption continues to vex policymakers, as reflected in the recent Cyberspace Solarium Commission report which noted tradeoffs and found the issue "difficult." Stay tuned for more discussion about these issues.

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