

Effect of Sunset on Expiring Authorities

Although there is some ambiguity in the language, we think the better, and more prudent, view is that Section 215 of the USA PATRIOT Act, as well as FISA's "lone wolf" and "roving wiretap" provisions, sunset at midnight on Sunday, May 31, 2015 (or, more technically, at the very first moment of the day on Monday, June 1).

If Congress does not act to reauthorize these provisions prior to that time the "business records" authority contained in Title V of the Foreign Intelligence Surveillance Act will revert to its form on October 25, 2001, and the "lone wolf" and "roving wiretap" provisions, codified at 50 U.S.C. §1801(b)(1)(C) and 1805(c)(2)(B), respectively, will sunset entirely.

After midnight on Sunday, May 31, 2015, the expiring authorities will be unavailable for use by the government with respect to any foreign intelligence investigation beginning after that date, until such time as legislation is enacted to reauthorize those authorities in some form.

Legislation enacted after midnight on Sunday, May 31, 2015, that seeks to reauthorize the authorities by amending the dates that appear in Section 102(b)(1) of the USA PATRIOT Improvements and Reauthorization Act of 2005 and Section 6001(b)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, we believe, would be effective in making the authorities operative again, but may expose the government to some litigation risk in the event of legal challenge. To the extent Congress would want to make its intent even clearer, however, we believe that could be done with relatively simple language; it would not require reenacting the lapsed provisions in their entirety.

After May 22, 2015, the National Security Agency will need to begin taking steps to wind down the bulk telephone metadata program in anticipation of a possible sunset in order to ensure that it does not engage in any unauthorized collection or use of the metadata. NSA will attempt to ensure that any shutdown of the program occurs as close in time as possible to the expiration of the authority, assuming the program has not been reauthorized in some form prior to the scheduled sunset of Section 215. In the event of a lapse in authority and subsequent reauthorization, there will necessarily be some time needed to restart the program.

Further, the February 26, 2015 Court order renewing the authority for the NSA's bulk telephone metadata program, which expires at 5:00 pm on June 1, 2015, directs the government to file any proposed renewal application no later than Friday, May 22, 2015, if the government seeks to renew the authorities granted in the order prior to their expiration under the order.

For these reasons, after May 22, 2015, it will become increasingly difficult for the government to avoid a lapse in the current NSA program of at least some duration.