

# HOW REPUBLICANS (AND A FEW DEMOCRATS) AVOIDED LIMITS ON SECTION 215

In the markup of the PATRIOT reauthorization last week, Dick Durbin and Russ Feingold repeatedly pointed out that in 2005, the Senate Judiciary Committee had unanimously approved language to require Section 215 only be used with people who had some known tie to terrorism or a foreign power. Back then, everyone on the Committee supported the change Durbin and Feingold have been proposing as an improvement on Section 215.

Now, Durbin and Feingold did so to point out the indefensible position of those who—like DiFi—said in 2005 that the current and proposed law amounts to an invitation for a fishing expedition, but are nonetheless insisting on issuing just such an invitation now.

But that doesn't explain how it happened that, sometime between the Committee markup and the final bill in 2005-6, real limits on the use of Section 215 were eliminated over the apparent objections of the entire Committee. And while I'm just beginning to piece together that story, the history seems to support my suspicions that Section 215 and NSLs became the new vehicles for Bush's illegal data mining program just as it was being exposed.

The primary bill that became the Patriot Improvement and Reauthorization Act of 2005 was HR 3199, introduced by Jim Sensenbrenner, then-Chair of the House Judiciary Committee, on July 11, 2005; in addition, then-Chair of the Senate Judiciary Committee Arlen Specter introduced S 1389 on July 22, 2005.

Sensenbrenner's bill introduced the following language into Section 215, requiring that,

the information likely to be obtained from the tangible things is reasonably expected to be (A) foreign intelligence information not concerning a United States person, or (B) relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities.

That is, when this was introduced in the House, it basically allowed Section 215 to be used for anything, provided it pertained to international terrorism. That language remained in the bill through the House Judiciary and House Intelligence Committee markups of the bill and was adopted by the House as a whole.

But the Senate substituted its own bill, including the language limiting Section 215 orders to those with a definitive tie to terrorism or foreign intelligence, specifically requiring the judge to make sure there was some kind of tie.

*(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records or tangible things if the judge finds that—*

- *`(A) the statement of facts contained in the application establishes reasonable grounds to believe that the records or other things sought are relevant to an authorized investigation conducted in accordance with subsection (a)(2) to obtain foreign*

*intelligence  
information not  
concerning a United  
States person or to  
protect against  
international terrorism  
or clandestine  
intelligence  
activities;*

- *`(B) the statement of  
facts contained in the  
application establishes  
reasonable grounds to  
believe that the  
records or other things  
sought-*
  - *`(i) pertain to  
a foreign power  
or an agent of a  
foreign power;*
  - *`(ii) are  
relevant to the  
activities of a  
suspected agent  
of a foreign  
power who is the  
subject of such  
authorized  
investigation; or*
  - *`(iii) pertain  
to an individual  
in contact with,  
or known to, a  
suspected agent*

*of a foreign  
power; and*

This bill passed the Senate on July 29. The House was formally informed on September 6, 2005, after the August recess, but the House did not return to the PATRIOT reauthorization until November 9.

To resolve this difference and a great deal of others, the bill went to conference. Conferees from the House generally were:

- Sensenbrenner
- Coble
- Smith (TX)
- Gallegly
- Chabot
- Jenkins
- Lungren
- Daniel E.
- Conyers
- Berman
- Boucher
- Nadler
- Scott (VA)

But Denny Hastert appointed the following three people for reconsideration of the clauses pertaining to Section 215.

- Hoekstra
- Wilson (NM)
- Harman

Those conferees were named on November 9. Then, five days later, Hastert somehow added to Dan Lungren's role, though I'm not sure exactly how.

And conferees from the Senate were:

- Specter
- Hatch

- Kyl
- DeWine
- Sessions
- Roberts
- Leahy
- Kennedy
- Rockefeller
- Levin

Now, on the House side, Hastert made sure not to get any Republican like—most notably—Jeff Flake, who actually pushed through several of the amendments protecting civil liberties. So the House side was, predictably, stacked in favor of the House amendment with no protections tied to Section 215.

The Senate side is more interesting. The conferees consisted of SJC members (Specter, Hatch, Kyl, DeWine, Sessions, Leahy, and Kennedy), all of whom had voted for the amendments limiting application of Section 215 to people specifically tied to terrorism or foreign intelligence. The remainder were SSCI members (Roberts, Rockefeller, and Levin). Significantly, the conferees included both Republicans who sat on both committees—Hatch and DeWine—but neither of the Democrats who did—Feinstein and Feingold (both of whom, of course, were adamantly in favor of the Section 215 limits). Now presumably, the Senate allowed its own amendment to get replaced on this and other issues both because 1) Specter, though in favor of these civil liberties protections, was weak within his own party, and 2) there were more Democrats who had not voted in favor of the Section 215 controls than there were Republicans (and besides, neither Hatch nor DeWine much seem to care for civil liberties in the first place). In other words, Hatch and DeWine must have flipped their votes, with at least Specter, Rockefeller, or Levin acceding to those changes.

In any case, the conference report came out with

the House language intact. The House voted on the conference report on December 14, 2005. It was largely along party lines, though notably, Jane Harman voted in favor of the conference report. The Senate then immediately filed for cloture (which requires a two day wait), also on December 14. The Risen-Lichtblau story exposing Bush's illegal wiretap program came out on December 15, which caused the cloture to fail on December 16 (Johnson and Ben Nelson voted for cloture; Craig, Hagel, Murkowski, Sununu, plus Frist, for legislative reasons, voted against). After several months and a great deal of lies from the Bush Administration on its illegal wiretap program, cloture was successfully invoked on March 1. Senate Democratic conferees Levin and Leahy voted against cloture; Kennedy and Rockefeller voted for. Both Levin and Leahy continued to oppose the bill when it was approved the following day. DiFi—who had warned against fishing expeditions—voted in favor of the bill both times.

Now, I'm going to return to discuss the timing of this. But for now, note simply that the Republicans stacked the conference in August and November 2005 to make sure the House language—and not the more restrictive Senate language—passed on reauthorization.