



Statement of the American Civil Liberties Union  
Before the House Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
September 22, 2009

The USA Patriot Act

On October 26, 2001, amid the climate of fear and uncertainty that followed the terrorist attacks of September 11, 2001, President George W. Bush signed into law the USA Patriot Act and fundamentally altered the relationship Americans share with their government.<sup>1</sup> This act betrayed the confidence the framers of the Constitution had that a government bounded by the law would be strong enough to defend the liberties they so bravely struggled to achieve. By expanding the government's authority to secretly search private records and monitor communications, often without any evidence of wrongdoing, the Patriot Act eroded our most basic right – the freedom from unwarranted government intrusion into our private lives – and thwarted constitutional checks and balances. Put very simply, under the Patriot Act the government now has the right to know what you're doing, but you have no right to know what it's doing.

More than seven years after its implementation there is little evidence that the Patriot Act has been effective in making America more secure from terrorists. However, there are many unfortunate examples that the government abused these authorities in ways that both violate the rights of innocent people and squander precious security resources. Three Patriot Act-related surveillance provisions will expire in December 2009, which will give the 111<sup>th</sup> Congress an opportunity to review and thoroughly evaluate all Patriot Act authorities – as well as any other post-9/11 domestic intelligence programs – and rescind, repeal or modify provisions that are unused, ineffective or prone to abuse. The American Civil Liberties Union encourages Congress to exercise its oversight powers fully, to restore effective checks on executive branch surveillance powers and to prohibit unreasonable searches and seizures of private information without probable cause based on particularized suspicion.

In a September 14, 2009 letter to the Senate Judiciary Committee, the Department of Justice (DOJ) called for “a careful examination” of the expiring Patriot Act authorities and stated its willingness to consider modifications that would “provide additional protection for the privacy of law abiding Americans.”<sup>2</sup> Congress should accept this invitation and conduct a thorough evaluation of all government surveillance authorities. The DOJ letter went on to argue for reauthorization of all three provisions without amendment but we believe that the “careful examination” it calls for will reveal that these and many other surveillance authorities are unnecessary and unconstitutionally broad.

## **OUR FOUNDING FATHERS FOUGHT FOR THE RIGHT TO BE FREE FROM GOVERNMENT INTRUSION**

The Fourth Amendment to the U. S. Constitution protects individuals against ‘unreasonable searches and seizures.’ In 1886, Supreme Court Justice Joseph P. Bradley suggested that the meaning of this phrase could not be understood without reference to the historic controversy over general warrants in England and her colonies.<sup>3</sup> General warrants were broad orders that allowed the search or seizure of unspecified places or persons, without probable cause or individualized suspicion. For centuries, English authorities had used these broad general warrants to enforce “seditious libel” laws designed to stifle the press and suppress political dissent. This history is particularly informative to an analysis of the Patriot Act because the purpose of the Fourth Amendment was not just to protect personal property, but “to curb the exercise of discretionary authority by [government] officers.”<sup>4</sup>

To the American colonists, nothing demonstrated the British government’s illegitimate use of authority more than “writs of assistance” – general warrants that granted revenue agents of the Crown blanket authority to search private property at their own discretion.<sup>5</sup> In 1761, in an event that John Adams later described as “the first act of opposition” to British rule, Boston lawyer James Otis condemned general warrants as “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book.”<sup>6</sup> Otis declared such discretionary warrants illegal, despite their official government sanction, because they “placed the liberty of every man in the hands of every petty officer.”<sup>7</sup> The resistance to writs of assistance provided an ideological foundation for the American Revolution – the concept that the right of the people to be free from unwarranted government intrusion into their private affairs was the essence of liberty. American patriots carried a declaration of this foundational idea on their flag as they marched into battle: “Don’t tread on me.”

Proponents of the Patriot Act suggest that reducing individual liberties during a time of increased threat to our national security is both reasonable and necessary, and that allowing fear to drive the government’s decisions in a time of emergency is “not a bad thing.”<sup>8</sup> In effect, these modern-day patriots are willing to exchange our forbearers’ “don’t tread on me” banner for a less inspiring, one reading “if you aren’t doing anything wrong you have nothing to worry about.”

Colonial-era patriots were cut from different cloth. They saw liberty not as something to trade for temporary comfort or security, but rather as a cause worth fighting for even when the odds of success, not to mention survival, were slight. Our forbearers’ commitment to personal liberty did not waver when Great Britain sent troops to quell their rebellion, nor did it waver during the tumultuous and uncertain period following the war as they struggled to establish a government that could secure the blessings of the liberty they fought so hard to win.

The framers of the Constitution recognized that giving the government unchecked authority to pry into our private lives risked more than just individual property rights, as the Supreme Court later recounted: “The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.”<sup>9</sup> These patriots understood from their own experience that political rights could not be secured without procedural protections. The Fourth Amendment requirements of prior judicial review and warrants issued only upon probable cause were determined to be the necessary remedies to the arbitrary and unreasonable assaults on free expression that were characterized by the government’s use of general warrants. “The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.”<sup>10</sup> The Supreme Court has long acknowledged the important interplay between First Amendment and Fourth Amendment freedoms. As it reflected in 1965, “what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the ‘things to be seized’ is to be accorded the most scrupulous exactitude when the ‘things’ are books, and the basis for their seizure is the ideas which they contain.”<sup>11</sup>

The seizure of electronic communications and private records under the Patriot Act today is no less an assault on the ideas they contain than seizure of books during a less technologically advanced era. Indeed, even more fundamental liberty interests are at stake today because the Patriot Act expanded “material support” for terrorism statutes that effectively criminalize political association and punish wholly innocent assistance to arbitrarily blacklisted individuals and organizations. Patriot Act proponents suggest we should forfeit our rights in times of emergency, but the Supreme Court has made clear that the Constitution requires holding the government to more exacting standards when a seizure involve the expression of ideas even where compelling security interests are involved. As Justice Powell explained in *United States v. United States District Court*,

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of “ordinary” crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.<sup>12</sup>

More exacting standards are necessary in national security cases because history has repeatedly shown that government leaders too easily mistake threats to their political security for threats to the national security. Enhanced executive powers justified on national security grounds were used against anti-war activists, political dissidents, labor organizers and immigrants during and after World War I. In the 1950s prominent intellectuals, artists and writers were blacklisted and denied employment for associating with suspected communists and socialists. Civil rights activists and anti-war protesters were targeted in the 1960s and 1970s in secret FBI and CIA operations.

Stifling dissent does not enhance security. The framers created our constitutional system of checks and balances to curb government abuse, and ultimately to make the government more responsive to the needs of the people – which is where all government

power ultimately lies. The Patriot Act gave the executive branch broad and unprecedented discretion to monitor electronic communications and seize private records, placing individual liberty, as John Otis warned, “in the hands of every petty officer.” Limiting the government’s power to intrude into private affairs, and checking that power with independent oversight, reduces the error and abuse that conspire to undermine public confidence. As the original patriots knew, adhering to the Constitution and the Bill of Rights makes our government stronger, not weaker.

## EXCESSIVE SECRECY THWARTS CONGRESSIONAL OVERSIGHT

Just 45 days after the worst terrorist attack in history Congress passed the Patriot Act, a 342-page bill amending more than a dozen federal statutes, with virtually no debate. The Patriot Act was not crafted with careful deliberation, or narrowly tailored to address specific gaps in intelligence gathering authorities that were found to have harmed the government's ability to protect the nation from terrorism. In fact, the government hesitated for months before authorizing an official inquiry, and it took over a year before Congress published a report detailing the many significant pieces of intelligence the government lawfully collected before 9/11 but failed to properly analyze, disseminate or exploit to prevent the attacks.<sup>13</sup> Instead of first determining what led to the intelligence breakdowns and then legislating, Congress quickly cobbled together a bill in ignorance, and while under intense pressure, to give the president all the authorities he claimed he needed to protect the nation against future attacks.

The Patriot Act vastly – and unconstitutionally – expanded the government's authority to pry into people's private lives with little or no evidence of wrongdoing. This overbroad authority unnecessarily and improperly infringes on Fourth Amendment protections against unreasonable searches and seizures and First Amendment protections of free speech and association. Worse, it authorizes the government to engage in this expanded domestic spying in secret, with few, if any, protections built in to ensure these powers are not abused, and little opportunity for Congress to review whether the authorities it granted the government actually made Americans any safer.

The ACLU warned that these unchecked powers could be used improperly against wholly innocent American citizens, against immigrants living legally within our borders and against those whose First Amendment-protected activities were improperly deemed to be threats to national security by the attorney general.<sup>14</sup> Many members of Congress shared the ACLU's concerns and demanded the government include "sunsets," or expiration dates on certain provisions of the Patriot Act to give Congress an opportunity to review their effectiveness over time.

Unfortunately, when the expiring provisions came up for review in 2005 there was very little in the public record for Congress to evaluate. While the ACLU objected to the way the government exercised Patriot Act powers against individuals like Oregon attorney Brandon Mayfield, Idaho student Sami al-Hussayen and European scholar Tariq Ramadan, among others,<sup>15</sup> officials from the DOJ and the Federal Bureau of Investigation (FBI) repeatedly claimed there had been no "substantiated" allegations of abuse.<sup>16</sup> Of course, the lack of substantiation was not due to a lack of abuse, but rather to the cloak of secrecy that surrounded the government's use of these authorities, which was duly enforced through unconstitutional gag orders. Excessive secrecy prevented any meaningful evaluation of the Patriot Act. Nevertheless, in March 2006 Congress passed the USA Patriot Act Improvement and Reauthorization Act (Patriot Act reauthorization), making fourteen of the sixteen expiring provisions permanent.<sup>17</sup>

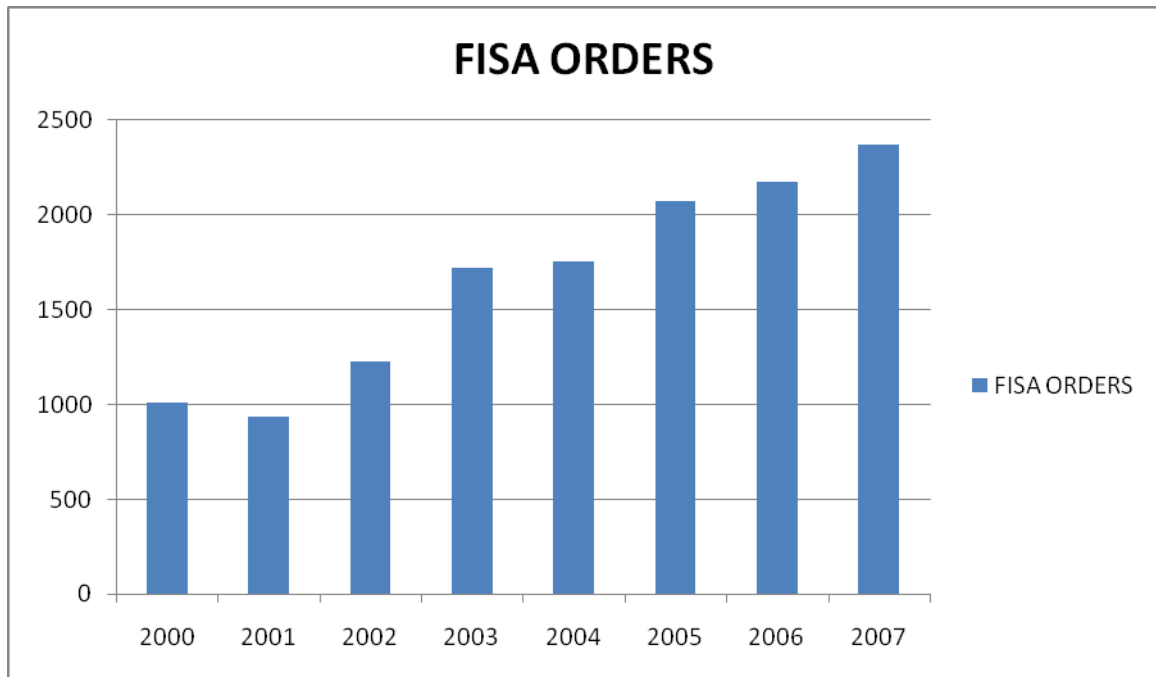
## INCREASING LEVELS OF SURVEILLANCE

Little is known about how the government uses many of its authorities under the Patriot Act, but raw numbers available through government reports reflect a rapidly increasing level of surveillance.

### Foreign Intelligence Surveillance Court Orders Approved

(Includes orders for electronic surveillance and physical searches)

**Section 218** of the Patriot Act modified the legal standard necessary to obtain Foreign Intelligence Surveillance Court orders.



2000: 1012

2001: 934

2002: 1228

2003: 1724

2004: 1754

2005: 2072

2006: 2176

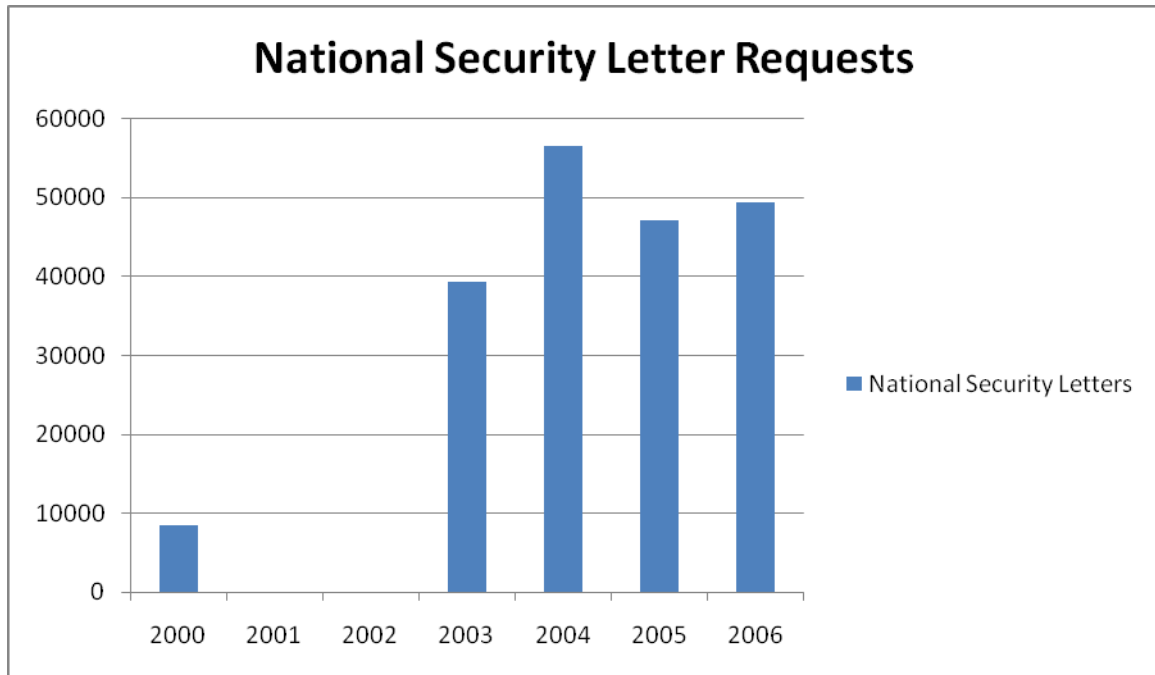
2007: 2370

See Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979-2007,

[http://epic.org/privacy/wiretap/stats/fisa\\_stats.html#footnote12](http://epic.org/privacy/wiretap/stats/fisa_stats.html#footnote12) (last visited Dec. 1, 2008).

## National Security Letter Requests\*

Section 505 of the Patriot Act reduced the legal standard for issuing National Security Letters.



2000: 8,500

2001: No Data

2002: No Data

2003: 39,346

2004: 56,507

2005: 47,221

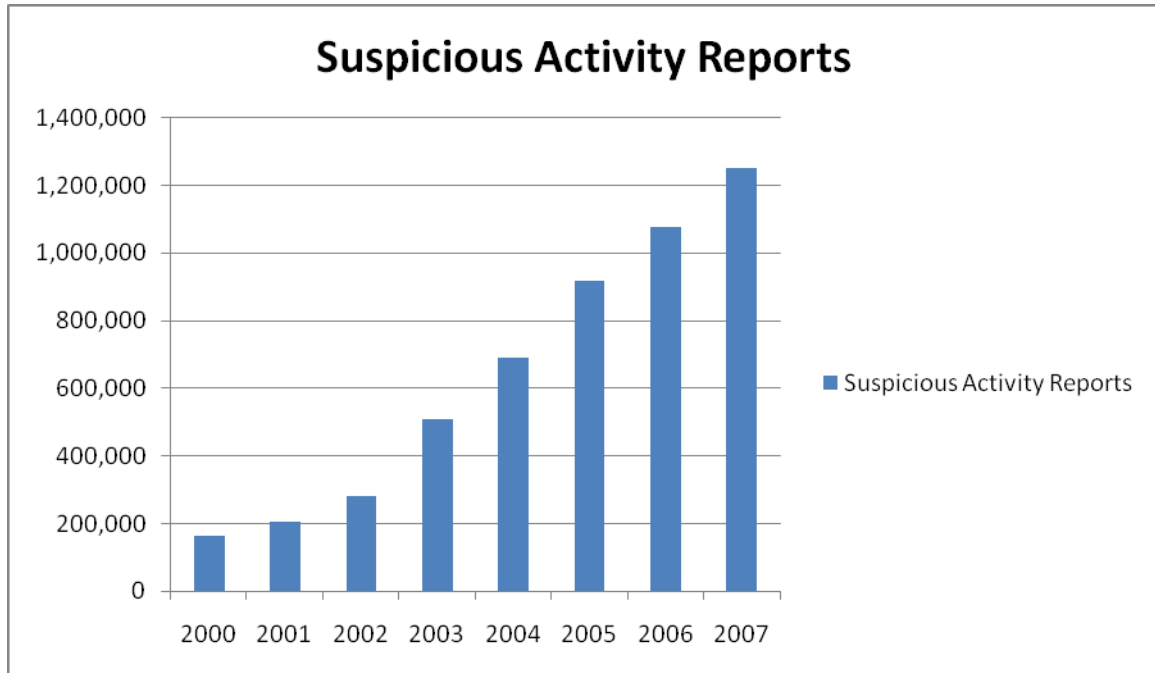
2006: 49,425

See DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 69 (Mar. 2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>; DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), available at <http://www.usdoj.gov/oig/special/s0703a/final.pdf>.

\*These numbers understate the number of NSL requests the FBI actually made during these time periods. The inspector general determined that the FBI did not keep proper records regarding their use of NSLs and the audit revealed significant undercounting of NSL requests. No reliable data exists for the number of NSLs served in 2001 and 2002.

### Suspicious Activity Reports filed by financial institutions

Sections 356 and 359 of the Patriot Act expanded the types of financial institutions required to file suspicious activity reports under the Bank Secrecy Act. These reports include detailed personal and account information and are turned over to the Treasury Department and the FBI.



2000: 163,184  
2001: 204,915  
2002: 281,373  
2003: 507,217  
2004: 689,414  
2005: 919,230  
2006: 1,078,894  
2007: 1,250,439

See DEP'T OF THE TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REVIEW – BY THE NUMBERS, ISSUE 10 (May 2008), available at [http://www.fincen.gov/news\\_room/rp/files/sar\\_by\\_num\\_10.pdf](http://www.fincen.gov/news_room/rp/files/sar_by_num_10.pdf).



## MORE COLLECTION DOES NOT RESULT IN MORE PROSECUTIONS

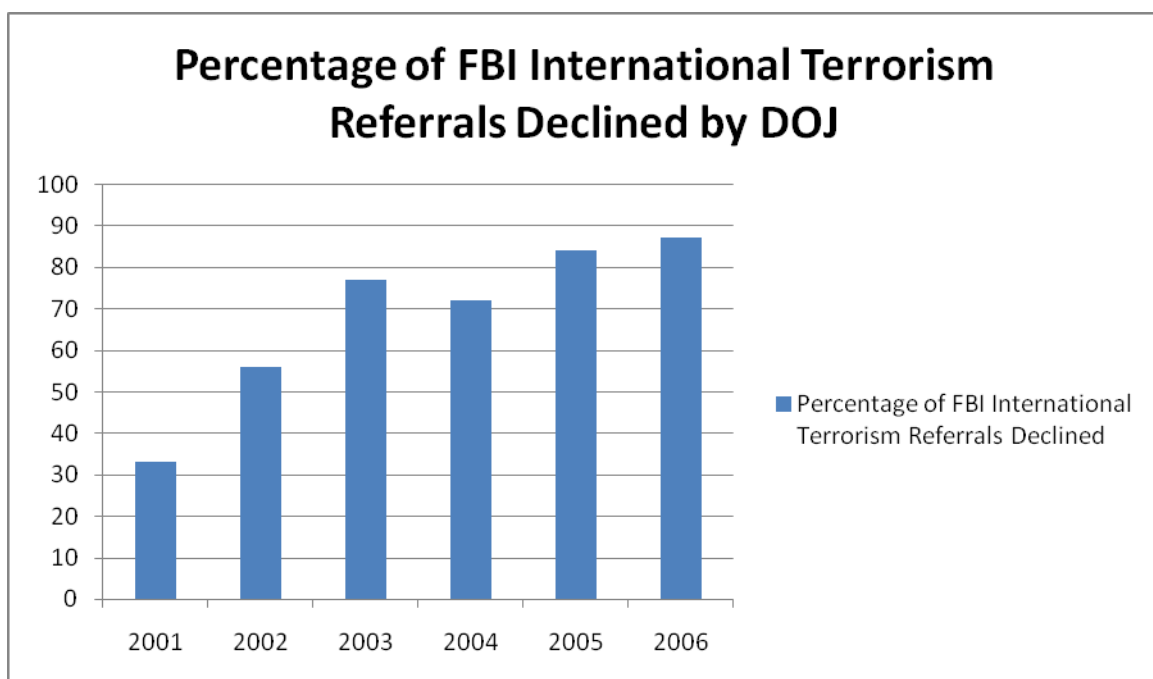
Data produced by the Executive Office for United States Attorneys and analyzed by the Transactional Records Access Clearinghouse (TRAC) shows that prosecutions in FBI international terrorism cases dropped steadily from 2002 to 2008.\*



1999: 29  
2000: 14  
2001: 57  
2002: 355  
2003: 66  
2004: 100  
2005: 56  
2006: 48  
2007: 44  
2008: 34

## NEW SUNSET DATES CREATE OVERSIGHT AND AMENDMENT OPPORTUNITY

More critical to evaluating the effectiveness of post-Patriot Act surveillance, however, is DOJ's increasing tendency to refuse to prosecute FBI international terrorism investigations during that time period. In 2006, the DOJ declined to prosecute a shocking 87% of the international terrorism cases the FBI referred for prosecution. Only a tiny fraction of the many thousands of terrorism investigations the FBI opens each year are even referred for prosecution, thereby demonstrating that the vast majority of the FBI's terrorism-related investigative activity is completely for naught – yet the FBI keeps all of the information it collects through these dubious investigations, forever.



2001: 33%  
2002: 56%  
2003: 77%  
2004: 72%  
2005: 84%  
2006: 87%

See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, NATIONAL PROFILE AND ENFORCEMENT: TRENDS OVER TIME (2006), <http://trac.syr.edu/tracfbi/newfindings/current/> (last visited Dec. 1, 2008); Todd Lochner, *Sound and Fury: Perpetual Prosecution and Department of Justice Antiterrorism Efforts*, 30 LAW & POLICY 168, 179 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1109250](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109250) (“In fiscal year 2003 alone

the FBI opened over 25,000 terrorism investigations, a figure that dwarfs all declinations by federal prosecutors since that time”).

## **NEW SUNSET DATES CREATE OVERSIGHT AND AMENDMENT OPPORTUNITY**

When Congress reauthorized the Patriot Act in 2006, it established new expiration dates for two Patriot Act provisions and for a related provision of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).<sup>18</sup> Under the reauthorization these three provisions, **section 206** and **section 215** of the Patriot Act and **section 6001** of the IRTPA, are all set to expire on December 31, 2009. The 111<sup>th</sup> Congress will revisit these provisions this year, which creates an opportunity for Congress to examine and evaluate the government’s use and abuse of all Patriot Act authorities, as well as any other post-9/11 surveillance or security programs.

**Section 206** of the Patriot Act authorizes the government to obtain “roving wiretap” orders from the Foreign Intelligence Surveillance Court (FISC) whenever a subject of a wiretap request uses multiple communications devices. The FISC is a secret court established under the Foreign Intelligence Surveillance Act (FISA) that issues classified orders for the FBI to conduct electronic surveillance or physical searches in intelligence investigations against foreign agents and international terrorists. Unlike roving wiretaps authorized for criminal investigations,<sup>19</sup> section 206 does not require the order to identify either the communications device to be tapped nor the individual against whom the surveillance is directed, which is what gives section 206 the Kafkaesque moniker, the “John Doe roving wiretap provision.” The reauthorized provision requires the target to be described “with particularity,” and the FBI to file an after-the-fact report to the FISC to explain why the government believed the target was using the phones it was tapping. However, it does not require the government to name the target, or to make sure its roving wiretaps are intercepting only the target’s communications. The power to intercept a roving series of unidentified devices of an unidentified target provides government agents with an inappropriate level of discretion reminiscent of the general warrants that so angered the American colonists. There is very little public information available regarding how the government uses section 206, though FBI Director Robert Mueller recently revealed in March 25, 2009 testimony before the Senate Judiciary Committee that the FBI obtained roving wiretaps under this authority 147 times.<sup>20</sup> The DOJ’s September 14, 2009 letter to the Senate Judiciary Committee offers no explanation for why the roving wiretap authorities the FBI has used in criminal cases since 1986, which better protect the rights of completely innocent persons, are insufficient. This provision should be narrowed to bring it in line with criminal wiretap authorities, or be allowed to expire.

The DOJ letter revealed that the FBI has never used the surveillance authorities granted under **section 6001** of the IRTPA, which is known as the “lone wolf” provision. Section 6001 authorizes government agencies to obtain secret FISA surveillance orders against individuals who are not connected to any international terrorist group or foreign nation. The government justified this provision by imagining a hypothetical “lone wolf,” an international terrorist operating independently of any terrorist organization, but there is

little evidence to suggest this imaginary construct had any basis in reality. The failure to use this authority seems to substantiate this claim. Moreover, since terrorism is a crime, there is no reason to believe that the government could not obtain a Title III surveillance order from a criminal court if the government had probable cause to believe an individual was planning an act of terrorism.<sup>21</sup> Quite simply, this provision allows the government to avoid the more exacting standards for obtaining electronic surveillance orders from criminal courts. The constitutionality of a provision that allows the government to circumvent the warrant requirement of the Fourth Amendment where there is no connection to a foreign power or international terrorist group remains dubious. Congress should not provide the government an unconstitutionally broad power; especially where the problem it resolves only exists in hypothetical. This provision should be allowed to expire.

**Section 215** of the Patriot Act provides a sweeping grant of authority for the government to obtain secret FISC orders demanding “any tangible thing” it claims is relevant to an authorized investigation regarding international terrorism or espionage. Known as the “library provision,” section 215 significantly expands the types of items the government can demand under FISA and lowers the standard of proof necessary to obtain an order. Prior to the Patriot Act, FISA required probable cause to believe the target was an agent of a foreign power. Section 215 only requires the government to claim the items sought are relevant to an authorized investigation. Most significant in this change of standard, however, was the removal of the requirement for the FBI to show that the items sought pertain to a person the FBI is investigating. Under section 215, the government can obtain orders for private records or items belonging to people who are not even under suspicion of involvement with terrorism or espionage, including U.S. citizens and lawful resident aliens, not just foreigners.

Section 215 orders come with compulsory non-disclosure orders, which contributed to the secrecy surrounding how they were being used. To ensure that it would have at least some information upon which to evaluate Patriot Act powers before the next sunset period, Congress included a provision in the 2006 Patriot Act reauthorization that required the Department of Justice Inspector General (IG) to audit the FBI’s use of National Security Letters (NSLs) and section 215 orders.<sup>22</sup> These reports provided the first thorough examination of the implementation of the post-9/11 anti-terrorism powers. They also confirmed what our nation’s founders already knew: unchecked authority is too easily abused.

## **EVIDENCE OF ABUSE: THE INSPECTOR GENERAL AUDITS**

### **NATIONAL SECURITY LETTERS**

NSLs are secret demand letters issued without judicial review to obtain sensitive personal information such as financial records, credit reports, telephone and e-mail communications data and Internet searches. The FBI had authority to issue NSLs through four separate statutes, but these authorities were significantly expanded by **section 505** of the Patriot Act.<sup>23</sup> **Section 505** increased the number of officials who could authorize

NSLs and reduced the standard necessary to obtain information with them, requiring only an internal certification that the records sought are “relevant” to an authorized counterterrorism or counter-intelligence investigation. The Patriot Act reauthorization made the NSL provisions permanent.

The NSL statutes now allow the FBI and other executive branch agencies to obtain records about people who are not known – or even suspected – to have done anything wrong. The NSL statutes also allow the government to prohibit NSL recipients from disclosing that the government sought or obtained information from them. While Congress modified these “gag orders” in the Patriot Act reauthorization to allow NSL recipients to consult a lawyer, under the current state of the law NSLs are still not subject to any meaningful level of judicial review (ACLU challenges to the NSL gag orders are described below).<sup>24</sup>

The first two IG audits, covering NSLs and section 215 orders issued from 2003 through 2005, were released in March of 2007. They confirmed widespread FBI mismanagement, misuse and abuse of these Patriot Act authorities.<sup>25</sup> The NSL audit revealed that the FBI managed its use of NSLs so negligently that it literally did not know how many NSLs it had issued. As a result, the FBI seriously under-reported its use of NSLs in its previous reports to Congress. The IG also found that FBI agents repeatedly ignored or confused the requirements of the NSL authorizing statutes, and used NSLs to collect private information against individuals two or three times removed from the subjects of FBI investigations. Twenty-two percent of the audited files contained unreported legal violations.<sup>26</sup> Most troubling, FBI supervisors used hundreds of illegal “exigent letters” to obtain telephone records without NSLs by falsely claiming emergencies.<sup>27</sup>

On March 13, 2008, the IG released a second pair of audit reports covering 2006 and evaluating the reforms implemented by the DOJ and the FBI after the first audits were released in 2007.<sup>28</sup> Not surprisingly, the new reports identified many of the same problems discovered in the earlier audits. The 2008 NSL report shows that the FBI issued 49,425 NSLs in 2006 (a 4.7 percent increase over 2005), and confirms the FBI is increasingly using NSLs to gather information on U.S. persons (57 percent in 2006, up from 53 percent in 2005).<sup>29</sup>

The 2008 IG audit also revealed that high-ranking FBI officials, including an assistant director, a deputy assistant director, two acting deputy directors and a special agent in charge, improperly issued eleven “blanket NSLs” in 2006 seeking data on 3,860 telephone numbers.<sup>30</sup> None of these “blanket NSLs” complied with FBI policy and eight imposed unlawful non-disclosure requirements on recipients.<sup>31</sup> Moreover, the “blanket NSLs” were written to “cover information already acquired through exigent letters and other informal responses.”<sup>32</sup> The IG expressed concern that such high-ranking officials would fail to comply with FBI policies requiring FBI lawyers to review all NSLs, but it seems clear enough that this step was intentionally avoided because the officials knew these NSL requests were illegal.<sup>33</sup> It would be difficult to call this conduct anything but intentional.

The ACLU successfully challenged the constitutionality of the original Patriot Act's gag provisions, which imposed a categorical and blanket non-disclosure order on every NSL recipient.<sup>34</sup> Upon reauthorization, the Patriot Act limited these gag orders to situations when a special agent in charge certifies that disclosure of the NSL request might result in danger to the national security, interference with an FBI investigation or danger to any person. Despite this attempted reform, the IG's 2008 audit showed that 97 percent of NSLs issued by the FBI in 2006 included gag orders, and that five percent of these NSLs contained "insufficient explanation to justify imposition of these obligations."<sup>35</sup> While a five percent violation rate may seem small compared to the widespread abuse of NSL authorities documented elsewhere, these audit findings demonstrate that the FBI continues to gag NSL recipients in an overly broad, and therefore unconstitutional manner. Moreover, the IG found that gags were improperly included in eight of the 11 "blanket NSLs" that senior FBI counterterrorism officials issued to cover hundreds of illegal FBI requests for telephone records through exigent letters.<sup>36</sup>

The FBI's gross mismanagement of its NSL authorities risks security as much as it risks the privacy of innocent persons. The IG reported that the FBI could not locate return information for at least 532 NSL requests issued from the field, and 70 NSL requests issued from FBI headquarters (28 percent of the NSLs sampled).<sup>37</sup> Since the law only allows the FBI to issue NSLs in terrorism and espionage investigations, it cannot be assumed that the loss of these records is inconsequential to our security. Intelligence information continuing to fall through the cracks at the FBI through sheer incompetence is truly a worrisome revelation.

#### SUGGESTED REFORM OF NSL STATUTES

- Repeal the expanded NSL authorities that allow the FBI to demand information about innocent people who are not the targets of any investigation. Reinstate prior standards limiting NSLs to information about terrorism suspects and other agents of foreign powers.
- Allow gag orders only upon the authority of a court, and only when necessary to protect national security. Limit scope and duration of such gag orders and ensure that their targets and recipients have a meaningful right to challenge them before a fair and neutral arbiter.
- Impose judicial oversight of all Patriot Act authorities. Allowing the FBI to self-certify that it has met the statutory requirements invites further abuse and overuse of NSLs. Contemporaneous and independent oversight of the issuance of NSLs is needed to ensure that they are no longer issued at the drop of a hat to collect information about innocent U.S. persons.

The ACLU fully supports the National Security Letter Reform Act of 2009 (H.R. 1800) sponsored by Representative Jerrold Nadler (D-NY), as well as the JUSTICE Act

introduced by Senators Russ Feingold and Richard Durbin last week, both of which would rein in the FBI's improper use of NSLs. They should be acted upon promptly. Further delay will simply mean that thousands more innocent people will have their private records collected by the FBI.

## SECTION 215 ORDERS

The IG's **section 215** audits showed the number of FBI requests for section 215 orders were sparse by comparison to the number of NSLs issued. Only 13 section 215 applications were made in 2008.<sup>38</sup>

The disparity between the number of section 215 applications and the number of NSLs issued seems to suggest that FBI agents were bypassing judicial review in the section 215 process by using NSLs in a manner not authorized by law. An example of this abuse of the system was documented in the IG's 2008 section 215 report. The FBI applied to the FISC for a section 215 order, only to be denied on First Amendment grounds. The FBI instead used NSLs to obtain the information.

While this portion of the IG report is heavily redacted, it appears that sometime in 2006 the FBI twice asked the FISC for a section 215 order seeking "tangible things" as part of a counterterrorism case. The court denied the request, both times, because "the facts were too 'thin' and [the] request implicated the target's First Amendment rights."<sup>39</sup> Rather than re-evaluating the underlying investigation based on the court's First Amendment concerns, the FBI circumvented the court's oversight and pursued the investigation using three NSLs that were predicated on the same information contained in the section 215 application.<sup>40</sup> The IG questioned the legality of the FBI's use of NSLs based on the same factual predicate contained in the section 215 request the FISC rejected on First Amendment grounds, because the authorizing statutes for NSLs and section 215 orders contain the same First Amendment caveat.<sup>41</sup>

The IG also discovered the FISC was not the first to raise First Amendment concerns over this investigation to FBI officials. Lawyers with the DOJ Office of Intelligence Policy and Review (OIPR) raised the First Amendment issue when the FBI sent the section 215 application for its review.<sup>42</sup> The OIPR is supposed to oversee FBI intelligence investigations, but OIPR officials quoted in the IG report said the OIPR has "not been able to fully serve such an oversight role" and that they were often bullied by FBI agents:

In addition, the former Acting Counsel for Intelligence Policy stated that there is a history of significant pushback from the FBI when OIPR questions agents about the assertions included in FISA applications. The OIPR attorney assigned to Section 215 requests also told us that she routinely accepts the FBI's assertions regarding the underlying investigations as fact and that the FBI would respond poorly if she questioned their assertions.<sup>43</sup>

When the FISC raised First Amendment concerns about the FBI investigation, the FBI general counsel decided the FBI would continue the investigation anyway, using methods that had less oversight. When asked whether the court's concern caused her to review the underlying investigation for compliance with legal guidelines that prohibit investigations based solely on protected First Amendment activity, the general counsel said she did not because "she disagreed with the court's ruling and nothing in the court's ruling altered her belief that the investigation was appropriate."<sup>44</sup> Astonishingly, she put her own legal judgment above the decision of the court. She added that the FISC "does not have the authority to close an FBI investigation."<sup>45</sup>

A former OIPR counsel for intelligence policy argued that while investigations based solely on association with subjects of other national security investigations were "weak," they were "not necessarily illegitimate."<sup>46</sup> It is also important to note that this investigation, based on simple association with the subject of another FBI investigation, was apparently not an aberration. The FBI general counsel told the IG the FBI would have to close "numerous investigations" if they could not open cases against individuals who merely have contact with other subjects of FBI investigations.<sup>47</sup> Conducting "numerous investigations" based upon mere contact, and absent facts establishing a reasonable suspicion of wrongdoing, will only result in wasted effort, misspent security resources and unnecessary violations of the rights of innocent Americans.

The FBI's stubborn defiance of OIPR attorneys and the FISC demonstrates a dangerous interpretation of the legal limits of the FBI's authority at its highest levels, and lays bare the inherent weakness of any set of internal controls. The FBI's use of NSLs to circumvent more arduous section 215 procedures confirms the ACLU's previously articulated concerns that the lack of oversight of the FBI's use of its NSL authorities would lead to such inappropriate use.

The DOJ's September 14, 2009 letter indicates that no recipient of a section 215 order has ever challenged its validity, and cites this as evidence the authority is not being abused.<sup>48</sup> This argument ignores the fact that section 215 orders are designed to obtain records held in the possession of third parties, as opposed to the subject of the information demand, so the interest in expending the time and expense of fighting such an order is remote. We know the FBI engaged in massive abuse of NSLs, yet out of over two hundred thousand NSL recipients only a handful ever challenged these demands. Moreover, recipients of section 215 orders are gagged from disclosing they received them, so any public debate about the reasonableness of these demands short of a court challenge is effectively thwarted.

Moreover, despite the FBI's infrequent use of section 215, the IG discovered serious deficiencies in the way it managed this authority. The IG found substantial bureaucratic delays at both FBI headquarters and OIPR in bringing section 215 applications to the FISC for approval. While neither the FBI's FISA Management System nor DOJ's OIPR tracking system kept reliable records regarding the length of time section 215 requests remained pending, the IG was able to determine that processing times for section 215 requests ranged from ten days to an incredible 608 days, with an



average delay of 169 days for approved orders and 312 days for withdrawn requests.<sup>49</sup> The IG found these delays were the result of unfamiliarity with the proper process, simple misrouting of the section 215 requests and an unnecessarily bureaucratic, self-imposed, multi-layered review process.<sup>50</sup> Most tellingly, the IG's 2008 report found that the process had not improved since the IG identified these problems had been identified in the 2007 audit.<sup>51</sup> DOJ has used long processing times for FISA applications as justification for expanding its surveillance powers and reducing FISC review, but this evidence shows clearly that ongoing mismanagement at the FBI and OIPR drives these delays, not a lack of authority.<sup>52</sup> Congress should instead compel efficiency at these agencies by increasing its oversight and reining in these expanded authorities.

### SUGGESTED REFORMS

- Repeal the expanded section 215 authorities that allow the FBI to demand information about innocent people who are not the targets of any investigation. Return to previous standards limiting the use of 215 authorities to gather information only about terrorism suspects and other agents of foreign powers.

### UNCONSTITUTIONAL: COURT CHALLENGES TO THE PATRIOT ACT

Court challenges offered another source of information about the government's misuse of Patriot Act powers.

#### NATIONAL SECURITY LETTER GAG ORDERS

The ACLU challenged the non-disclosure and confidentiality requirements in NSLs in three cases. The first, *Doe v. Mukasey*, involved an NSL served on an Internet Service Provider (ISP) in 2004 demanding customer records pursuant to the Electronic Communications Privacy Act (ECPA).<sup>53</sup> The letter prohibited the anonymous ISP and its employees and agents "from disclosing to any person that the FBI sought or obtained access to information or records under these provisions." In the midst of a lawsuit over the constitutionality of the NSL provisions in ECPA, the Patriot Act reauthorization was enacted amending the NSL provision but maintaining the government's authority to request sensitive customer information and issue gag orders – albeit in a slightly narrower set of circumstances.<sup>54</sup> In September 2007, the District Court for the Southern District of New York found that even with the reauthorization amendments the gag provision violated the Constitution. The court struck down the amended ECPA NSL statute in its entirety,<sup>55</sup> with Judge Victor Marrero writing that the statute's gag provisions violated the First Amendment and the principle of separation of powers.

In December 2008, the Second U.S. Circuit Court of Appeals upheld the decision in part. The appeals court invalidated parts of the statute that placed the burden on NSL recipients to initiate judicial review of gag orders, holding that the government has the burden to justify silencing NSL recipients. The appeals court also invalidated parts of the statute that narrowly limited judicial review of the gag orders – provisions that required

the courts to treat the government's claims about the need for secrecy as conclusive and required the courts to defer entirely to the executive branch.<sup>56</sup> The appeals court then remanded the case back to the lower court and required the government to finally justify the more than four-year long gag on the “John Doe” NSL recipient in the case. In June 2009, the government attempted to satisfy this requirement by filing its justification for the gag entirely in secret documents which not even Doe’s lawyers had any access to. The ACLU asked the court to order the government to disclose its secret filings or at least provide them with an unclassified summary and redacted version of the documents. In August 2009, Judge Marrero ordered the government to partially disclose its secret filing and to release a public summary of its evidence. The parties are now briefing the issue of whether the now five-year-old gag on Doe is constitutional.

The second case, *Library Connection v. Gonzales*, involved an NSL served on a consortium of libraries in Connecticut.<sup>57</sup> In September 2006, a federal district court ruled that the gag on the librarians violated the First Amendment. The government ultimately withdrew both the gag and its demand for records.

The third case, *Internet Archive v. Mukasey*, involved an NSL served on a digital library.<sup>58</sup> In April 2008, the FBI withdrew the NSL and the gag as a part of the settlement of the legal challenge brought by the ACLU and the Electronic Frontier Foundation.<sup>59</sup> In every case in which an NSL recipient has challenged an NSL in court, the government has withdrawn its demand for records, creating doubt regarding the government’s need for the records in the first place.

In addition, a 2007 ACLU Freedom of Information Act suit revealed that the FBI was not the only agency abusing its NSL authority. The Department of Defense (DOD) does not have the authority to investigate Americans, except in extremely limited circumstances. Recognizing this, Congress gave the DOD a narrow NSL authority, strictly limited to non-compulsory requests for information regarding DOD employees in counterterrorism and counter-intelligence investigations,<sup>60</sup> and to obtaining financial records<sup>61</sup> and consumer reports<sup>62</sup> when necessary to conduct such investigations. Only the FBI has the authority to issue compulsory NSLs for electronic communication records and for certain consumer information from consumer reporting agencies. This authority can only be used in furtherance of authorized FBI investigations. Records obtained by the ACLU show the DOD issued hundreds of NSLs to collect financial and credit information since September 2001, and at times asked the FBI to issue NSLs compelling the production of records the DOD wanted but did not have the authority to obtain. The documents suggest the DOD used the FBI to circumvent limits on the DOD’s investigative authority and to obtain information it was not entitled to under the law. The FBI compliance with these DOD requests – even when it was not conducting its own authorized investigation – is an apparent violation of its own statutory authority.

## MATERIAL SUPPORT FOR TERRORISM PROVISIONS

Laws prohibiting material support for terrorism, which were expanded by the Patriot Act, are in desperate need of re-evaluation and reform. Intended as a mechanism

to starve terrorist organizations of resources, these statutes instead undermine legitimate humanitarian efforts and perpetuate the perception that U.S. counterterrorism policies are unjust.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), passed in the wake of the Oklahoma City bombing, criminalized providing material support to terrorists or terrorist organizations.<sup>63</sup> Title 18 U.S.C. § 2339A makes it a federal crime to knowingly provide material support or resources in preparation for or in carrying out specified crimes of terrorism, and 18 U.S.C. § 2339B outlaws the knowing provision of material support or resources to any group of individuals the secretary of state has designated a foreign terrorist organization (FTO).<sup>64</sup> AEDPA defined “material support or resources” as “currency or other financial securities, financial services, lodging, training, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” AEDPA also amended the Immigration & Nationality Act (INA) to give the secretary of state almost unfettered discretion to designate FTOs.<sup>65</sup>

The secretary of state may designate an organization as an FTO if she finds that the organization is foreign, that it engages in or retains the capacity and intent to engage in terrorist activities, and that its activities threaten the national defense, foreign relations or economic interests of the United States. An FTO may challenge its designation in federal court but the INA gives the government the ability to use classified information *in camera* and *ex parte*, so the designated organization never gets to see, much less dispute the allegations against it. Moreover, a judge must determine that the government acted in an arbitrary and capricious manner – a very difficult legal standard for an FTO to prove - in order to overturn a designation.

**Section 805** of the Patriot Act expanded the already overbroad definition of “material support and resources” to include “expert advice or assistance,” and **section 810** increased penalties for violations of the statute.<sup>66</sup> Through IRTPA, Congress narrowed these provisions in 2004 to require that a person have knowledge that the organization is an FTO, or has engaged or engages in terrorism. However, the statute still does not require the government to prove that the person specifically intended for his or her support to advance the terrorist activities of the designated organization.<sup>67</sup> In fact, the government has argued that those who provide support to designated organizations can run afoul of the law even if they oppose the unlawful activities of the designated group, intend their support to be used only for humanitarian purposes and take precautions to ensure that their support is indeed used for these purposes.<sup>68</sup> This broad interpretation of the material support prohibition effectively prevents humanitarian organizations from providing needed relief in many parts of the world where designated groups control schools, orphanages, medical clinics, hospitals and refugee camps.<sup>69</sup>

In testimony before Congress in 2005, ACLU of Southern California staff attorney Ahilan T. Arulanantham gave a first hand account of the difficulties he experienced while providing humanitarian aid to victims of the 2004 tsunami in Sri

Lanka.<sup>70</sup> At the time of the tsunami approximately one-fifth of Sri Lanka was controlled by the Liberation Tigers of Tamil Eelam (LTTE), an armed group fighting against the Sri Lankan government. The U.S. government designated the LTTE as an FTO, but for the 500,000 people living within its territory, the LTTE operates as an authoritarian military government. As a result, providing humanitarian aid to needy people in this part of Sri Lanka almost inevitably requires dealing directly with institutions the LTTE controls. And because there is no humanitarian exemption from material support laws (only the provision of medicine and religious materials are exempted), aid workers in conflict zones like Sri Lanka are at risk of prosecution by the U.S. government. Arulanantham explained the chilling effect of these laws:

I have spoken personally with doctors, teachers, and others who want to work with people desperately needing their help in Sri Lanka, but fear liability under the “expert advice,” “training,” and “personnel” provisions of the law. I also know people who feared to send funds for urgent humanitarian needs, including clothing, tents, and even books, because they thought that doing so might violate the material support laws. I have also consulted with organizations, in my capacity as an ACLU attorney, that seek to send money for humanitarian assistance to areas controlled by designated groups. I have heard those organizations express grave concerns about continuing their work for precisely these reasons. Unfortunately, the fears of these organizations are well-justified. Our Department of Justice has argued that doctors seeking to work in areas under LTTE control are not entitled to an injunction against prosecution under the material support laws, and it has even succeeded in winning deportation orders under the immigration law's definition of material support, for merely giving food and shelter to people who belong to a “terrorist organization” even if that group is not designated.<sup>71</sup>

Tragically, our counterterrorism laws make it more difficult for U.S. charities to operate in parts of the world where their good works could be most effective in winning the battle of hearts and minds. In 2006 Congress passed the Patriot Act reauthorization, making the material support provisions permanent.<sup>72</sup>

Such unjust and counter-productive consequences are a direct result of the overbroad and unconstitutionally vague definition of material support in the statute. The First Amendment protects an individual's right to join or support political organizations and to associate with others in order to pursue common goals. The framers understood that protecting speech and assembly were essential to the creation and functioning of a vibrant democracy. As a result, the government cannot punish mere membership in or political association with disfavored groups – even those that engage in both lawful and unlawful activity – without the strictest safeguards.

The material support provisions impermissibly criminalize a broad range of First Amendment-protected activity, both as a result of their sweeping, vague terms and because they do not require the government to show that a defendant *intends* to support

the criminal activity of a designated FTO. Courts have held that vague statutes should be invalidated for three reasons: “(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws...; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms.”<sup>73</sup> Material support prohibitions against “training,” “services” and “expert advice and assistance” fail each of these three standards.

Any suggestion that the government would not use the material support statutes to prosecute purely First Amendment-protected speech is belied by the fact that it already has. In a most notorious example, the government brought charges against University of Idaho Ph.D. candidate Sami Omar Al-Hussayen, whose volunteer work managing websites for a Muslim charity led to a six-week criminal trial for materially supporting terrorism. The prosecution argued that by running a website that had links to other websites that carried speeches advocating violence, Al Hussayen provided “expert assistance” to terrorists. A jury ultimately acquitted Al-Hussayen of all terrorism-related charges.<sup>74</sup>

The material support provisions also impose guilt by association in violation of the Fifth Amendment. Due process requires the government to prove personal guilt – that an individual *specifically intended* to further the group’s unlawful ends – before criminal sanctions may be imposed.<sup>75</sup> Even with the IRTPA amendments, the material support provisions do not require specific intent. Rather, the statutes impose criminal liability based on the mere knowledge that the group receiving support is an FTO or engages in terrorism. Indeed, a Florida district court judge in *United States v. Al-Arian* warned that under the government’s reading of the material support statute, “a cab driver could be guilty for giving a ride to an FTO member to the UN.”<sup>76</sup> And these constitutional deficiencies are only exacerbated by the unfettered discretion these laws give the secretary of state to designate groups, and the lack of due process afforded to groups that wish to appeal their designation.

A recent study of material support prosecutions from September 2001 to July 2007 reveals an unusually high acquittal rate for these cases.<sup>77</sup> The DOJ’s trial conviction rate for all felonies is fairly steady over the years: 80% in 2001, 82% in 2002, 82% in 2003 and 80% in 2004.<sup>78</sup> But almost half (eight of 17) of the defendants charged with material support of terrorism under §2339B who chose to go to trial were acquitted, and three others successfully moved to have their charges dismissed before trial.<sup>79</sup> This disparity suggests that the government is overreaching in charging material support violations for behavior not reasonably linked to illegal or violent activity. The data is especially troubling given that the median sentence for a conviction at trial for material support under §2339B is 84 months longer than for a guilty plea to the same offense.<sup>80</sup> That those defendants who risk the additional 84 months in prison are acquitted in almost half of the cases raises a disturbing question of whether the government is using the draconian sentences provided in this Patriot Act-enhanced statute to compel plea bargains where the evidence might not support conviction at trial. Of the 61 defendants whose cases were resolved during the study period, 30 pled guilty to material support and another 11 pled guilty to other charges. Only nine of the remaining 20 were convicted.

In *Humanitarian Law Project v. Mukasey*, a group of organizations and individuals seeking to support the nonviolent and lawful activities of Kurdish and Tamil humanitarian organizations challenged the constitutionality of the material support provisions on First and Fifth Amendment grounds.<sup>81</sup> They contended that the law violated the Constitution by imposing a criminal penalty for association without requiring specific intent to further an FTO's unlawful goals, and that the terms included in the definition of "material support or resources" were impermissibly vague. In 2007, the U.S. Court of Appeals for the Ninth Circuit found the terms "training" and "service," and part of the definition of "expert advice and assistance" unconstitutionally vague under the Fifth Amendment.<sup>82</sup> The government is appealing this decision.

## SUGGESTED REFORM OF MATERIAL SUPPORT STATUTES

- Amend the material support statutes to require specific intent to further an organization's unlawful activities before imposing criminal liability.
- Remove overbroad and impermissibly vague language, such as "training," "service" and "expert advice and assistance," from the definition of material support.
- Establish an explicit duress exemption to remove obstacles for genuine refugees and asylum-seekers to enter and/or remain in the United States.
- Provide notice, due process and meaningful review requirements in the designation process, and permit defendants charged with material support to challenge the underlying designation in their criminal cases.

## IDEOLOGICAL EXCLUSION

The Patriot Act revived the discredited practice of ideological exclusion: denying foreign citizens' entry into the U.S. based solely on their political views and associations, rather than their conduct.

**Section 411** of the Patriot Act amended the INA to expand the grounds for denying foreign nationals admission into the United States, and for deporting those already here.<sup>83</sup> This section authorizes the exclusion of not only foreign nationals who support domestic or foreign groups the U.S. has designated as "terrorist organizations," but also those who support "a political, social or other similar group whose public endorsement of acts of terrorist activity the secretary of state has determined undermines United States efforts to reduce or eliminate terrorist activities." Moreover, Congress added a provision that authorizes the exclusion of those who have used a "position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the secretary of state has determined undermines United States efforts to reduce or eliminate terrorist activities."<sup>84</sup> Though ostensibly directed at terrorism, the provision focuses on words, not conduct, and its terms are broad and easily manipulated. The State Department's Foreign Affairs Manual takes the sweeping view that the provision applies to foreign nationals who have voiced "irresponsible expressions of opinion." Over the last six years, dozens of foreign scholars, artists and human rights activists have been denied entry to the United States not because of their actions – but because of their political views, their writings and their associations.

During the Cold War, the U.S. was notorious for excluding suspected communists. Among the many dangerous individuals excluded in the name of national security were Nobel Laureates Gabriel Garcia Márquez, Pablo Neruda and Doris Lessing, British novelist Graham Greene, Italian playwright Dario Fo and Pierre Trudeau, who later became prime minister of Canada. When Congress repealed the Cold War era

communist exclusion laws, it determined that “it is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States.” It found that ideological exclusion caused “the reputation of the United States as an open society, tolerant of divergent ideas” to suffer. When Congress enacted the “endorse or espouse” provision, it ignored this historical lesson.

The ACLU challenged the constitutionality of “ideological exclusion” in *American Academy of Religion v. Napolitano* (previously *American Academy of Religion v. Chertoff*). In July 2004, the Department of Homeland Security (DHS) used the provision to revoke the visa of Tariq Ramadan, a Swiss citizen, one of Europe’s leading scholars of Islam and a vocal critic of U.S. policy. Ramadan had accepted a position to teach at the University of Notre Dame. After DHS and the State Department failed to act on a second visa application which would have permitted Ramadan to teach at Notre Dame, he applied for a B Visa to attend and participate in conferences in the U.S. After the government failed to act on *that* application for many months, in January 2006, the American Academy of Religion (AAR), the American Association of University Professors and PEN American Center – organizations that had invited Professor Ramadan to speak in the United States – filed suit. They argued that the government’s exclusion of Professor Ramadan, as well as the ideological exclusion provision, violated their First Amendment right to receive information and hear ideas, and compromised their ability to engage in an intellectual exchange with foreign scholars. When challenged in court, the government abandoned its allegation that Professor Ramadan had endorsed terrorism.<sup>85</sup>

The district court held that the government could not exclude Ramadan without providing a legitimate reason and that it could not exclude Ramadan based solely on his speech. It ordered the government to adjudicate Ramadan’s pending visa application within 90 days.<sup>86</sup> Thereafter, however, the government found an entirely new basis for barring Ramadan. Invoking the expanded material support provisions of the Real ID Act, the government determined that Professor Ramadan was inadmissible because of small donations he made from 1998 to 2002 to a lawful European charity that provides aid to Palestinians.<sup>87</sup> The plaintiffs continued to challenge the legality of Professor Ramadan’s exclusion as well as the constitutionality of the ideological exclusion provision. In July 2007, the district court upheld Professor Ramadan’s exclusion but did not rule on the constitutionality of the ideological exclusion provision, finding instead that the plaintiffs lacked standing. The ACLU appealed that decision, and in July of 2009, the U.S. Court of Appeals for the Second Circuit found that the U.S. government had not adequately justified its denial of a visa to Professor Ramadan. The court found that the First Amendment rights of U.S. organizations are at stake when foreign scholars, artists, politicians and others are excluded, and that the organizations have a First Amendment right to “hear, speak, and debate with’ a visa applicant.” The appeals court also found that the government cannot exclude an individual from the U.S. on the basis of “material support” for terrorism without affording him the “opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization.” The Second Circuit did not



address the constitutionality of the ideological exclusion provision because it agreed with the district court that plaintiffs lacked standing.

The imposition of an ideological litmus test at the border is raw censorship and violates the First Amendment. It allows the government to decide which ideas Americans may or may not hear. Ideological exclusion skews political and academic debate in the U.S. and deprives Americans of information they have a constitutional right to hear. Particularly now, Americans should be engaged with the world, not isolated from it.

#### SUGGESTED REFORM OF IDEOLOGICAL EXCLUSION STATUTES

- Ban ideological exclusion based on speech that would be protected in the United States under the First Amendment.
- Repeal the “endorse or espouse” provision.

#### RELAXED FISA STANDARDS

**Section 218** of the Patriot Act amended FISA to eliminate the requirement that the *primary purpose* of a FISA search or surveillance must be to gather foreign intelligence.<sup>88</sup> Under the Patriot Act’s amendment, the government needs to show only that a *significant purpose* of the search or surveillance is to gather foreign information in order to obtain authorization from the FISC.<sup>89</sup> This seemingly minor change allows the government to use FISA to circumvent the basic protections of the Fourth Amendment, even where criminal prosecution is the government’s primary purpose for conducting the search or surveillance. This amendment allows the government to conduct intrusive investigations to gather evidence for use in criminal trials without establishing probable cause of illegal activity before a neutral and disinterested magistrate, and without providing notice required with ordinary warrants. Instead, the government can obtain authorization for secret searches from a secret and unaccountable court based on an assertion of probable cause that the target is an “agent of a foreign power,” a representation the court must accept unless “clearly erroneous.” An improperly targeted person has no way of knowing his or her rights have been violated, so the government can never be held accountable.

Lowering evidentiary standards does not make it easier for the government to spy on the guilty. Rather, it makes it more likely that the innocent will be unfairly ensnared in overzealous investigations. A most disturbing example of the way this provision enables the government to spy on innocent Americans is the case of Brandon Mayfield, an American citizen and former U.S. Army officer who lives with his wife and three children in Oregon where he practices law.

In March 2004, the FBI began to suspect Mayfield of involvement in a series of terrorist bombings in Madrid, Spain, based on an inaccurate fingerprint identification. Although Mayfield had no criminal record and had not left the U.S. in over 10 years, he and his family became subject to months of secret physical searches and electronic surveillance approved by the FISC. In May 2004, Mayfield was arrested and imprisoned

for weeks until news reports revealed that the fingerprints had been matched to an Algerian national, Ouhane Daoud. Mayfield was released the following day. In a subsequent lawsuit, *Mayfield v. United States*, a federal district court held that the Patriot Act amendment violated the Fourth Amendment by allowing the government to avoid traditional judicial oversight to obtain a surveillance order, retain and use information collected in criminal prosecutions without allowing the targeted individuals a meaningful opportunity to challenge the legality of the surveillance, intercept communications and search a person's home without ever informing the targeted individual and circumvent the Fourth Amendment's particularity requirement.<sup>90</sup>

## SUGGESTED REFORM OF FISA STATUTES

- Restore the primary purpose requirement to FISA.

### **ONLY ONE PIECE OF THE PUZZLE**

The Patriot Act may have been the first overt expansion of domestic spying powers after September 11, 2001 – but it certainly wasn't the last, and arguably wasn't even the most egregious. There have been many significant changes to our national security laws over the past eight years, and addressing the excesses of the Patriot Act without examining the larger surveillance picture may not be enough to rein in an out of control intelligence-gathering regime. Congress must not only conduct vigorous oversight of the government's use of Patriot Act powers, it must also review the other laws, regulations and guidelines that now permit surveillance of Americans without suspicion of wrongdoing. Congress should scrutinize the expanded surveillance authorities found in the Attorney General Guidelines for Domestic FBI Operations, Executive Order 12333, IRTPA, the amended FISA, and the ECPA. Ultimately, Congress must examine the full panoply of intelligence activities, especially domestic intelligence gathering programs, and encourage a public debate about the proper nature and reach of government surveillance programs on American soil and abroad.

Fundamentally, Congress must recognize that overbroad, ineffective or abusive surveillance programs are counterproductive to long-term government interests because they undermine public confidence and support of U.S. anti-terrorism programs. An effort by Congress to account fully for abuses of government surveillance authorities in the recent past is absolutely necessary for several reasons. First, only by holding accountable those who engaged in intentional violations of law can we re-establish the primacy of the law and deter future abuses. Second, only by creating an accurate historical record of the failure of these abusive programs can government officials learn from these mistakes and properly reform our national security laws and policies. Finally, only by vigorously exercising its oversight responsibility in matters of national security can Congress reassert its critical role as an effective check against abuse of executive authority.

The Constitution gives Congress the responsibility to conduct oversight, and Congress must fulfill this obligation to ensure the effective operation of our government. Congress should begin vigorous and comprehensive oversight hearings to examine all

post-9/11 national security programs to evaluate their effectiveness and their impact on Americans' privacy and civil liberties, and it should hold these hearings in public to the greatest extent possible.

### **CONCLUSION – IT IS TIME TO AMEND OUR SURVEILLANCE LAWS**

In 2009, Congress must once again revisit the Patriot Act, as three temporary provisions from the 2006 reauthorization are set to expire by the end of the year. This time, however, Congress is not completely in the dark. The IG audits ordered in the Patriot Act reauthorization proved the government lied when it claimed that no Patriot Act powers had been abused. Critics once derided as hysterical librarians were proven prescient in their warnings that these arbitrary and unchecked authorities would be misused. Just like the colonists who fought against writs of assistance, these individuals recognized that true patriotism meant standing up for their rights, even in the face of an oppressive government and an unknowable future. Certainly there are threats to our security, as there always have been, but our nation can and must address those threats without sacrificing our essential values or we will have lost the very freedoms we strive to protect.

Courts all around the country have spoken, striking down several Patriot Act provisions that infringed on the constitutional rights of ordinary Americans. Yet the government has successfully hidden the true impacts of the Patriot Act under a cloak of secrecy that even the courts couldn't – or wouldn't – penetrate.

It is time for Congress to act. Lawmakers should take this opportunity to examine thoroughly all Patriot Act powers, and indeed all national security and intelligence programs, and bring an end to any government activities that are illegal, ineffective or prone to abuse. This oversight is essential to the proper functioning of our constitutional system of government and becomes more necessary during times of crisis, not less. Serving as an effective check against the abuse of executive power is more than just Congress' responsibility; it is its patriotic duty.

## APPENDIX – THE PATRIOT ACT AT A GLANCE

Many provisions in the amended Patriot Act have been abused – or have the potential to be – because of their broad and sweeping nature. The sections detailed on these pages need congressional oversight. Despite numerous hearings during the 2005 reauthorization process, there is a dearth of meaningful information about their use. Congress and the public need real answers, and the forthcoming expiration date is the perfect opportunity to revisit the provisions that have worried civil libertarians since 2001:

- Section 203: Information Sharing. The Patriot Act and subsequent statutes encourage or require information sharing. While it is important for critical details to reach the right people, little is known about the breadth of use and the scope of distribution of our personal information.
- Section 206: Roving “John Doe” Wiretaps. Typical judicial orders authorizing wiretaps, including Foreign Intelligence Surveillance Act (FISA) wiretap orders, identify the person or place to be monitored. This requirement has its roots firmly planted in the original Bill of Rights – the giants of our history having insisted on such a concept, now memorialized in the Fourth Amendment, where it calls for warrants “particularly describing the place to be searched, and the persons or things to be seized.” However, these roving warrants are required to specify neither person nor place, amounting to the “general warrants” that had been loath to our nation’s founders. This section will expire on December 31, 2009.
- Section 209: Access to Stored Communications. The Patriot Act amended criminal statutes so that the government can obtain opened emails and emails older than 180 days with only a subpoena instead of a warrant.
- Section 212: Voluntary Disclosures and Exigent Letters. Current law permits telecommunications companies to release consumer records and content to the government when they have a good faith belief it relates to a threat. However, the Patriot Act and subsequent legislation lowered that trigger from a “reasonable” to “good faith” belief that the information reflects an emergency. The act also took away the requirement that the threat be “imminent.” The Department of Justice Inspector General has confirmed that the government is using this loophole to request information in the absence of true emergencies.
- Section 213: Sneak and Peek Searches. These are delayed notice search warrants. Before the Patriot Act, criminal search warrants required prior notification except in exigent circumstances or for stored communications when notice would “seriously jeopardize an investigation.” The Patriot

Act expanded this once narrow loophole – used solely for stored communications – to all searches. Agents might now use this vague catch-all to circumvent longstanding Fourth Amendment protections. These sneak and peek warrants are not limited to terrorism cases – thereby undermining one of the core justifications for the original Patriot Act. In fact, for the 2007 fiscal year, the government reports that out of 690 sneak and peek applications, only seven, or about one percent, were used for terrorism cases.

- Section 214: Pen Register/Trap and Trace Orders Under FISA. Pen register/trap and trace devices pick up communication records in real time and provide the government with a streaming list of phone calls or emails made by a person or account. Before the Patriot Act, this section was limited to tracking the communications of suspected terrorists. Now, it can be used against people who are generally relevant to an investigation, even if they have done nothing wrong.
- Section 215: FISA Orders for Any Tangible Thing. These are FISA Court orders for any tangible thing – library records, a computer hard drive, a car – the government claims is relevant to an investigation to protect against terrorism. Since passage of the Patriot Act, the person whose things are being seized need not be a suspected terrorist or even be in contact with one. These changes are scheduled to expire on Dec. 31, 2009.
- Section 216: Criminal Pen Register/ Trap and Trace Orders. The Patriot Act amended the criminal code to clarify that the pen register/trap and trace authority permits the government to collect Internet records in real time. However, the statute does not define ‘Internet record’ clearly. Congress needs to make sure that the government is not abusing this provision to collect lists of everything an innocent person reads on the Internet.
- Section 218: “Significant Purpose” to Begin an Intelligence Wiretap or Conduct Physical Searches. Before the Patriot Act, the extensive and secretive powers under FISA could only be used when the collection of foreign intelligence – as opposed to prosecution – was the primary purpose of the surveillance. Now, collecting foreign intelligence need only be a “significant” purpose, permitting the government to use this lower FISA warrant standard in place of a traditional criminal warrant. Congress must find out whether the government has conducted surveillance under the relaxed FISA standards for criminal prosecutions.
- Section 219: Single Jurisdiction Search Warrants. The Patriot Act allows judges sitting in districts where terror related activities may have occurred to issue warrants outside of their district, possibly causing hardship on a recipient who may want to challenge the warrant.

- Section 220: Nationwide Search Warrants for Electronic Evidence. This provision permits a judge to issue an order for electronic evidence outside of the district in which he or she sits. This provision may cause a hardship for a remote Internet or phone service provider who wants to challenge the legality of the order.
- Section 411: Ideological Exclusion. The Patriot Act amended the Immigration and Nationality Act to expand the terrorism-related grounds for denying foreign nationals admission into the United States, and for deporting aliens already here. This revived the discredited practice of ideological exclusion: excluding foreign citizens based solely on their political views and associations, rather than their conduct.
- Section 505: National Security Letters. NSLs are demands for customer records from financial institutions, credit bureaus and communications service providers. They have existed for decades, but prior to passage of the Patriot Act and its subsequent amendments, they were limited to collecting information on suspected terrorists or foreign actors. Recipients are gagged from telling anyone besides their lawyers and those necessary to respond to the request that they either received or complied with a NSL. The gag has been struck down as unconstitutional but remains on the books. In 2007 and 2008, the Justice Department's inspector general reported that upwards of 50,000 NSLs are now issued each year, many of which obtain information on people two and three times removed from a suspected terrorist.
- Section 802: Definition of Domestic Terrorism. The Patriot Act broadened the definition of domestic terrorist acts to include any crime on a state or federal level as predicate offenses, including peaceful civil disobedience.
- Section 805: Material Support. This provision bars individuals from providing material support to terrorists, defined as providing any tangible or intangible good, service or advice to a terrorist or designated group. As amended by the Patriot Act and other laws since September 11, this section criminalizes a wide array of activities, regardless of whether they actually or intentionally further terrorist goals or organizations. Federal courts have struck portions of the statute as unconstitutional and a number of cases have been dismissed or ended in mistrial.
- Section 6001 of intelligence reform bill: "Lone Wolf" Surveillance and Search Orders. Since its inception, FISA has regulated searches and surveillance on US soil for intelligence purposes. Under FISA, a person would have to belong to a group suspected of terrorism before he or she could be surveilled. The Patriot Act added a new category, allowing

someone wholly unaffiliated with a terrorist organization to be targeted for surveillance. This section is scheduled to expire on December 31, 2009.

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<sup>1</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>2</sup> Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, to Senator Patrick Leahy, Chairman, Committee on the Judiciary, (Sept. 14, 2009), *available at* <http://judiciary.senate.gov/resources/documents/111thCongress/upload/091409WeichToLeahy.pdf>.

<sup>3</sup> *Boyd v. United States*, 116 U.S. 616, 624 (1886).

<sup>4</sup> Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999).

<sup>5</sup> *See Boyd*, 116 U.S. 616.

<sup>6</sup> *Id.* at 625.

<sup>7</sup> *Id.*

<sup>8</sup> John Yoo and Eric Posner, *Patriot Act Under Fire*, AMERICAN ENTERPRISE INSTITUTE ONLINE, Dec. 1, 2003, *available at* [http://www.aei.org/publications/pubID.19661.filter./pub\\_detail.asp](http://www.aei.org/publications/pubID.19661.filter./pub_detail.asp).

<sup>9</sup> *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

<sup>10</sup> *Marron v. United States*, 275 U.S. 192, 196 (1927).

<sup>11</sup> *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

<sup>12</sup> *United States v. United States District Court (Keith)*, 407 U.S. 297, 313 (1972).

<sup>13</sup> S. REP. NO. 107-351 (Dec. 2002); H.R. REP. NO. 107-792 (Dec. 2002).

<sup>14</sup> Letter from the American Civil Liberties Union to the U.S. House of Representatives (Oct. 23, 2001) (on file with author), *available at* <http://www.aclu.org/natsec/emergpowers/14402leg20011023.html>; Letter from the American Civil Liberties Union to the U.S. Senate (Oct. 23, 2001) (on file with author), *available at* <http://www.aclu.org/natsec/emergpowers/14401leg20011023.html>.

<sup>15</sup> Letter from the American Civil Liberties Union to Senator Dianne Feinstein (April 4, 2005) (on file with author), *available at* <http://www.aclu.org/safefree/general/17563leg20050404.html>.

<sup>16</sup> *USA PATRIOT Act of 2001: Hearing Before the S. Select Comm. on Intelligence*, 109<sup>th</sup> Cong. 97, 100 (2005) (statement of Alberto R. Gonzales, Att’y Gen. of the United States and Robert S. Mueller, III, Director, Federal Bureau of Investigation). A later report by the Department of Justice Inspector General would reveal that between 2003 and 2005 the FBI had self-reported 19 possible legal violations regarding its use of National Security Letters to the President’s Intelligence Oversight Board. Attorney General Gonzales received at least six reports detailing FBI intelligence violations, including misuse of NSLs, three months prior to his Senate testimony. To a certain degree AG Gonzales and FBI Director Mueller were truthful in their testimony because as they well knew, President Bush’s Intelligence Oversight Board did not meet to “substantiate” any of the violations reported until the Spring of 2007. *See* DEP’T. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS 69 (Mar. 2007), *available at*

<http://www.usdoj.gov/oig/special/s0703b/final.pdf>; John Solomon, *Gonzales was told of FBI violations*, WASH. POST, Jul. 10, 2007, at A1, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/09/AR2007070902065.html>; John Solomon, *In Intelligence World, a Mute Watchdog*, WASH. POST, Jul. 15, 2007, at A3, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400862.html>.

<sup>17</sup> USA PATRIOT Improvement and Reauthorization Act of 2005 (PIRA), Pub. L. No. 109-177, § 119(a), 120 Stat. 192 (2006).

<sup>18</sup> Pub. L. No. 108-458, 118 Stat. 3638 (2004).

<sup>19</sup> 18 U.S.C. § 2518(11), (12).

<sup>20</sup> *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 111<sup>th</sup> Cong. (2009) (Testimony of Robert S. Mueller, III, Director, Federal Bureau of Investigation).

<sup>21</sup> Electronic surveillance orders in criminal investigations are governed by the Omnibus Crime Control and Safe Streets Act of 1968. *See* 18 U.S.C. §§ 2510-2520 (2006).

<sup>22</sup> PIRA § 119(a).

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<sup>23</sup> The four NSL authorizing statutes include the Electronic Communications Privacy Act, 18 U.S.C. § 2709 (2000), the Right to Financial Privacy Act, 12 U.S.C. § 3401 (2000), the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2000), and the National Security Act of 1947, 50 U.S.C. § 436(a)(1)(2000).

<sup>24</sup> As amended, the NSL statute authorizes the Director of the FBI or his designee (including a Special Agent in Charge of a Bureau field office) to impose a gag order on any person or entity served with an NSL. *See* 18 U.S.C. § 2709(c). To impose such an order, the Director or his designee must “certify” that, absent the non-disclosure obligation, “there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person.” *Id.* at § 2709(c)(1). If the Director of the FBI or his designee so certifies, the recipient of the NSL is prohibited from “disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the [FBI] has sought or obtained access to information or records under [the NSL statute].” *Id.* Gag orders imposed under the NSL statute are imposed by the FBI unilaterally, without prior judicial review. While the statute requires a “certification” that the gag is necessary, the certification is not examined by anyone outside the executive branch. The gag provisions permit the recipient of an NSL to petition a court “for an order modifying or setting aside a nondisclosure requirement.” *Id.* at § 3511(b)(1). However, in the case of a petition filed “within one year of the request for records,” the reviewing court may modify or set aside the nondisclosure requirement only if it finds that there is “no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.” *Id.* at § 3511(b)(2). Moreover, if a designated senior government official “certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations,” the certification must be “treated as conclusive unless the court finds that the certification was made in bad faith.” *Id.*

<sup>25</sup> DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS (Mar. 2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf> [hereinafter 2007 NSL Report]; DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), available at <http://www.usdoj.gov/oig/special/s0703a/final.pdf> [hereinafter 2007 Section 215 Report].

<sup>26</sup> 2007 NSL Report, *supra* note 25, at 84.

<sup>27</sup> *Id.* at 86-99.

<sup>28</sup> DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI’S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (Mar. 2008), available at <http://www.usdoj.gov/oig/special/s0803b/final.pdf> [hereinafter 2008 NSL Report]; DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 (Mar. 2008), available at <http://www.usdoj.gov/oig/special/s0803a/final.pdf> [hereinafter 2008 Section 215 Report].

<sup>29</sup> 2008 NSL Report, *supra* note 28, at 9.

<sup>30</sup> *Id.* at 127, 129 n.116.

<sup>31</sup> *Id.* at 127.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 130.

<sup>34</sup> *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); *Doe v. Gonzales*, 500 F.Supp. 2d 379 (S.D.N.Y. 2007); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D.Conn. 2005); PIRA, Pub. L. No. 109-177, 120 Stat. 195 (2006); USA Patriot Act Additional Reauthorizing Amendments Act of 2006 (ARAA) Pub. L. No.109-178, 120 Stat. 278 (2006). The ACLU is still litigating the constitutionality of the gag order provisions in the USA PATRIOT Improvement and Reauthorization Act of 2005. *See* Press Release, American Civil Liberties Union, ACLU Asks Appeals Court to Affirm Striking Down Patriot Act ‘National Security Letter’ Provision (Mar. 14, 2008) (on file with author), available at <http://www.aclu.org/safefree/nationalsecurityletters/34480prs20080314.html>.

<sup>35</sup> 2008 NSL Report, *supra* note 28, at 11, 124.

<sup>36</sup> *Id.* at 127.

<sup>37</sup> *Id.* at 81, 88.



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- <sup>38</sup> Letter from Ronald Weich, Assistant Attorney General, United States Department of Justice, to Harry Reid, Majority Leader, United States Senate (May 14, 2009) (on file with author), *available at* <http://www.fas.org/irp/agency/doj/fisa/2008rept.pdf>.
- <sup>39</sup> 2008 Section 215 Report, *supra* note 28, at 68.
- <sup>40</sup> *Id.* at 72.
- <sup>41</sup> *Id.* at 73.
- <sup>42</sup> *Id.* at 67.
- <sup>43</sup> *Id.* at 72.
- <sup>44</sup> *Id.*
- <sup>45</sup> *Id.* at 71 n.63.
- <sup>46</sup> *Id.* at 73.
- <sup>47</sup> *Id.* at 72-73.
- <sup>48</sup> Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, to Senator Patrick Leahy, Chairman, Committee on the Judiciary, *supra* note 2.
- <sup>49</sup> 2008 Section 215 Report, *supra* note 28, at 43.
- <sup>50</sup> *Id.* at 45-47.
- <sup>51</sup> *Id.* at 47.
- <sup>52</sup> *See, Foreign Intelligence Surveillance Act: Closed Hearing Before the H. Permanent Select Comm. on Intelligence*, 110<sup>th</sup> Cong. (Sept. 6, 2007) (Statement of Kenneth Wainstein, Assistant Att’y Gen., National Security Division, U.S. Dep’t of Justice), *available at* [http://www.fas.org/irp/congress/2007\\_hr/090607wainstein.pdf](http://www.fas.org/irp/congress/2007_hr/090607wainstein.pdf).
- <sup>53</sup> *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D.Conn. 2005). The ACLU is still litigating the constitutionality of the gag order provisions in the USA PATRIOT Improvement and Reauthorization Act of 2005. *See*, Press Release, American Civil Liberties Union, ACLU Asks Appeals Court to Affirm Striking Down Patriot Act ‘National Security Letter’ Provision (Mar. 14, 2008) (on file with author), *available at* <http://www.aclu.org/safefree/nationalsecurityletters/34480prs20080314.html>.
- <sup>54</sup> PIRA.
- <sup>55</sup> *Doe v. Gonzales*, 500 F. Supp. 2d 379, 25 A.L.R. Fed. 2d 775 (S.D.N.Y. 2007).
- <sup>56</sup> *Doe v. Mukasey*, No. 07-4943-cv (2<sup>nd</sup> Cir. Dec. 15, 2008), *available at* [http://www.aclu.org/pdfs/safefree/doevmukasey\\_decision.pdf](http://www.aclu.org/pdfs/safefree/doevmukasey_decision.pdf).
- <sup>57</sup> *Library Connection v. Gonzales*, 386 F. Supp. 2d 66, 75 (D. Conn. 2005).
- <sup>58</sup> *See* Joint Administrative Motion to Unseal Case, Internet Archive v. Mukasey, No. 07-6346-CW (N.D. Cal. May 1, 2008), *available at* [https://www.aclu.org/pdfs/safefree/internetarchive\\_motiontounseal\\_20080501.pdf](https://www.aclu.org/pdfs/safefree/internetarchive_motiontounseal_20080501.pdf).
- <sup>59</sup> *Id.* at 3.
- <sup>60</sup> National Security Act of 1947, 50 U.S.C. § 436.
- <sup>61</sup> Right to Financial Privacy Act, 12 U.S.C. § 4314.
- <sup>62</sup> Fair Credit Reporting Act, 15 U.S.C. § 1681v.
- <sup>63</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).
- <sup>64</sup> § 2339A. Providing material support to terrorists
- (a) Offense. – Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 1993, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), or section 46502 or 60123(b) of title 49, or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.
- (b) Definition. – In this section, the term “material support or resources” means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment,

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facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities. –

(1) Unlawful conduct. – Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. . . .

(g) Definitions. – As used in this section . . .

(4) the term “material support or resources” has the same meaning as in section 2339A; . .

(6) the term “terrorist organization” means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

<sup>65</sup> 66 Stat. 163, § 219, as amended, 8 U.S.C. §§ 1101 et seq. As noted, 18 U.S.C. §§ 2339A and 2339B are not the only statutes pertaining to material support. In addition, the criminal liability provisions of the International Emergency Economic Powers Act (IEEPA), permit the designation of “specially designated terrorists” and “specially designated global terrorists” and give the President authority to regulate, prohibit or prevent any form of economic transaction that provides services to benefit terrorists. 50 U.S.C. § 1705 (2007).

<sup>66</sup> PATRIOT Act, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272 (2001). ; 18 U.S.C. §§ 2339A(b) and 2339B(g)(4).

<sup>67</sup> IRTPA, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

<sup>68</sup> See *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d, 1134, 1142-48, (C.D. Cal. 2005).

<sup>69</sup> See Brief for American Civil Liberties Union as Amicus Curiae Supporting Plaintiffs-Appellees, *Humanitarian Law Project v. Gonzales*, No. 05-56753, 05-56846 (9th Cir. filed May 19, 2006), available at [http://www.aclu.org/images/general/asset\\_upload\\_file394\\_25628.pdf](http://www.aclu.org/images/general/asset_upload_file394_25628.pdf).

<sup>70</sup> *Implementation of the USA Patriot Act: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the H. Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 23-28 (2005) (Written statement of Ahilan T. Arulanantham, Staff Attorney, ACLU of Southern California), available at <http://www.aclu.org/safefree/general/17536leg20050510.html>; See also, Ahilan T. Arulanantham, A Hungry Child Knows No Politics: A Proposal for Reform of the Laws Governing Humanitarian Relief and ‘Material Support’ of Terrorism, American Constitution Society (June 2008), available at <http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf>.

<sup>71</sup> *Implementation of the USA Patriot Act: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the H. Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 26 (2005) (Written statement of Ahilan T. Arulanantham, Staff Attorney, ACLU of Southern California).,

<sup>72</sup> PIRA § 104.

<sup>73</sup> *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9<sup>th</sup> Cir. 1998).

<sup>74</sup> Maureen O’Hagan, *A Terrorism Case that went Awry*, SEATTLE TIMES, Nov. 22, 2004, available at [http://seattletimes.nwsourc.com/html/localnews/2002097570\\_sami22m.html](http://seattletimes.nwsourc.com/html/localnews/2002097570_sami22m.html).

<sup>75</sup> See *Scales v. United States*, 367 U.S. 203, 224-25 (1961).

<sup>76</sup> *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1337 (M.D. Fla. 2004).

<sup>77</sup> Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 837 (2007).

<sup>78</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2001 (2003), BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002 (2004), BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 (2005), BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 (2006), available <http://www.ojp.usdoj.gov/bjs/pubal/p2.htm#cfjs> (follow the hyperlink of the same title to access each year’s compendium).

<sup>79</sup> Chesney, *supra* note 77, at 885.

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<sup>80</sup> *Id.* at 886.

<sup>81</sup> The ACLU filed an *amicus curiae* brief on behalf of Plaintiffs. See Brief for American Civil Liberties Union as Amicus Curiae Supporting Plaintiffs-Appellees, Humanitarian Law Project v. Gonzales, No. 05-56753, 05-56846 (9th Cir. filed May 19, 2006), available at [http://www.aclu.org/images/general/asset\\_upload\\_file394\\_25628.pdf](http://www.aclu.org/images/general/asset_upload_file394_25628.pdf).

<sup>82</sup> *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

<sup>83</sup> 8 U.S.C. § 1182(a)(3)(B)(i)(VI).

<sup>84</sup> *Id.*

<sup>85</sup> *American Academy of Religion v. Chertoff*, No. 06 CV 588 (PAC), 2007 WL 4527504 (S.D.N.Y.).

<sup>86</sup> See *American Academy of Religion v. Chertoff*, 463 F.Supp.2d 400 (S.D.N.Y. 2006); *American Academy of Religion v. Chertoff*, No. 06 CV 588 (PAC), 2007 WL 4527504 (S.D.N.Y.).

<sup>87</sup> See Rearing and Empowering America for Longevity against acts of International Destruction Act of 2005 (REAL ID), Pub. L. No. 109-13, Div. B, 119 Stat. 231.

<sup>88</sup> PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272 (2001)..

<sup>89</sup> *Id.*.

<sup>90</sup> *Mayfield v. United States*, 504 F. Supp. 2d 1023 (D. Or. 2007). The ACLU filed an *amicus curiae* brief on behalf of Plaintiffs. See brief for American Civil Liberties Union as Amicus Curiae Supporting Plaintiffs, *Mayfield v. United States*, No. 07-35865 (9th Cir. filed March 14, 2008), available at [http://www.aclu.org/images/asset\\_upload\\_file16\\_34495.pdf](http://www.aclu.org/images/asset_upload_file16_34495.pdf).