



June 21, 2016

RE: **Vote “NO” on McCain Amendment 4787 to Expand Warrantless Surveillance Under the PATRIOT Act and Make Permanent Other Surveillance Authorities**

Dear Senator:

The American Civil Liberties Union (ACLU) strongly urges you to vote “NO” on McCain Amendment 4787, which would expand warrantless surveillance under the USA PATRIOT Act (“Patriot Act”) and make permanent other surveillance authorities set to expire in 2019.

Just last year, the Senate passed the USA Freedom Act—taking the first steps towards reforming the Patriot Act. The proposed amendment would erode many of the reforms in that bill, expanding existing surveillance authorities that have a history of abuse. Specifically, McCain Amendment 4787 would:

1. Expand existing provisions of the Patriot Act to permit the FBI to collect sensitive electronic information, including browsing history, IP addresses, and email metadata of Americans without a court order; and
2. Make permanent the “lone wolf” provision, which has reportedly never been used¹ and improperly allows the government to obtain secret Foreign Intelligence Surveillance Act (FISA) orders for individuals who are not connected to an international terrorist group or foreign nation.

The National Security Letter (NSL) Expansion Would Expand Warrantless Surveillance of Americans

McCain Amendment 4787 would expand existing provisions of the Patriot Act to allow the government to use administrative subpoenas, called NSLs, to obtain even Americans’ sensitive electronic information without a court a court order—potentially including browsing history, IP address, email metadata, the times an individual signs into and out of accounts, routing and transmission information, and more. The ACLU, Google, Yahoo, Microsoft, trade groups, privacy groups, and numerous other major companies oppose such a proposal.²

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¹ Shane Harris, *The Patriot Act May be Dead Forever*, THE DAILY BEAST, May 28, 2015, <http://www.thedailybeast.com/articles/2015/05/28/the-patriot-act-may-be-dead-for-good.html>.

² Coalition Letter Opposing National Security Letter Expansion (June 16, 2016), <https://www.aclu.org/letter/ectr-coalition-letter>.

This expansion of the Patriot Act has been mischaracterized by some government officials as merely fixing a “typo”³ in the law. In reality, however, it would dramatically expand the ability of the FBI to get sensitive electronic information without any court oversight. Indeed, some of the categories of information that could be covered under the proposal⁴—such as URLs related to an internet search—have been considered content by courts requiring a warrant under current law.⁵

Our concerns over this proposal are compounded by the government’s history of abusing the NSL statute. In the past ten years, the FBI has issued over 300,000 NSLs, a vast majority of which included gag orders that prevented companies from disclosing that they received a request for information.⁶ An audit by the Office of the Inspector General (IG) at the Department of Justice in 2007 found that the FBI illegally used NSLs to collect information that was not permitted by the NSL statutes.⁷ In addition, the IG found that data collected pursuant to NSLs was stored indefinitely, used to gain access to private information in cases that were not relevant to an FBI investigation, and that NSLs were used to conduct bulk collection of tens of thousands of records at a time.⁸ Given this history of abuse, we urge Congress to reject further expansions of the FBI’s NSL and Patriot Act authority.

The “Lone Wolf” Provision Allows the Government to Circumvent the Warrant Requirement

McCain Amendment 4787 would also wrongly make permanent Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (commonly referred to as the “lone wolf” provision). Just last year, with passage of the USA Freedom Act, Congress declined to make this provision permanent and instead extended it until 2019. Requiring reauthorization of this

³ *Hearing on Worldwide Threats Before the S. Comm. On the Judiciary, 114th Cong.* (Feb. 9, 2016) (Statement of James Comey, Dir., Fed. Bureau of Investigations) *available at* <http://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-hearing>.

⁴ The FBI has suggested that they would not collect URLs under the proposal. However, the text of the McCain amendment includes reference to addressing information, which the DOJ Inspector General has explicitly noted could include types of information for which a warrant is required. See OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI’S USE OF SECTION 215 ORDERS: ASSESSMENT OF PROGRESS IN IMPLEMENTING RECOMMENDATIONS AND EXAMINATION OF USE IN 2007 THROUGH 2009 33 (2015), *available at* <https://www.documentcloud.org/documents/2084740-doj-ig-section-215-report-may-2015.html>.

⁵ See *In re Google Inc.*, 806 F.3d 125 (3rd Cir. 2015)

⁶ See *National Security Letters*, ELECT. FRONTIER FOUND. (last visited June 21, 2016), <https://www.eff.org/issues/national-security-letters/faq>.

⁷ OFF. OF INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS (2007) *available at* <https://oig.justice.gov/special/s0703b/final.pdf>. In addition, a recently disclosed NSL suggests that the FBI requested ECTR from Yahoo despite a DOJ Office of Legal Counsel memorandum in 2008 stating that only “name, address, length of service, and local and long distance toll billing records” could be obtained using an NSL under the Electronic Communications Privacy Act. See, Memorandum from Daniel L. Koffsky, Dep. Asst. Att’y Gen., Fed. Bureau of Investigation, Requests for Information Under the Electronic Communications Privacy Act (Nov. 5, 2008), *available at* <https://fas.org/irp/agency/doj/olc/ecpa.pdf>; Letter from Donald Freese, Special Agent in Charge, Fed. Bureau of Investigation to Yahoo! (March 29, 2013), *available at* https://www.wired.com/wp-content/uploads/2016/06/Redacted_NSLs-Yahoo.pdf.

⁸ Mike German, *ACLU Roadmap of Justice Department Inspector General’s Review of the FBI’s Use of National Security Letters*, ACLU (March 19, 2007), <https://www.aclu.org/letter/aclu-roadmap-justice-department-inspector-generals-review-fbis-use-national-security-letters>.

controversial provision is critical, as it forces Congress to periodically assess its efficacy and civil liberties implications. In 2015, FBI officials stated that the “lone wolf” provision had never been used.⁹

Making Section 6001 permanent is concerning given that it relaxes prior limitations of FISA, allowing the government to circumvent the more exacting standards to obtain surveillance orders required in criminal court. Since its inception, FISA has regulated searches and surveillance for intelligence purposes in the U.S. Prior to passage of Section 6001, in order to conduct a physical search or engage in electronic surveillance for foreign intelligence purposes in the U.S., the government had to demonstrate that an individual was affiliated with a foreign nation or an international terrorist group. Section 6001 amended FISA to permit surveillance even in cases where an individual was wholly unaffiliated with such entities. Such a change in the law is unnecessary to provide the government the tools necessary to prevent terrorism. In cases where the government has probable cause to believe an individual is planning an act of terrorism, they can obtain a Title III surveillance order from a criminal court.¹⁰ Instead, allowing the government to seek secret authorizations opens the door to abuse and threatens our longstanding respect for the limits of the government’s investigatory powers.

Thank you for your consideration of our concerns. If you have any questions or comments regarding this legislation, please contact Neema Singh Guliani at nguliani@aclu.org or 202-675-2322.

Sincerely,



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Director, Washington Legislative Office



Neema Singh Guliani
Legislative Counsel

⁹ Harris, *supra* note 1.

¹⁰ Since terrorism is generally a crime, the government can utilize existing authorities to conduct electronic surveillance of terrorism suspects. *See* 18 U.S.C.A. §§2510-2520 (2006)