

**Statement by the American Civil Liberties Union to the 86<sup>th</sup> session of UN Human Rights Committee regarding the U.S. government compliance with the International Covenant on Civil and Political Rights**

Monday, March 13, 2006  
United Nations, New York

Madame Chair and distinguished members of the committee:

**Introduction and Overview**

My name is Ann Beeson, and I am the Associate Legal Director of the American Civil Liberties Union (ACLU). On behalf of the ACLU, I would like to thank you for this opportunity and welcome you to New York City. The ACLU works for an America that values freedom and fairness. We are the largest civil liberties organization in the United States, with offices in 50 states and over half a million members. Since the tragic events of September 11, the core priority of the ACLU has been to stem the backlash against human rights in the name of national security. We are honored to address this Committee as part of our commitment to ensure that our government complies with universally recognized human rights principles in addition to upholding our Constitution. We believe that liberty and security are not mutually exclusive, but rather are closely linked. Safeguarding our fundamental liberties under the U.S. Constitution and through universally recognized human rights standards will make us more safe, not less. Unfortunately, in the name of national security, the United States has enacted laws and pursued policies that threaten our most cherished freedoms. There is a disturbing theme that connects these policies – the granting, or in many cases the unilateral assumption of – unchecked executive power. Today I will discuss these policies and the threat they pose to human rights inside the United States.

While my presentation today will highlight the U.S. government's failure to comply with its obligations under the International Covenant on Civil and Political Rights (ICCPR) at the domestic level, we are equally vigilant in exposing U.S. violations of the ICCPR outside the United States. The ACLU is very concerned about the U.S. position that the ICCPR does not apply extraterritorially. We call upon the Committee to reaffirm the position expressed in General Comment No. 31 that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."<sup>1</sup>

As we discussed in our September 2<sup>nd</sup> submission to the Committee, the U.S. government continues to violate basic human rights of persons held in U.S. custody abroad, in breach of its specific obligations under several articles of ICCPR.<sup>2</sup> In addition, as proven through over 90,000 pages the ACLU obtained from the government through the Freedom of Information Act, the U.S. government has engaged in torture and other cruel, inhuman or degrading treatment of detainees, in direct violation of the absolute prohibition of these practices under international law. In short, we share the concerns that will be discussed more fully today by other human rights organizations regarding the serious human rights violations committed by our government outside the United States.

In the last four years, we have witnessed serious setbacks in the protection of civil and political rights within the United States. The U.S. government has instituted a

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<sup>1</sup> Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, April 21, 2004.

<sup>2</sup> <http://www.aclu.org/intlhumanrights/gen/20224lg|20050919.html>

number of unbalanced and unchecked policies that clearly undermine fundamental rights and liberties long recognized and honored in our country. These policies affect a broad range of issues, including women's rights, immigrant's rights, racial justice, national security, and the freedom of religion and belief. We have documented and challenged human rights violations in courts, in Congress, and through community organizing and public education. The ACLU will submit a full shadow report to the Committee on these issues and we look forward to the full review session of the U.S. report this summer. Today I wish to provide a brief update on two important issues regarding the erosion of rights in the name of national security: the reauthorization of the USA Patriot Act and the President's authorization for the National Security Agency to engage in electronic surveillance of Americans without a warrant.

### **Reauthorization of the Patriot Act**

The U.S. Congress passed the USA Patriot Act only forty-five days after the September 11 attacks, with little or no debate in either house of Congress. The ACLU believes there are significant flaws in the Act, flaws that threaten the fundamental rights of people within the United States. We highlighted our concerns in our September 2005 submission to the committee.

There was broad opposition to renewal of the Patriot Act across the country and the political spectrum. More than 400 communities (cities, towns, counties and eight states) passed resolutions seeking reforms of the Patriot Act. These communities range from the conservative state of Montana to the progressive state of Hawaii; and from cities as large as New York to small towns like Elko, Nevada.<sup>3</sup> Nevertheless, on March 9,

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<sup>3</sup> For a full list of these resolutions, go to: <http://www.aclu.org/resolutions>

2006, after months of debate, Congress passed and President Bush signed a law reauthorizing several provisions of the Patriot Act that would otherwise have expired. Unfortunately, the reauthorization statute retains the vast majority of flaws from the original Patriot Act.

I will focus today on two surveillance provisions of the Patriot Act that, even after revisions were made, continue to seriously threaten free speech and privacy rights guaranteed by the ICCPR and the U.S. Constitution.

The first is the National Security Letter provision, which authorizes the FBI to demand certain kinds of personal records from Internet Service Providers and other businesses without court approval, and which gags businesses from telling their clients or anyone else about the demand for records.

- Although there is no longer an indefinite gag imposed on NSL recipients, the ability of recipients to challenge the gag order is still extremely limited. The gag remains in place if a high-level political appointee simply certifies that national security or diplomatic relations would otherwise be harmed; courts must consider that certification "conclusive" unless there is "bad faith." After the initial certification, recipients are not allowed to challenge the gag order again for a year. To illustrate the stark overbreadth of the gag provision, Patriot Act gag orders prohibited two National Security Letter recipients – an organization that maintains library records and an Internet Service Provider – from participating in the recent debate over the Patriot Act.
- Even under the revised National Security Letter provision, customers will never learn their personal records were turned over to the government unless the National Security Letter recipient challenges the gag order and wins – an extremely unlikely outcome given the obstacles described above.
- Under the revised National Security Letter provision, penalties are even more coercive and more punitive. Any employee – from the mail clerk to the CEO of a company – who intentionally discloses a demand for records can go to jail for five years for merely disclosing that they have received a demand for records.
- In the only significant improvement from the original, the revised National Security Letter provision clarifies that any business that receives an order for records has the right to consult with a lawyer.

The second provision I would like to discuss is known as Section 215, and authorizes the FBI to go to a secret court and get an order demanding records or “any tangible thing,” which could include anything from library and university records to medical files or even diaries in your home. Like the NSL provision, Section 215 orders gag recipients from telling anyone about the demand.

- The revisions to the gag provision under Section 215 are identical to those made to the National Security Letter provision, and are equally flawed.
- Although the standard for authorizing Section 215 orders was improved slightly, it is still heavily stacked in favor of the government, requiring the government to assert only “reasonable grounds” to believe that the demand is relevant to a terrorism investigation.
- Although the revised Section 215 provision now authorizes businesses to challenge the orders, which is a slight improvement over the prior law, court review is little more than a rubberstamping process, as a court must uphold the Section 215 order unless it is “unlawful.” Recipients are also limited in their ability to challenge Section 215 orders because they are required to litigate in a secret court in Washington D.C., rather than in courts in their home states, and can only retain counsel with security clearance. This final new provision was clearly designed to prevent recipients from retaining pro bono counsel at organizations like the ACLU.

One additional provision in the Patriot Act reauthorization law bears noting: The new law adds additional death penalties to federal crimes linked to terrorism.

Some members of Congress have vowed to continue to push for much-needed changes to Patriot Act provisions to ensure that free speech and privacy rights are not compromised. In addition, the ACLU will continue to pursue three lawsuits challenging the constitutionality of Section 215 and the National Security Letter (NSL) provisions. We won two challenges to the NSL powers in federal district court, and we hope these challenges are affirmed on appeal.

## **NSA Spying Program**

On December 16, 2005, *The New York Times* reported that President Bush signed a presidential order in 2002 authorizing the National Security Agency to monitor the international (and sometimes domestic) telephone calls and e-mail messages of people inside the United States without a warrant. The NSA spying program violates fundamental free speech and privacy rights guaranteed by the ICCPR and the U.S. Constitution. It also violates a law known as the Foreign Intelligence Surveillance Act, which was passed in 1978 to guard against executive surveillance abuses that had threatened our democracy in the past.

Electronic eavesdropping poses a particularly grave threat to privacy because of its potential for abuse. Eavesdropping, with its broad, intrusive sweep, is dangerously similar to a general search – a fishing expedition. Under the NSA spying program, no neutral judge determines whether there is probable cause for the surveillance or limits its scope and duration. Executive officers, on a whim, can listen in on the most personal and intimate of our conversations, for months or even years.

The NSA spying program also threatens the right to free expression, which is closely linked to the right to privacy. Unrestricted power to search and to seize has been used throughout history by totalitarian rulers to stifle liberty of expression and suppress dissent. Knowledge that the government is listening to phone calls often has a demonstrable chilling effect on freedom of speech and association. It should come as no surprise, then, that the illegal NSA spying program has already caused Americans to cease having certain conversations. The program is disrupting the ability of American journalists to talk to sources overseas, of human rights advocates to communicate with

pro-democracy activists in the Middle East, and of attorneys to locate witnesses and interview family members and clients accused of terrorism-related crimes. The ACLU represents a group of these prominent journalists, scholars and attorneys in a lawsuit challenging the NSA spying program, now pending in Detroit, Michigan.

Rather than deny that he broke the law, President Bush has conceded that he authorized the illegal spying, and that the program violates the Foreign Intelligence Surveillance Act. Yet the President claims he is not bound by the law, and he is pressuring members of Congress to retroactively authorize this dangerous eavesdropping program.

The illegal NSA spying program is thus another indication of the erosion of the rule of law and the principle of separation of powers in the United States, both fundamental principles in any democracy. In a democracy, the President is bound by the law like everyone else. In a democracy, checks and balances work to prevent any one branch of government from gaining absolute power, even during times of war or emergency.

The ACLU and other organizations will continue to demand full respect for human rights and civil liberties, in compliance with the U.S. Constitution, the ICCPR, and other universal human rights standards. Today we call upon you to join us in the effort to hold the U.S. government accountable to its human rights obligation under the ICCPR.

Thank you.