

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

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March 17, 2010

The Honorable Eric H. Holder, Jr.
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

Dear Attorney General Holder:

Congress recently passed legislation extending, until February 28, 2011, three authorities of the Foreign Intelligence Surveillance Act of 1978 (FISA) that were due to sunset on December 31, 2009 pursuant to the USA PATRIOT Improvement and Reauthorization Act of 2005 (PATRIOT Act). These are sections 206 and 215 of the PATRIOT Act, and section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004. As you know, this temporary one-year extension does not include the improvements of existing law that were included in the bipartisan bill reported by the Senate Judiciary Committee last October, the USA PATRIOT Act Sunset Extension Act, S.1692, negotiated in November and December of last year, and endorsed by the Administration. We had sought to preserve important intelligence tools while promoting transparency, accountability, and civil liberties. In my view, it would be a mistake to wait yet another year before the Administration implements these reforms.

Last November 9, 2009, you sent a letter strongly endorsing the reported bill and expressing the Department of Justice's support for the expanded privacy and civil liberties protections it contained. The letter also stated unequivocally that the changes to law contained in the bill pose no operational concerns. In response to a few outstanding concerns of the Department, I negotiated a manager's amendment that also received the support of the Administration. Last December, I worked with Senate and House leadership to reach agreement with respect to additional improvements, including new reporting requirements on the use of section 215 orders and a mandate that Congress be notified when the so-called "lone wolf" provision is used. On February 19, 2010, the Department of Justice sent Senate and House leadership a letter urging passage of S.1692, including the modifications that had been subsequently negotiated. The letter acknowledges that the bill "strikes the right balance by both reauthorizing these essential national security tools and enhancing statutory protections for civil liberties and privacy...."

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The one-year extension should not become an excuse to defer implementation of the important civil liberties and enhanced accountability provisions of S.1692 and subsequent negotiations that received the support of the Administration. We should work together to ensure that these important accountability provisions are realized without delay. A number of the improvements that were included in the bill should not require statutory changes. Even without congressional action the Administration can issue the reports that were included in the Senate bill as well as those negotiated between the Senate and House leadership. These reports would be in addition to those that are currently required by statute, and would include increased public reporting on the use of National Security Letters (NSLs), an annual unclassified report on the use of FISA authorities and the impact on the privacy of U.S. persons, and a public report detailing ways in which the Government can exercise its section 215 authority while providing enhanced protections for civil liberties. To the extent consistent with classification requirements, all of these reports could be posted on the Department of Justice website so that the public has the opportunity to learn more about how these authorities are being used.

As you know, a key measure in S.1692 aimed at increasing accountability was a new sunset for National Security Letters (NSLs). For years, I have been concerned about the issuance and oversight of NSLs. We now know that the National Security Letter authority was significantly misused. That is why I fought hard to retain a sunset for National Security Letters in our legislation, in addition to an audit. It is important that there be increased accountability for this authority. I urge you to proceed without delay to implement the accountability measures that were in our bill with respect to NSLs. Some improvements can be achieved through the issuance of internal policies, procedures, and guidance. Last September, FBI Director Mueller testified before the Judiciary Committee that the FBI had already instituted nationwide changes to its procedures for seeking nondisclosure orders on National Security Letters – a constitutional fix that we sought to codify with the Senate legislation. I applaud the FBI's efforts to rectify this constitutional deficiency proactively, and would like to receive specific information about how these new procedures have been implemented around the country. Please inform the Committee when and how the FBI will implement procedures related to the collection, use, and storage of information obtained in response to a National Security Letters, and how the procedures will be enforced.

Similarly, while I am encouraged by the progress the FBI has made in reforming its system for issuing and monitoring National Security Letters, the FBI should issue formal policies for retaining internally a statement of specific facts showing that the information sought is relevant to an authorized investigation. This information would be available for internal review and audits, and the development of formal policy guidance governing this practice would be simple, yet important, progress. A further improvement in the legislation that the administration should undertake is to require the FBI to notify NSL recipients who challenge nondisclosure orders when compliance with the order is no longer required.

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I also plan to request that the Department of Justice Inspector General conduct the audits that were included in S. 1692. The importance of these types of audits was underscored by the Department of Justice Inspector General's 2008 NSL audit, as well as the follow-up report on the abuse of exigent letters, both of which detailed the previous abuse of this significant authority. If we are to afford the Government these broad authorities, it is critical that there be significant oversight with respect to how they are being used.

I am also asking for your cooperation in determining how we can move forward in implementing the policies and procedures that achieve the goals of the legislation. With regard to section 215 orders, please explain the policy guidance you will issue in order to realize the changes to section 215 orders that you supported in the bill, including the additional provisions negotiated in December. For example, there is no reason that the Government should be afforded a presumption in its favor when it is asking the court to issue a section 215 order. Assistant Attorney General for National Security David Kris acknowledged during a Senate Judiciary Committee hearing on this issue last year that, in order to obtain such an order from the Foreign Intelligence Surveillance Court (FISC) the Government must, "establish reasonable grounds to believe that the documents are relevant." I urge you to issue guidance that requires the FBI to present the FISC with a complete statement of facts sufficient to show relevance of the section 215 order to an authorized investigation. In instances where the Government is seeking to obtain section 215 records that contain bookseller records, or records from a library and contain personally identifiable information about a patron of the library, I urge you to issue guidance requiring the Government to meet the higher standard for section 215 records that was negotiated in December.

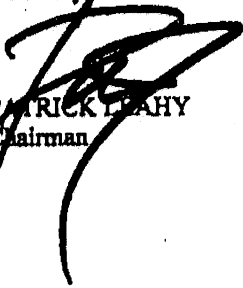
Furthermore, with regard to the issuance of orders preventing the disclosure of requests for material pursuant to section 215, the Government does not need the conclusive presumption in its favor when it asserts a potential danger to national security or interference with diplomatic relations. Accordingly, I encourage you to issue guidance that requires certifications accompanying applications for section 215 nondisclosure orders to include an appropriately thorough statement of facts that sets forth the need for nondisclosure.

Another provision in S. 1692 that you supported would require court-approved minimization procedures for both section 215 orders and pen register and trap and trace devices. Please explain how you will institute appropriate guidelines that are consistent with the intent of the bill in this regard, and whether you will seek the approval of the FISC prior to implementing the provisions.

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I share your concern that our Government be provided with the tools it needs to protect our national security. I also know that you share my commitment to ensuring that these sweeping authorities are being used responsibly and not unnecessarily infringing upon our citizens' civil liberties. I look forward to the Department's action and ideas so that we can work together on these matters now, without delay.

Sincerely,



PATRICK LEAHY
Chairman