



STATEMENT ON REFORMING THE PATRIOT ACT

A REPORT BY THE CONSTITUTION PROJECT'S
LIBERTY AND SECURITY COMMITTEE

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In October 2001, Congress enacted the USA PATRIOT Act to expand the government's authority to conduct surveillance and search and monitor private records and communications. When Congress reauthorized the Patriot Act in 2006, it made most provisions of the Act permanent, but three provisions are scheduled to sunset on December 31, 2009. These expiring provisions cover business record orders, surveillance of a so-called "lone wolf" terrorist, and "roving" wiretaps.

Since the initial passage of the Patriot Act, we have learned how numerous provisions of the Act intrude upon Americans' privacy rights and civil liberties. Although many parts of the Act were designed to remedy gaps in the United States' intelligence gathering powers, the Patriot Act authorizes overly broad executive powers to track, monitor, and search individuals without adequate safeguards to forestall abuse. In too many instances, such surveillance unnecessarily chills First Amendment freedoms and intrudes upon Fourth Amendment rights.

We, the undersigned members of the Constitution Project's Liberty and Security Committee, agree that the Patriot Act is in need of reform. Some of us would go further, and ask Congress to allow all of the sunset provisions to expire, and would also seek repeal of additional Patriot Act provisions. But we are united in urging Congress that it should only reauthorize these three sunset provisions if they are amended as outlined below to include more robust protections for constitutional rights and civil liberties. Further, Congress should take this opportunity to revisit and reform two additional Patriot Act provisions covering national security letters and ideological exclusion.

A. THE SUNSETTING PROVISIONS

1. Business Records Provision: Section 215 of the Patriot Act

Section 215 of the Patriot Act, also known as the "business records" or "library records" provision, expanded the FBI's power to obtain material from businesses in connection with counter-terrorism or counter-espionage investigations. It eliminated the prior requirement that the information sought must pertain to an agent of a foreign power, and it expanded the kind of material that could be sought and the entities that could be required to provide information. Under Section 215, the government is required to make only a minimal showing to a judge to obtain an order requiring any person or entity to turn over any document or object. The FBI does not even need to show that the items sought relate to a person the FBI is investigating. The government has to prove only that the information or object sought is relevant to an investigation to protect against international terrorism or espionage. Moreover, Section 215 includes a non-disclosure or "gag order" requirement, allowing the government to effectively bar recipients from disclosing that they have received such orders.

While a judicial order is required before the government can seek records under Section 215, the minimal showing that must be made combined with the broad scope of records that can be obtained makes this power ripe for abuse. As discussed below, we are likewise concerned about the National Security Letter Provision of the Patriot Act, which is not scheduled to sunset.

That provision does not even require a court order and creates similar, but even greater, potential for abuse.

RECOMMENDATIONS:

Congress should amend Section 215 to restore safeguards. These should include all of the following:

- a) Tightening the standard for issuing an order under Section 215 to require a showing to a judge of specific and articulable facts demonstrating that the material sought pertains to a suspected agent of a foreign power or a person in contact with or otherwise directly linked to such an agent;
- b) Limiting to 30 days the period during which the recipient of a Section 215 order can be required not to disclose existence of the order, unless the government can prove to a judge that there is reason to believe that a specified and articulable harm would result unless the "gag order" is extended; and
- c) Requiring adoption of minimization procedures, to ensure that the scope of the order is no greater than necessary to accomplish the investigative purpose.

2. "Lone Wolf" Provision: Section 6001 of the Intelligence Reform and Terrorism Prevention Act

The "lone wolf" provision was originally created to permit surveillance of a hypothetical "lone wolf" terrorist – one who operates without ties to any international terrorist organization. The provision defines "agent of a foreign power" as "any person other than a United States person who engages in international terrorism or activities in preparation therefore" This provision eliminated the prior requirement in the Foreign Intelligence Surveillance Act (FISA) that surveillance be carried out only against persons suspected of being agents of foreign powers or terrorist organizations. It allows the government to use FISA for surveillance of a non-US person who has no known ties to a group or entity. This authority was further expanded by the amendments enacted last summer which broadened the definition of an "agent of a foreign power" to include individuals "engaged in the proliferation of weapons of mass destruction" even if they are acting alone and are unaware that their actions may be contributing to a WMD effort.

Under FISA, the government can obtain a warrant without a showing of probable cause that a crime is being committed or is about to be committed. FISA's authorization of secret wiretaps and secret home searches in the United States is an exception to traditional Fourth Amendment standards, which has been justified on the basis that these extraordinary surveillance powers are limited to investigations of foreign powers and their agents. By eliminating the requirement to show a connection to any foreign group, the "lone wolf" provision undermines this justification for the lower FISA standards and raises serious constitutional concerns under the Fourth Amendment.

RECOMMENDATION:

Congress should let the "lone wolf" provision sunset due to the serious constitutional issues it raises. Individuals suspected of engaging in terrorism or activities in preparation therefore would still be subject to surveillance and search under traditional and established criminal law standards.

If Congress reauthorizes the "lone wolf" provision it should include a new sunset period together with a rigorous public reporting requirement that would help Members of Congress and the public to assess whether there is any justification for this provision. The new reporting provision should include requirements that the executive branch report on the number of "lone wolf" surveillances authorized and on how many of these targets were charged and prosecuted. This would enable Congress to assess whether surveillance under Title III which is already available for traditional criminal prosecutions is sufficient. Currently, the Attorney General is required to report to Congress semiannually on the use of the "lone wolf" provision; however such reports are not made public.

3. "Roving" Wiretap Provision: Section 206 of the Patriot Act

Section 206 of the Patriot Act allows the government to obtain "roving wiretap" orders that cover multiple phones or email addresses, without citing the particular location of the target. These wiretaps are conducted under FISA and based on orders received from the FISA Court.

This provision was designed to allow surveillance of a target who continually eludes government agents by constantly changing phones and email addresses. However, under Section 206, unlike in traditional criminal investigations, the government is not required to identify *either* the particular communications device to be monitored or the individual who is the subject of the surveillance. The provision does require that the target be described "with particularity," but not that the target be named. Because there is no particularity of location requirement, as traditionally required by the Fourth Amendment, innocent civilians may become inadvertent targets of surveillance.

RECOMMENDATION:

Congress should require that if the wiretap order does not specify the location of the surveillance, then it must identify the target. Conversely, if the order does not specify the target, then it should identify the location with particularity.

B. ADDITIONAL PROBLEMATIC PATRIOT ACT PROVISIONS

1. National Security Letter Provision: Section 505 of the Patriot Act

National Security Letters (NSLs) are demand letters signed by officials of the FBI and other agencies, which require disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet Service Providers, among others. No prior judicial approval is required to issue an NSL, and recipients of NSLs are usually prohibited from disclosing the fact or nature of a request.

Section 505 of the Patriot Act eliminated the requirement that the information being sought "pertain to" a foreign power or the agent of a foreign power. This requirement protected information about Americans because few are agents of a foreign government, a foreign terrorist organization, or another foreign power. Instead, today it is sufficient for the FBI merely to assert that the records are "relevant to" an investigation to protect against international terrorism or foreign espionage. Section 505 also eliminated the statutory requirement that agents have any factual basis for seeking records. In addition, Congress has dramatically expanded the types of "financial institutions" on which an NSL can be served to include travel agencies, real estate agents, jewelers, the Postal Service, insurance companies, casinos, car dealers, and other businesses not normally considered "financial institutions."

Audits by the Justice Department Inspector General (IG) released in 2007 and 2008 have revealed numerous abuses in the issuance of NSLs. The IG audits demonstrated that FBI agents had used NSLs in many cases where they were not authorized, including using them against individuals insufficiently related to any FBI investigation and issuing inappropriate "blanket NSLs" in violation of FBI policy. The audits also revealed that the FBI had used "exigent letters" not authorized by law to quickly obtain information without ever issuing the NSL that it promised to issue to cover the request.

RECOMMENDATIONS:

Congress should enact reforms to limit the scope of NSLs and the potential for abuse. These should include all of the following:

- a) Requiring that NSLs be used only to obtain records that pertain to suspected terrorists or spies, by re-establishing the prior requirement that there be specific and articulable facts giving reason to believe that the records sought pertain to an agent of a foreign power;
- b) Establishing reasonable limits on the "gag" that attaches to an NSL, requiring it to be narrowly tailored and limiting it to 30-days, extendable only by a court and based upon a showing of necessity;
- c) Establishing recipients' rights to seek judicial review of NSLs; and
- d) Requiring adoption of minimization procedures for information obtained with an NSL to ensure that the scope of the order is no greater than necessary to accomplish the investigative purpose.

2. Ideological Exclusion Provision: Section 411 of the Patriot Act

Section 411 of the Patriot Act expanded the grounds for excluding and deporting foreign nationals based upon speech, raising serious First Amendment concerns. This provision permits the United States to deport foreign nationals for wholly innocent support of a “terrorist organization,” even where there is no connection between the foreign national’s support and any act of violence, much less terrorism, by the recipient group. It also bars admission to the United States of foreign nationals who “endorse or espouse terrorist activity” or who “persuade others to support terrorist activity or a terrorist organization” in ways determined by the Secretary of State to undermine U.S. efforts to combat terrorism. It also excludes representatives of groups that “endorse acts of terrorist activity” in ways that undermine U.S. efforts to combat terrorism.

These provisions make individuals excludable and removable for speech and association that is constitutionally protected by the First Amendment, and are subject to the same sorts of ideologically biased application that the 1952 McCarran-Walter Act permitted before it was repealed over thirty years later. These provisions were initially cited by the State Department in denying admission to Tariq Ramadan, a Swiss scholar of Islam who had been hired to fill an endowed chair at Notre Dame University.

RECOMMENDATION:

Congress should amend Section 411 to eliminate deportation and exclusion based on speech and association that would be protected by the Constitution if engaged by a United States citizen. When it comes to core First Amendment freedoms, we should not tolerate a double standard.

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Endorsing the Statement on Reforming the Patriot Act

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