

Dissenting Views to Accompany H.R. 3199,
the “USA PATRIOT and Intelligence Reform
Reauthorization Act of 2005”

We dissent from the passage of H.R. 3199 in its present form.

We oppose this legislation for several reasons. First, we never have been given the facts necessary to fully evaluate the operation of the PATRIOT Act. Second, there are numerous provisions in both the expiring and other sections of the PATRIOT Act that have little to do with combating terrorism, intrude on our privacy and civil liberties, and have been subject to repeated abuse and misuse by the Justice Department. Third, the legislation does nothing to address the many unilateral civil rights and civil liberties abuses by the Administration since the September 11 attacks. Finally, the bill does not provide law enforcement with any additional real and meaningful tools necessary to help our nation prevail in the war against terrorism. Since 2002, 389 communities and seven states have passed resolutions opposing parts of the PATRIOT Act, representing over 62 million people.¹ Additionally, numerous groups ranging the political spectrum have come forward to oppose certain sections of the PATRIOT Act and to demand that Congress conduct more oversight on its use, including the American Civil Liberties Union, American Conservative Union, American Immigration Lawyers Association, American Library Association, Center for Constitutional Rights, Center for Democracy and Technology, Common Cause, , Free Congress Foundation, Gun Owners of America, Lawyers’ Committee for Civil Rights, National Association for the Advancement of Colored People (NAACP), National Association of Criminal Defense Lawyers, People for the American Way, and numerous groups concerned about immigrants’ rights.²

¹A Complete List of Communities That Have Passed Resolutions, *is available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (last checked July 18, 2005). Colorado, Montana, Idaho, Maine, Vermont, Alaska, and Hawaii have all passed statewide resolutions. Resolutions have also been passed in such communities as Lincoln, Nebraska; Des Moines, Iowa; Savannah, GA; Pittsburgh, PA; Dallas, TX; New York, New York; Atlanta, GA; Portland, Oregon; Philadelphia, PA; Dillon, Montana; and Detroit, Michigan.

²Other groups opposing the PATRIOT Act include the American-Arab Anti-Discrimination Committee, American Association of Law Libraries , American Baptist Churches USA, American Humanist Association, American Policy Center, Americans for Tax Reform, Arab American Institute, Asian Americans for Equality, Asian American Legal Defense & Education Fund, Association of American Physicians and Surgeons, Association of Research Libraries, Bill of Rights Defense Committee, Center for Human Rights and Constitutional Law, Center for Justice and Accountability, Center for National Security Studies, Chicago Committee to Defend the Bill of Rights, Commission on Social Action of Reform Judaism, Consumer Action, Doctors for Disaster Preparedness, Electronic Privacy Information Center, First Amendment Foundation, F.I.R.S.T. Project, Inc.Friends Committee on National Legislation, Hate Free Zone Campaign of Washington, Immigrant Defense Project of the New York State Defenders Association, Immigrant Legal Resource Center, International Institute of Boston, Japanese American Citizens League, Korean Resource Center, Latin American Integration Center, Lawyers Committee for Human Rights, League of United Latin American Citizens, Mennonite Central Committee U.S., Washington Office, Mexican American Legal Defense and

While the PATRIOT Act may not deserve all of the ridicule that is heaped against it, there is little doubt that the legislation has been repeatedly and seriously misused by the Justice Department. Consider the following:

- It has been used more than 150 times to secretly search an individual's home, with nearly 90% of those cases having had nothing to do with terrorism.
- It was used against Brandon Mayfield, an innocent Muslim American, to tap his phones, seize his property, copy his computer files, spy on his children, and take his DNA, all without his knowledge.
- It has been used to deny, on account of his political beliefs, the admission to the United States of a Swiss citizen and prominent Muslim Scholar to teach at Notre Dame University.
- It has been used to unconstitutionally coerce an Internet Service Provider to divulge information about e-mail activity and web surfing on its system, and then to gag that Provider from even disclosing the abuse to the public.
- Because of gag restrictions, we will never know how many times it has been used to obtain reading records from library and bookstores, but we do know that libraries have been solicited by the Department of Justice – voluntarily or under threat of the PATRIOT Act – for reader information on more than 200 occasions since September 11.
- It has been used to charge, detain and prosecute a Muslim student in Idaho for posting Internet website links to objectionable materials, even though the same links were available on the U.S. Government's web site.

Educational Fund (MALDEF) , Multiracial Activist, National Asian Pacific American Legal Consortium, National Coalition Against Repressive Legislation, National Council of La Raza, National Employment Law Project, National Immigration Law Center, National Lawyers Guild, New York Immigration Coalition, Northwest Immigrant Rights Project, OMB Watch, Organization of Chinese Americans, Police Accountability Project, Presbyterian Church USA, Washington Office, Special Libraries Association, Square One Media Network, Unitarian Universalist Association of Congregations, United Electrical, Radio and Machine Workers of America, Washington Defenders Immigration Project, Women Against War Young Korean-American Service & Education Center (YKASEC). In addition, a new coalition of conservative and liberal groups have come together to urge increasing checks and balances on the powers the government already has: Association of American Physicians and Surgeons, American Civil Liberties Union, American Conservative Union, Americans for Tax Reform, American Policy Center, Citizens Committee for the Right to Keep and Bear Arms, Eagle Forum, Free Congress Foundation, Libertarian Party, Gun Owners of America , Second Amendment Foundation

Even worse than the PATRIOT Act has been the abuse of unilateral powers by the Administration. Since September 11, our government has detained and verbally and physically abused thousands of immigrants without time limit, for unknown and unspecified reasons, and targeted tens of thousands of Arab-Americans for intensive interrogations and immigration screenings. All this serves to accomplish is to alienate Muslim and Arab Americans – the key groups to fighting terrorism in our own county – who see a Justice Department that has institutionalized racial and ethnic profiling, without the benefit of a single terrorism conviction.

_____Nor is it helpful when our government condones the torture of prisoners at home and abroad, authorizes the monitoring of mosques and religious sites without any indication of criminal activity, and detains scores of individuals as material witnesses because it does not have evidence to indict them. This makes our citizens less safe not more safe, and undermines our role as a beacon of democracy and freedom.

While the Majority asserts it is not the duty of this Committee to respond to these abuses, we believe that ignoring these and other cases of abuse by our own government constitutes an abdication of our responsibility as legislators, and should be addressed by this legislation.

The following is a brief background and description of the PATRIOT Act and the proposed reauthorization legislation, followed by a listing of our various concerns with the legislation.

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I. Background and Description of Legislation

The PATRIOT Act was passed into law on October 26, 2001. A major concern with this legislation is the process by which it was enacted into law. Within days of the September 11 attacks, then-Attorney General John Ashcroft publicly announced that the Justice Department was drafting a new bill that Congress should pass within one week because the new powers were needed to fight terrorism. An initial draft of the legislation was leaked to the media soon after; it is believed that Republican Members and staff of the Committee were provided actual copies of the bill. A few days after the draft was leaked, the Department sent a new, official draft to Congress that consisted of its wish list of new law enforcement, immigration, and intelligence authorities. The hearing was so rushed that then-Attorney General Ashcroft would not even submit himself to a full round of questions by the members.

The U.S. House Judiciary Committee worked out a bipartisan compromise with the Administration. The Committee passed the compromise legislation in the form of H.R. 2975 on an unprecedented 36-0 vote.³ While H.R. 2975 was being prepared for floor consideration,

³H.R. REP. NO. 236, 107th Cong., 2d Sess. (2001).

however, the Administration reneged on the deal and Chairman Sensenbrenner introduced a new and more aggressive terrorism bill, H.R. 3108, on the morning of October 12, 2001. That same day, the Rules Committee issued the rule for H.R. 2975 and provided that H.R. 3108 would be the adopted substitute amendment to H.R. 2975. The very same day, the House passed the new legislation by a vote of 337-79 under a closed rule.

While the House was moving forward on new legislation, the Attorney General turned his attention to the Senate, which had yet to pass a new terrorism bill. The Attorney General publicly indicated that Senate Democrats questioning the scope of the Department's new bill would be responsible for future terrorist attacks if a new terrorism law was not passed in time.⁴

Compromise discussions proceeded and eventually broke down. Based in part on these discussions, Chairman Sensenbrenner introduced the new legislation as H.R. 3162 on October 23, 2001. H.R. 3162 was brought straight to the floor under suspension of the rules and passed the House the next day by a vote of 357-66. The Senate passed the bill on October 25, 2001, by a vote of 98-1.⁵

Although it was originally hoped that the legislation would simply give the Justice Department a set of specific tools to help it fight terrorism, the legislation ended up being a broad expansion of law enforcement powers that the Department had been seeking for years, but had been unable to convince Congress to enact.

As enacted into law, the PATRIOT Act included more than 160 separate sections (Appendix A provides a section by section description of those provisions). In addition, due in part to the concern by many Members with the rushed nature and broad scope of the PATRIOT Act, it was determined that 16 of the sections authorizing new surveillance powers should sunset on December 31, 2005 (Appendix B contains a more detailed section by section description of those 16 expiring provisions).

H.R. 3199 would make permanent all of the sunset provisions of the PATRIOT Act, save Section 206, concerning John Doe Roving Wiretaps, and Section 215, concerning foreign intelligence orders for any tangible thing, which are renewed for 10 years each. It also makes permanent the material support and lone wolf authorities created in the intelligence reform bill last fall.⁶

⁴See David G. Savage & Eric Lichtblau, *Ashcroft Deals with Daunting Responsibilities*, L.A. TIMES, Oct. 28, 2001, at A10 (“When the Attorney General’s imposed deadline [for passage of new terrorism legislation] passed, Ashcroft suggested that if a second terrorist attack occurred, the recalcitrant lawmakers would deserve the blame.”).

⁵Senator Russ Feingold (D-WI) voted “No” and Senator Mary Landrieu (D-LA) did not vote.

⁶Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108- 458, Sections 6603 and 6001, respectively.

The bill makes several changes to current law. First, H.R. 3199 allows a Section 215 recipient to challenge his order in writing before a three-judge panel of the Foreign Intelligence Surveillance Court (FISC) in Washington, DC, and assert that FISA, as written was wrongly applied to his order. Arguably, it also provides that a person may discuss his 215 order with his attorney.

Second, H.R. 3199 creates a “return” on Section 206 John Doe Roving Wiretap orders. It simply provides that after a roving wiretap is issued, the Justice Department return to the FISA court and certify what facilities were ultimately tapped within 10 days.

Third, the legislation amends Section 203(b) of the PATRIOT Act. Section 203(b) allows federal agencies to share information it gathers from electronic, oral and wire intercepts with other departments and agencies. This bill would require the government to notify the court that approved the original surveillance of the sharing.

Fourth, H.R. 3199 alters Section 207 of the PATRIOT Act pertaining to the length of FISA orders. It limits the new extended durations to non-U.S. persons, and extended pen register and trap and trace orders to one year.

Fifth, during the markup, a Lungren amendment was accepted that created an annual reporting requirement on Section 212, which immunizes private companies for their voluntary disclosures of electronic information to law enforcement in emergency situations.

Sixth, during markup, a Schiff amendment was accepted which would add to the list of activities which, if done willfully, will result in violating the statute which prohibits the planning of terrorist attacks on mass transportation (18 USC 1993(a)(3)).

Seventh, during markup, a Lofgren amendment was accepted which amends Section 1001 of the PATRIOT Act to require the Inspector General of the Department of Justice to also report on the detentions of persons by the United States, including information about the length of detention, the offense, and the conditions and frequency of their access to counsel.

Eighth, during markup, a Schiff amendment was accepted which (a) adds to the list of predicate offenses which are considered “federal crimes of terrorism”; (b) allows for the forfeiture of property involved in the trafficking of weapons of mass destruction; and (c) adds numerous crimes related to terrorism to the list of offenses for which oral and wire communications may be intercepted under 18 U.S.C. 2516.

Finally, during the markup, Mr. Nadler and Mr. Flake offered a bipartisan amendment to address the notification delay period relating to the Section 213 “sneak and peek” provision. Under their amendment, the initial period of delayed notification of secret searches may not be for more than 180 days, and extensions may be given for not more than 90 days at a time.

It is important to note that the 9/11 Commission recommended that to retain any new authorities, **“The burden of proof for retaining a particular government power should be on the executive to explain (a) that the power materially enhances security and (b) that there is**

adequate supervision of the executive's use of those powers to ensure protection of civil liberties.”⁷ We have never been given the facts necessary to properly evaluate its operation; however, based upon the information we have been able to glean our review indicates that this burden has not been met. For these and the reasons set forth herein, we oppose H.R. 3199

II. We Have Never Been Given the Necessary Facts to Properly Evaluate the PATRIOT Act

Neither the original USA PATRIOT Act nor this reauthorization legislation were subject to proper oversight. Since the enactment of the PATRIOT Act, the Department has failed to account for its use. In addition, the pending legislation was deprived of any deliberative consideration prior to the full Committee markup.

First, the Department has thwarted efforts on the part of Democratic Members to learn how the PATRIOT Act has been enforced. While the Department has responded to Committee inquiries pertaining to the Act, in many instances it states that it does not keep track of how certain authorities are used or qualifies the answers it does give. For instance, in its most recent submission to the Committee, the Department states it does not know how many times Foreign Intelligence Surveillance Act authorities have been used to investigate terrorism crimes versus other offenses.⁸

On April 1, 2003, the Committee sent the Department an exhaustive series of questions on the Act. In response to a question about how many mosques have been contacted for membership lists, the Department merely states that it has conducted demographic surveys of mosques; it simply ignores the question.⁹ It further states it does not keep racial or ethnic characteristic information on material witness detainees and, as such, is unable to answer a question about that matter.¹⁰ When it chooses to answer a question, the Department often includes a qualifier, making the answer meaningless. For example, when replying to a question about material witness detainees since September 11, 2001, having access to legal counsel, the Department says that “every single person detained as a material witness as part of the September 11 investigation has been represented by counsel.”¹¹ The answer left open the possibility that a

⁷ *The 9/11 Commission Report*, National Commission on Terrorist Attacks Upon the United States, at 395.

⁸ Letter from the Honorable Alberto Gonzales, Attorney General of the United States, to the Honorable F. James Sensenbrenner, Jr., Chairman, U.S. House Comm. on the Judiciary 3-4 (July 12, 2005).

⁹ Letter from the Honorable Jamie E. Brown, Acting Ass't Attorney General, U.S. Dep't of Justice, to the Honorable F. James Sensenbrenner, Jr., Chairman, U.S. House Comm. on the Judiciary 56 (May 13, 2003).

¹⁰ *Id.* at 50.

¹¹ *Id.* at 48.

material witness as part of a non-September 11 terrorism investigation was denied access to counsel.

In addition, the Department prohibits public review of its activities by sending some information about the PATRIOT Act under classified cover. Interestingly, in at least two instances, the Department has declassified relevant information only when it was politically expedient. In the summer of 2003, there was significant criticism of section 215 of the Act from the media, civil liberties groups, and libraries and bookstores based on the belief that the provision gave unconstitutionally broad power to seize documents and things about anybody, including patrons' library and bookstore records in violation of the First Amendment.¹² Attempting to quell such rising criticism, on September 18, 2003, the Attorney General declassified a memorandum he had written to FBI Director Robert Mueller showing that section 215 had never been used as of that date.¹³ In addition, then-Attorney General John Ashcroft declassified a memo written by 9/11 Commissioner Jamie Gorelick concerning the "wall" between criminal and intelligence investigations as a way to turn attention away from his failure to appropriately focus on counterterrorism.¹⁴

The Department's lack of accountability is even more troubling considering that it was derelict in its duties to Congress just prior to the markup. On May 19, 2005, over one month after the Committee's April 6, 2005 hearing with the Attorney General, Chairman Sensenbrenner transmitted to the Department a series of questions about the Act for himself,¹⁵ Ranking Member

¹²Warren Richey & Linda Feldmann, *Has Post-9/11 Dragnet Gone too Far?*, CHRISTIAN SCIENCE MONITOR, Sept. 12, 2003, at 1; Howard Troxler, *New Powers? Not Unless the Feds Get Old Ones Right*, ST. PETERSBURG TIMES, Sept. 10, 2003, at 1B; Jack Torry, *Opinions Clash on Terrorism-Fighting Patriot Act*, COLUMBUS DISPATCH, Sept. 7, 2003, at 1C; Peter Schworm, *Librarians Fight Search Law*, BOSTON GLOBE, Aug. 21, 2003, at 1; Nat Hentoff, *Ashcroft Moves to Encroach further on our Liberties*, CHICAGO SUN-TIMES, Aug. 24, 2003, at 30 (op-ed); James Bovard, *America Fights for Freedom to Read*, BALT. SUN, Aug. 18, 2003, at 15A; *Congress Should Reform Dangerous Patriot Act*, DET. NEWS, Aug. 1, 2003, at 10A (editorial); Ellen Goodman, *It's Time for Congress to Take Away Ashcroft's Fishing License*, BALT. SUN, at July 24, 2003, at 17A (editorial); Lillian Thomas, *Rights Groups Rally Opposition to National Anti-Terrorism Law*, PITTSBURGH POST-GAZETTE, July 17, 2003, at B5; Don Behm, *Bookstores Balk at Record-Seizure Law*, MILWAUKEE JOURNAL-SENTINEL, June 23, 2003, at 2A; Wayne Woodlief, *Ashcroft's Act Borders on Unpatriotic*, BOSTON HERALD, June 8, 2003, at 25 (op-ed)

¹³Memorandum from the Honorable John D. Ashcroft, Attorney General of the United States, to the Honorable Robert S. Mueller, Director, FBI (Sept. 18, 2003).

¹⁴Jason Zengerle, "Critiquing Ashcroft's 9/11 Show," *The New Republic*, April 15, 2004.

¹⁵Letter from the Honorable F. James Sensenbrenner, Jr., Chairman, U.S. House Comm. on the Judiciary, to the Honorable Alberto Gonzales, Attorney General of the United States (May 19, 2005) (transmitting questions on behalf of himself).

John Conyers, Rep. Zoe Lofgren, and Rep. Martin Meehan (D-MA).¹⁶ While the Department answered the Chairman's questions on June 10, 2005,¹⁷ the answers to the questions submitted by the three Democratic Members were answered only on the morning of the full Committee markup over one month later, and most of the answers were incomplete and unresponsive.¹⁸

Similarly, Rep. Zoe Lofgren attempted to exercise her oversight authority and requested to see applications for search and seizure orders obtained under Section 214 (pen register and trap-and-trace orders) and Section 215 (business records) of the USA PATRIOT Act. A letter was sent on behalf of Ms. Lofgren and the other Members of the Committee who wished to review these order applications on July 7, 2005.¹⁹ The letter asked that they be allowed to review these orders on either Monday or Tuesday, July 11 or July 12, as the Committee was set to markup H.R. 3199 on Wednesday. On Monday, July 11, two days before the Committee was set to meet, DOJ responded that usually only redacted copies are provided to the Intelligence Committees; DOJ was asked to determine if our members could also review these orders. Finally, at 5:50 on Tuesday, July 12, 2005, approximately 16 hours before the Committee markup was to begin, the DOJ responded that Committee members could review a sample of FISA applications at the Senate Select Committee on Intelligence, and could not review FISA applications at main Justice.

This entire process illuminates the steps DOJ has taken to prevent the Democratic members from performing effective oversight. Second, Ms. Lofgren and the other Committee members have the authority and necessary clearance to review these orders and there was no clear reason why the Judiciary Committee members should be blocked from reviewing orders that the Intelligence Committees can review. Finally, this interchange undermines one of the main reasons the Majority uses to justify making the PATRIOT Act permanent – the Majority argues that the Members can exercise oversight if they so choose, and that they have not chosen to exert this oversight. Here, the Members attempted to review the authority granted to law enforcement by the PATRIOT Act under FISA and they were deliberately delayed and thwarted in their attempt to perform their constitutional duty of oversight of the executive branch. Thus, it is not that the Members do not wish to perform oversight of the use of these authorities; rather, it

¹⁶Letter from the Honorable F. James Sensenbrenner, Jr., Chairman, U.S. House Comm. on the Judiciary, to the Honorable Alberto Gonzales, Attorney General of the United States (May 19, 2005) (transmitting questions on behalf of Democratic Members).

¹⁷Letter from the Honorable Alberto Gonzales, Attorney General of the United States, to the Honorable F. James Sensenbrenner, Jr., Chairman, U.S. House Comm. on the Judiciary (June 10, 2005) (sent under classified cover).

¹⁸Letter from the Honorable Alberto Gonzales, Attorney General of the United States, to the Honorable F. James Sensenbrenner, Jr., Chairman, U.S. House Comm. on the Judiciary (July 12, 2005).

¹⁹Letter from Perry Apelbaum, Minority Chief Counsel, House Judiciary Committee, to Assistant Attorney General William E. Moschella, July 7, 2005. Letter on file with Committee.

is that the Administration has conducted a deliberate attempt to deny and block certain Members ability to do so.

The concerted effort to thwart any meaningful oversight and review of the Patriot Act is also evident by the manner in which the Majority chose to respond to the Minority's request for additional day of oversight hearings on the legislation. During the course of the Committee's oversight hearing with Deputy Attorney General Comey, and pursuant to House Rule XI, clause 2(j)(1), the Minority requested an additional day of oversight hearings on the reauthorization of the Patriot Act. The purpose of the additional day of hearings was to provide Members with a last chance opportunity to explore important issues within the scope of the Patriot Act which up until that point had not been adequately covered.

Unfortunately in responding of the Minority's request, the Majority decided to engage in a series of actions which frustrated the Minority's party efforts to conduct such a hearing. Namely, the Majority chose to schedule the requested day of hearings with less than forty-eight hours notice; required the Minority to provide the Majority with a list of witnesses and witness testimony in less than twenty-four hours; decided to schedule the hearing at 8:30am on a Friday, a date in which there where no votes on the House floor; and chose to unilaterally adjourn the hearing without first obtaining or seeking either a unanimous consent request or a vote of the Committee members present. As pointed out in the resolution offered by Mr. Nadler raising a question of privilege regarding these actions, many of these aforementioned deeds were in clear violation of numerous House rules and certainly contrary to the Committee's usual custom and practices.

Finally, Members of the Committee were deprived of any meaningful review of H.R. 3199 after its introduction. The Majority distributed the legislation only on the late afternoon of Friday, July 8, 2005, just five days before it was scheduled to be considered by the Committee. In addition, this legislation was not subject to any hearing, either at the full Committee or subcommittee level, or to a subcommittee markup. Hearings and subcommittee markups are preliminary stages of review that are customary in the House for any legislation; they permit the Members and other interested parties to consider and debate specific legislation prior to final consideration before either the full Committee or the full House.²⁰ The Majority, unfortunately, bypassed these important steps and immediately scheduled H.R. 3199 for a full Committee vote.

III. There are Numerous Provisions in Both the Expiring and Other Parts of the PATRIOT Act that are Largely Unrelated to Terrorism and Unnecessarily Intrude on Privacy Rights and Other Civil Liberties

There are numerous provisions in the PATRIOT Act, that have raised concerns. The following is a description of some of the concerns and issues.

²⁰We would note that even in the immediate aftermath of the September 11 attacks, a preliminary draft of the PATRIOT Act was subject to a legislative hearing in the Committee. *Administration's Draft Anti-Terrorism Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. (Sept. 24, 2001).

A. Specific Concerns with Expiring Provisions

1. Sec. 206 - Roving surveillance authority under the Foreign Intelligence Surveillance Act

This section allows the FBI to use roving wiretaps under FISA. This means that the FBI can obtain a single court order to tap any phone they believe a foreign agent would use, instead of getting separate court orders for each phone. Additionally, the government does not need to name the target, thus allowing so-called “John Doe” wiretaps. The impact of allowing “John Doe” roving wiretaps is that the government can legally tap almost any phone of almost any person without having to show that the person is in any way connected to espionage or terrorism, or even suspected of criminal wrongdoing. Thus, the Fourth Amendment rights of ordinary citizens against such search and seizures can be completely circumvented.

Few disagree that roving wiretaps are important. Indeed, they have been useful in criminal investigations since 1986. However, FISA roving wiretaps go far beyond criminal wiretaps. First, FISA allows for blanket tapping, such as tapping all the payphones in the target’s neighborhood or all of his relatives, without showing that the target will actually use the device.²¹ Second, agents seeking a roving wiretap need not even identify a specific suspect and may instead get “John Doe” warrants.²² These add up to roving “John Doe” warrants that require so little specificity that they can be easily abused. The number of times this authority has been used and in what manner was classified²³ until April 6 2005, when the Attorney General admitted to using it 49 times since the PATRIOT Act passed.

The Justice Department argues that this authority is available in criminal cases. However, a criminal wiretap application must include specific information about the crime, the location to be tapped and the identity of the target, if known.²⁴ A judge must also find probable cause that (1) the target has or will commit a crime, (2) the communications to be seized are related to that crime, and (3) the phones to be tapped will be used by the target, as well as that normal investigative procedures have failed or will fail.

²¹John Podesta, “USA PATRIOT Act: The Good, the Bad and the Sunset,” Human Rights Magazine, Section of Individual Rights and Responsibilities, American Bar Association, Winter 2002.

²²“Let the Sun Set on PATRIOT,” Electronic Frontier Foundation, available at www.eff.org.

²³Oversight answers, submitted by Daniel J. Bryant, Assistant Attorney General, July 26, 2002, on file with the House Judiciary Committee; The PATRIOT Act: Myth vs. Reality, U.S. Department of Justice, September 2003.

²⁴18 U.S.C.A. § 2518 (1) (b) (2005).

This statute does allow roving wiretaps. However, a roving wiretap triggers a whole new section that requires that the application “identif[y] the person committing the offense and whose communications are to be intercepted.”²⁵ In other words, the Justice Department must choose between a John Doe or a roving wiretap in criminal cases – it cannot have both at the same time.²⁶

2. Sec. 209 - Seizure of voicemail messages pursuant to warrants

Section 209 of the PATRIOT Act expands the ability of law enforcement to seize voicemails. Before the Act, voicemail messages on an answering machine in one’s home could be seized pursuant to a search warrant. Voicemail messages stored with a service provider, however, required a Title III order. A Title III order actually offers higher protections than a search warrant: a Title III warrant requires more information than just a showing of probable cause and the probable cause section of a Title III order is more extensive than an affidavit for a search warrant.²⁷

Some of us are concerned Section 209 may unreasonably expand the authority of law enforcement to seize the content contained in voicemail messages by amending the law to treat stored voicemails like other stored data. Section 209 may circumvent the Fourth Amendment requirements of notice and probable cause for voicemails stored by a third party, leading to a real concern about how private and personal communications should be treated in connection with criminal investigations.

Section 209 amends the law to treat stored voicemails like other stored data (such as emails). While Section 209 seemingly requires a warrant to seize voicemail messages, the law amended by this provision actually makes a key distinction between older and newer stored emails, and this distinction now applies to stored voicemails. Those voicemails that are considered “old” do not require a warrant or Title III order to be seized – which requires probable cause – but rather merely require a subpoena. Therefore, a possibly reasonable power of seizing stored voicemails has been expanded unreasonably to allow their seizure by any prosecutor at any time, thus vitiating existing privacy rights. And, merely because the voicemails are stored by a

²⁵50 U.S.C.A. 2518 (11) (2005).

²⁶The Justice Department will claim that it has the authority to issue similar wiretaps in criminal cases, and cites support from three circuits. Yet, the cases that found the use of roving wiretaps to be constitutional did so because of the other requirements in the Title III statute that make the warrant particular enough to meet Fourth Amendment muster. These requirements are not in FISA, however. Also, it appears that those cases were not about “John Doe” wiretaps and therefore not quite as “similar” as the Justice Department claims.

²⁷A Title III search warrant or order requires what is known at “probable cause plus.” Rather than showing there is probable cause to believe, for example, that a particular phone line is being used in connection with criminal activity, a Title III order must prove that the particular phone line is “clearly being used” for illegal purposes. Furthermore, in order to obtain a Title III warrant, the officer must show why normal investigative procedures have failed.

third party, rather than stored on a home answering machine, they can be seized without notice to the target. This violates the longstanding constitutional principal that "the Fourth Amendment protects people, not places," expressed by the Supreme Court in *Katz v. United States*.²⁸ As a result, Section 209 allows law enforcement to seize the content contained in voicemails without any of the necessary Fourth Amendment protections. Finally, Section 209 applies to not just to terrorism investigations, but to *any* criminal investigation.

3. Sec. 212: Emergency Disclosures of Communications held by Phone Companies and Internet Service Providers

This section permits telephone companies and Internet Service Providers (ISPs) to disclose to the government, without penalty, customer communications and records if they think there is a danger of death or serious injury. This section precludes liability regardless of whether the company innocently stumbles on the information itself and approaches the government, or whether law enforcement initiates the disclosure itself. Because this section directly amended Title 18 of the U.S. Code, it can be used in any run-of-the-mill criminal investigation and has no ties to terrorism cases. In fact, all of the examples cited by the Justice Department are non-terror cases, including a bomb threat against a school, numerous kidnaping cases, and computer hacking threats.²⁹

Section 225 of the Homeland Security Act (HSA) of 2002³⁰ made permanent the provision that allowed the disclosure of content. Only the portion of Section 212 that authorized the disclosure of records is scheduled to sunset at the end of the year. However, it is important to note that the new content disclosure rules in the HSA that prematurely reversed the PATRIOT Act sunset are even more permissive than originally passed by the PATRIOT Act. By all accounts, the new provision is far worse as it, "lower[s] the relevant standard from 'reasonable belief' of a life-threatening emergency to a 'good faith belief,' allow[s] communications providers to use the emergency exception to disclose data to any government entity, not just law enforcement, and drop[s] the requirement that the threat to life or limb be immediate."³¹

There are several concerns with the emergency disclosure provision, Section 212: First, there is absolutely no judicial oversight, including after-the-fact review by a court such as what happens under FISA.³² The Justice Department has not addressed why a similar provision could

²⁸389 U.S. 347, 351 (1967).

²⁹*See* Report From the Field: The USA PATRIOT Act at Work, U.S. Department of Justice, July 2004.

³⁰PUB. L. NO. 107-296 (2002).

³¹Let the Sun Set on PATRIOT, Electronic Frontier Foundation, *available at* www.eff.org.

³²The Attorney General may authorize emergency orders, but must then apply for a FISA Court warrant within 72 hours. If it is not granted, the exclusionary rule prevents the information

not be put into the criminal law. Second, no notice is given to the target, even after the emergency has been resolved. Third, there is no consequence for a rogue or careless law enforcement officer who may overstate a threat in order to elicit communications without obtaining a subpoena or warrant. Under Fourth Amendment controlled searches, the government would be prohibited from using the evidence at trial, yet there appears to be no such protection for these disclosures. Finally, the Homeland Security Act of 2002 required each entity to receive one of these disclosures to report it to the Attorney General within 90 days.³³ The Attorney General is then to report to Congress, but never has. Unfortunately, H.R. 3199 makes no effort to reign these powers in and provide even limited safeguards to ensure these authorities are not abused.

4. Sec. 214 - Pen register and trap and trace authority under FISA

This section made it easier for the FBI to get a pen register or trap-and-trace under FISA.³⁴ The FBI needs to prove the order is needed to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities. Prior to the PATRIOT Act, the FBI needed to establish that the telephone line in question had been used or was about to be used in connection with terrorism or a crime; this requirement was deleted.

As the majority and the DOJ points out, search warrants are not required for pen register and trap and trace activities under the criminal law.³⁵ However, FISA pen register/trap and trace orders not only are not based on probable cause, but are not necessarily targeted at an individual based on even a lesser showing of involvement in any wrongdoing or any activities that otherwise might legitimately expose him to clandestine surveillance by the FBI. Before section 214, the government had to prove that the target was an agent of a foreign power; now, they need only prove that the information is related to a terror or intelligence investigation. This extremely broad qualification of a FISA pen register/trap and trace order has led many groups to oppose it.³⁶

5. Sec. 215 - Access to records and other items under the Foreign Intelligence Surveillance Act (so-called “Library” Provision)

from being used in court.

³³PUB. L. NO. 107-296 § 225(d) (2002).

³⁴A pen register is used to record the phone numbers that are dialed from a target phone. A trap-and-trace is used to record the phone numbers of the incoming calls to a target phone.

³⁵Smith v. Maryland, 442 U.S. 735, 744 (1979) (using the phone involved a third party – the phone company – and therefore destroyed any expectation of privacy the target had).

³⁶See, for example, Electronic Privacy Information Center “The USA PATRIOT Act,” at www.epic.org/privacy/terrorism/usapatriot/.

Section 215 of the PATRIOT Act expanded the FBI's ability to obtain "any tangible thing" under the Foreign Intelligence Surveillance Act. Before the Act, the government could obtain records only from hotels/motels, storage facilities and car rental companies, and only if they pertain to "agents of a foreign power." Now, it can seek "any tangible thing" from any one at all as long as it is relevant to investigation.

Because the statute is so broad, the government could investigate consumers' reading and Internet habits and private records (such as credit card information, medical records, and employment histories). The Government will argue that it already had access to these sorts of business records in criminal investigations using grand jury subpoenas. However, the government's powers here are wholly different because there is no requirement of relevance to any criminal activity, as there is with grand jury investigations. A federal court found that section 215 implicates new constitutional problems: 1) it applies to *any* tangible thing, and is no longer limited merely to business records, and 2) it no longer requires "specific and articulable facts giving reason to believe that the person whom the records pertain is a foreign power or an agent of a foreign power," but only that "the records concerned are sought for an authorized investigation."³⁷ Thus, Section 215 can be used against *any* person even if the person is NOT suspected of wrongdoing or of any connection to a foreign power. Thus, there is virtually no limit to what these orders can get, and H.R. 3199 did nothing to improve this section.

We are concerned that these sections can be used to obtain very private information on purely innocent people. Whether it is library records, medical information or gun purchase records, the government should have access to them only when it can at clearly state why it needs them and why the person they pertain to is a terrorist or closely related to one. For example, the American Library Association has confirmed that the federal government has gone into a library and asked for a list of everyone who checked out a book on Osama bin Laden. In the wake of the horrific attack of September 11, it is obvious that many innocent people may go seeking information on why it happened. This search clearly gathered information on innocent people, who had the right to privacy in their reading habits. As a matter of fact, since 9/11, the American Library Association found that libraries have received over 200 formal and informal requests for materials, including 49 requests from federal officers, although it cannot be confirmed what authority (if any) was cited by the federal officers for obtaining this information.

Importantly, recipients of 215 orders are prohibited from disclosing that they received such an order to anyone but their attorneys. As a result, even though Section 215 allows for library reading habits to be surveilled and other private information to be seized, we have absolutely no way of knowing how often this authority has been used. And, recipients of 215 orders have no way of denouncing or challenging government overreach or abuse.

The only amendment on this issue that was accepted was one offered by Mr. Flake, though most of us feel that it is clear that this amendment does not solve the problem. Mr. Flake's amendment would allow 215 order recipients to consult their attorneys "with respect to" the order,

³⁷ACLU v. Dept. of Justice, 321 F.Supp.2d 24 (D.D.C. 2004) (citing section 215 in its current form, and its original form, Pub. L. No. 105-272 (1998)).

rather than “in response to.” Mr. Flake argues that this change would therefore allow a Section 215 order to consult an attorney about challenging the order. However, this small cosmetic change does not clearly give Section 215 recipients the right to challenge 215 orders. The right to consult an attorney does not directly lead to an ability to challenge the order in court, and this amendment does nothing to relieve the burden of the review mechanism created by H.R. 3199 or ensure that recipients will have enough information to successfully challenge problematic 215 orders.

In order to be meaningful, reform of section 215 must directly address its current infirmities. First, the standard for issuing a section 215 order must be reformed to require some individual suspicion that the records related to a spy, terrorist or other foreign agent, which may include the records of other (innocent) third parties where those records are clearly relevant to the activities of the subject under investigation. Second, a right to challenge must be a meaningful one. A meaningful right to challenge cannot be limited to the FISA court itself, which sits only in Washington, DC, operates in secret according to highly classified procedures, and ordinarily hears only from the government. The challenge must be based not only on whether the order is legal, but should allow for challenges on the basis that an order is unreasonable, oppressive, seeks privileged information. Finally, the hearing on the challenge should not be limited to a one-sided presentation of government attorneys based on secret evidence.

While a court has not ruled on the ultimate constitutional merits on section 215, it may well be found to violate the First Amendment because it (a) places a prior restraint on free speech and (b) monitors the free speech activities of its targets, and to violate the Fourth Amendment because it fails to provide notice to the target.³⁸ Minority members offered many amendments that would have protected the privacy of Americans; all were rejected on party line votes.³⁹

³⁸ACLU, *Surveillance Under the USA PATRIOT Act*, available at www.aclu.org/Safeandfree.

³⁹The Amendments were as follows:

- Mr. Nadler offered several amendments. He offered an amendment to limit 215 orders to “agents of a foreign power.” Mr. Nadler also offered an amendment on the gag order contained in Section 215. His amendment would still allow gag orders, but the government would first need to show that the gag order is necessary, rather than having gag orders be automatically applied to any Section 215 recipient. For example, a gag order could be obtained if the government showed disclosure would endanger someone’s life. Additionally, gag orders, if obtained, would have time limit of 180 days, with extensions available for up to 180 days. Mr. Nadler offered another amendment to the nondisclosure provision in Section 505. His amendment would allow disclosure to one’s attorney or to anyone to whom disclosure is necessary to comply, thus making Section 505 have the same nondisclosure provision as Section 215. In addition, the amendment limited the nondisclosure period to 90 days. The government may request extensions of up to 180 days if they can show a clear harm would result from disclosure.
- Mr. Schiff offered an amendment to require 215 orders to be made by the Director of the

On June 15 of this year, however, the House of Representatives voted to prevent funds from being spent on any 215 orders that would produce library circulation records, patron lists, book sales records or book customer records.⁴⁰ The Amendment to the SCJSS 2006 Appropriations bill passed 238-187.

6. Sec. 218 - Foreign intelligence information

This section says the FBI needs to aver that a “significant” purpose of a FISA order request is to gather foreign intelligence; before the Act, the FBI needed to show that obtaining foreign intelligence was the “primary purpose” of the order.

The Department has confirmed that “there was no *legal* impediment to introducing in a criminal prosecution evidence obtained through FISA before the USA PATRIOT Act.”⁴¹ Instead, the Department says these barriers resulted from “certain court decisions and administrative practice by the Department.”⁴² Impediments to sharing information between intelligence and law enforcement investigators were, therefore, almost entirely the result of administrative barriers, rather than statutory requirements that were eased by the USA PATRIOT Act. This was confirmed by the FISC Court of Review.⁴³ Because the Court held that there was no legal “wall” to begin with, there is no reason to believe that letting this section sunset would reimpose the “wall.”

Again, it is important to note that PATRIOT Act has already created permanent authorization for information sharing between the criminal and intelligence agencies: Section 905 requires the Attorney General to provide terror-related information that is uncovered in the

Federal Bureau of Investigation;

- Ms. Jackson Lee offered an amendment to exempt medical records from the 215 authority.
- Mr. Watt and Ms. Waters offered a compromise amendment which would provide for automatic gag orders for Section 215 order recipients but would limit the nondisclosure period to 180 days. The amendment also allowed the government to obtain an extension for up to 180 days if it could show the disclosure would result in a clear harm such as endangering someone’s life.

⁴⁰Amendment 280 to H.R. 2862, the Science, the Departments of State, Justice, and Commerce Appropriates Act for Fiscal Year 2006.

⁴¹*May 13, 2003 Letter* at 12 (emphasis in original).

⁴²*Id.* at 13.

⁴³In re: Sealed Case No. 02-001, 310 F.3d 717 (F.I.S.Ct. Rev. 2002).

process of a criminal investigation to the Director of National Intelligence, and section 504 allows FISA information to be given to the Criminal Division.⁴⁴

The Justice Department has provided a small number of anecdotal stories of how FISA obtained evidence helped prosecute standard crimes, although it refuses to give a full accounting about how this provision has gone above and beyond sharing already allowed under the law.⁴⁵ The Department also has admitted to sending over 4,500 FISA files to the Criminal Division, although it could not account for how many of those resulted in prosecutions.⁴⁶

The effect of letting the status quo continue is that evidence obtained from a FISA warrant under FISA's statutory "probable cause" standard can be given to non-terror criminal prosecutors who are governed by the higher standard of 4th Amendment probable cause. In fact, the lower standard FISA warrant can be sought for criminal prosecution purposes, as long as terrorism or national intelligence is some small (but "significant") part of the reason given. The long-standing policy of not letting criminal prosecutors direct intelligence investigations has been vitiated.

We are aware of at least one significant abuse of this new authority by the Department. The FBI used Section 218 to secretly break into Brandon Mayfield's home, download the contents of four computer drives, take DNA evidence and take 355 digital photographs. Though the FBI admits Mr. Mayfield is innocent, they still will not divulge the secret court order to him, or allow him to defend himself in court. Given that this search took place after the terrorist attack for which Mr. Mayfield was wrongly suspected, and not before, it is unclear how the search was for any reason but to find evidence incriminating Mr. Mayfield.

Strikingly, under Section 218, a notice is not provided to the target unless the evidence collected is used at trial. Thus, a target of a search may never learn that their house or business was searched and that evidence was seized. Furthermore, as seen in the Brandon Mayfield case, the government refuses to even let Mr. Mayfield see the order for the search that took place under Section 218, thus preventing him from being able to defend himself.⁴⁷

⁴⁴Kate Martin, "Why Sections 203 and 905 Should be Modified," American Bar Association's Patriot Debates, available at <http://www.patriotdebates.com/203-2#opening>.

⁴⁵Oversight answers, submitted by Jamie E. Brown, Acting Assistant Attorney General, May 13, 2003, on file with the House Judiciary Committee; Oversight answers, submitted by Daniel J. Bryant, Assistant Attorney General, July 26, 2002, on file with the House Judiciary Committee.

⁴⁶Oversight answers, submitted by Jamie E. Brown, Acting Assistant Attorney General, May 13, 2003, on file with the House Judiciary Committee.

⁴⁷Ms. Jackson Lee introduced an amendment to provide notice of a search or surveillance under Section 218 if the target is found to be a United States person who is not an agent of a foreign power. The amendment would mandate that notification be given no later than 180 days after it is determined that a U.S. person is not an agent of a foreign power, and this amendment covered all forms of surveillance and searches allowed under Section 218. However, this

7. Sec. 220 - Nationwide service of search warrants for electronic evidence

Section 220 allows a single court to issue a search warrant for electronic evidence that is valid nationally. According to the Department's May 13, 2003 letter, it has used this authority to track a fugitive and to track a hacker who stole trade secrets from a company and then extorted money from it.⁴⁸ Importantly, Section 220 deals *only* with *ordinary criminal investigations*. It is doubtful Congress meant to expand this power to even ordinary criminal investigations in its rush to pass the USA PATRIOT Act.

The biggest threat is that Section 220 allows law enforcement to “forum shop” by having a more lenient judge in a different jurisdiction that may have little or no nexus to the actual target issue a warrant. Thus, law enforcement officers can game the system to ensure they obtain the warrants they want. Furthermore, nationwide search warrants decrease the possibility of judicial review – a person served with a search warrant in New Jersey, but issued by a judge in California, is highly unlikely to travel to California to challenge even a facially unconstitutional warrant.⁴⁹

8. “Lone Wolves” as Agents of a Foreign Power

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 created the so-called “lone wolf” provision of FISA redefining the “agent of a foreign power” to include those who “engage in international terrorism or activities in preparation therefore.” In other words, agents of a foreign power no longer need to have any connection to a foreign power and instead can be persons working alone. This is limited to non-U.S. persons.⁵⁰ The effect of this change is to allow individuals to be targeted and surveilled under the FISA powers usually reserved for those who are clearly agents of a foreign power. Importantly, the powers used under FISA significantly relax many of the protections provided those targeted in criminal investigations.

reasonable amendment was rejected by the Majority.

⁴⁸*Id.* at 24.

⁴⁹Mr. Watt introduced an amendment to fix precisely this problem. Mr. Watt's amendment would allow the target of a search warrant to challenge it in the district where it is served, or, if the warrant is executed against a corporation, in any district where the corporation is incorporated. This reasonable amendment would ensure that people are able to assert their constitutional rights against unreasonable searches and seizures. However, the majority rejected this commonsense approach.

⁵⁰Although a leaked “PATRIOT II” bill authored by the Justice Department would have expanded the lone wolf provision to cover U.S. persons as well.

The purpose of FISA always has been espionage and terrorism surveillance against foreign governments, foreign groups, or individuals associated with such governments or groups. Section 6001 expanded FISA to include any single person who engages in a violent act that (1) transcends national boundaries and (2) is intended to coerce the government or a civilian population. The “foreign agent” probably cause that the “lone wolf” provision repealed was critical to the constitutionality of FISA surveillance and this change threatened to render the FISA statute unconstitutional. Importantly, when this provision passed the House Judiciary Committee in the markup of H.R. 10, it contained a rebuttable presumption that a FISA judge could invoke to approve surveillance based on a presumption that the suspect was acting for a foreign power, even though there was no evidence the target had ties to foreign governments or an international terrorist group. This was an important modification to the “lone wolf” power that would have given more discretion to the FISA court to use this power when the circumstances suggested the suspect was acting for a foreign power, but would not have allowed surveillance when it is clear there was no foreign power at all. That provision was removed before the bill went to the floor and passed as part of the intelligence bill.

B. Specific Concerns with Other Provisions of PATRIOT Act

Concerns have been expressed with several other provisions of the Act. Though a number of germane amendments were offered by Democratic Members at the markup, all were rejected by the Majority.

1. Sec. 213 - Authority for delaying notice of the execution of a warrant (so-called “sneak and peek” provision)

This section permits Federal agents to search a home and indefinitely delay notification of that search to a suspect if a court finds ‘reasonable cause’ that immediate notification could have an adverse result (also known as “sneak and peek” searches).⁵¹ With court permission, the government also can use this authority to seize property and delay notification to the suspect of that seizure.

The majority argues that these search warrants were available in many circuits before the PATRIOT Act. But as CRS explains, section 213 breaks new ground by answering questions the courts had not yet confronted: “*The Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C.*”⁵² Before, delayed notice was reserved for 1) exigent circumstances and 2) when notification of a search/seizure of stored communications would interfere with an investigation, and many courts had yet to rule on the government’s

⁵¹USA PATRIOT Act § 213.

⁵²Charles Doyle, *The PATRIOT ACT: A Legal Analysis*, CRS, April 15, 2002 at 65.

contention that delayed notice searches were appropriate in far broader circumstances. This latter exception was based on the courts' repeated finding that stored communications did not have Fourth Amendment protections, and therefore notice was not required. The problem with section 213 is that it extends this "investigative interference" exception to *all criminal activity*, where the Fourth Amendment is clearly implicated and where many court had not yet ruled on the appropriate standards.

Additionally, two other concerns have been raised: First, the 5th and final "catch-all provision" that delayed notification justification is necessary because otherwise the investigation will be "seriously jeopardized" allows the government to delay notification in almost any instance; in fact, in 92 out of 108 cases, this provision was used to justify delayed notification. Second, Section 213 as currently written allows law enforcement to indefinitely delay notification.

In its May 13, 2003 letter to the Committee, the Department indicated that it has used this authority 47 times.⁵³ On April 5, 2005, in his testimony before the Senate, the Attorney General upped the number to 155. Delays in notification of sneak and peek have been for unspecified durations in many cases and as long as 180 days in others; in fact, the longest delay has been for *406 days*.⁵⁴ The government has sought to delay notification of sneak and peeks 248 times and *every single request has been granted*.⁵⁵

It is important to note that by and large, this provision is not being used in terrorism cases. In a July 5, 2005 letter to Rep. Bobby Scott, DOJ said Section 213 had been used 153 times as of January 31, 2005; only eighteen (11.8%) uses involved terrorism investigations. Thus, nearly 90% of "sneak and peek" warrants were used in ordinary criminal investigations.⁵⁶

We have learned of the following additional concerns:

- Abuse of delayed notice warrants: In April 2005, DOJ said 90-day delays are common, and that delays in notification have lasted for as long as 180 days. The DOJ is getting more strident, as in 2003, the DOJ said its longest delay was 90 days.
- Abuse of extensions: In May 2003, DOJ reported it had asked for 248 delay notification extensions, including multiple extension requests for a single warrant, and that the courts had granted EVERY SINGLE REQUEST, the longest being 406 days.

⁵³May 13, 2003 Letter at 8.

⁵⁴April 4, 2005 Letter.

⁵⁵May 13, 2003 Letter. at 11.

⁵⁶97 warrants were used in drug investigations and 38 were used in other criminal investigations. Letter on file with the House Judiciary Committee.

- Abuse of “catch-all provision”: In an April 4, 2005 letter to Chairman Sensenbrenner, DOJ reports 92 out of 108 (85%) sneak and peek warrants were justified because notification would “seriously jeopardize the investigation” and in 28 instances that was the sole ground for delaying notice.

Significantly, this committee never approved Section 213 and its expansive invasions into a person’s privacy. It was slipped into the final bill by the Rules Committee, and was never sanctioned by the Committee of jurisdiction. Concerns about this authority are widespread; in fact, Rep. Butch Otter) successfully offered an amendment to the Commerce-Justice-State appropriations bill, H.R. 2799, on the House floor that would have prevented delay of notification entirely

2. Sec. 216 - Extension of Trap and Trace/ Pen Register Orders

Capturing internet and email data is fundamentally different than capturing phone data. While the majority argues that this section does not capture “content,” there is nothing in this section that describes what content is. So, for example, the statute is unclear whether the Justice Department can capture just www.aclu.org, or www.aclu.org/newmember/registration, the latter being more than just an address, and clearly indicating the content. There is also concern that as a technical matter, it is impossible to separate out an email address from the content being sent either from it or to it.⁵⁷

3. Section 411, Revocation of Visas

Section 411 of the PATRIOT Act allows the government to revoke visas. It expanded the reasons for inadmissibility to include association with a designated terror group, whether the person actually knew that the people or group he was associating were linked to terrorism. We are concerned that this section applies retroactively, and has been abused against peaceful alien visitors years after their so-called association with terrorists:

For example, Professor Tariq Ramadan’s visa to teach at Notre Dame was revoked upon charges that he supported terrorism; Notre Dame, Scotland Yard, and Swiss intelligence all agree the charges were groundless.⁵⁸

⁵⁷Nancy Chang, *The USA PATRIOT Act: What’s So Patriotic About Trampling on the Bill of Rights?*, Center for Constitutional Rights, November 2001.

⁵⁸Deborah Sontag, “Mystery of the Islamic Scholar Who was Barred by the U.S.,” *New York Times*, October 6, 2004, A1.

Similarly, Nicaraguan Professor Dora Maria Tellez was denied her visa to teach at Harvard due to her association with the Sandinistas in the 1980s, where she helped to overthrow a brutal dictator whom the U.S. supported.⁵⁹

4. Sec. 412 - Detention of Immigrants

During the Judiciary Committee's consideration of the PATRIOT Act in 2001, intense negotiations ensued on the issue of detaining non-citizens for extended periods of time. The result was Section 412 of the PATRIOT Act, which set up a system by which the Attorney General could detain any alien he certified as 1) deportable or inadmissible on grounds of terrorism, espionage, sabotage or sedition or 2) a danger to national security, as long as he initiated removal proceedings or criminal charges within 7 days of detention. After initiation of removal or charges, the certified alien could be held for up to 6 months at a time. This is a power that we have been assured verbally has never been used either by DOJ or by the Department of Homeland Security after it was transferred there by the Homeland Security Act. We cannot be certain about this, of course, because we have not received 6 out of the 7 reports required to detail how and whether Section 412 has been used.

The authority to hold someone for up to 6 months at a time on the word of the Attorney General is an extraordinary power. Congress measured this extraordinary power with the mandatory reporting requirement. However, Attorney General Ashcroft's Department of Justice was able to circumvent the spirit of the requirement-- to report on how many people were being held for long periods without charge-- by avoiding use of Section 412 in favor of a rule the Attorney General published on September 20, 2001, before the PATRIOT Act was enacted. Prior to September 11, 2001, the INS was required to make charging determinations within 24 hours of arrest. The rule put in place on September 20, 2001, extended that charging period to 48 hours or "an additional reasonable period of time" in "emergency or other extraordinary circumstances." It is under this rule that the extended detentions without charge outlined in the DOJ Inspector General's report took place.

Since it has been left not only unused but intentionally circumvented, it is enticing to propose repeal of Section 412. Instead, Section 201 of the Civil Liberties Restoration Act leaves Section 412 of the PATRIOT Act in place. However, for those detained who the AG chooses not to certify, DHS would be required to serve a Notice to Appear - the charging document that begins an immigration proceeding - on every non-citizen within 48 hours of his arrest or detention. Any non-citizen held for more than 48 hours would have to be brought before an immigration judge within 72 hours of the arrest or detention. The provision recognizes an exemption for non-citizens who are "certified" by the Attorney General to have engaged in espionage or a terrorist offense, thus preserving PATRIOT Section 412.

⁵⁹Associated Press, "ACLU Requests Documents on Visas," *New York Times*, March 17, 2005, A20.

5. Sec. 505 - Miscellaneous national security authorities⁶⁰ – “National Security Letters”

We are concerned with section 505 of the PATRIOT Act, which grants law enforcement sweeping authority to issue national security letters (NSLs). National security letters are a form of “administrative subpoena” for personal records which compel the holder of the records to turn them over to the government. NSLs grant the Justice Department access to telephone and internet records, financial documents, and consumer records without any sort of judicial oversight. It is important to note that subsequent legislation redefined “financial institutions” subject to NSLs to include travel agencies, pawn brokers, casinos and car dealers, among other things.⁶¹ In fact, it is hard to imagine what type of record wouldn’t be covered under these new definitions.

It is speculated that DOJ has avoided using Section 215 because the NSL’s represent a far more extensive section of the PATRIOT Act that is permanently at its disposal. Prior to the PATRIOT Act, NSLs could only be used to get records when there was “reason to believe” someone was an agent of a foreign power. Now they are issued on the standard of relevancy.⁶²

The Justice Department has never accounted for their use. However, in response to a FOIA request, the DOJ released a six page list of NSLs delivered as of January 2003. The actual recipients have been redacted, but it confirms that the Justice Department has used this new power hundreds of times since the PATRIOT Act was signed into law.

The Justice Department argues that they have already have the ability to summon records through a) administrative subpoenas and b) grand jury subpoenas. And in recent hearings, the director of the FBI actually requested more NSL authority. However, NSLs are far more intrusive than the Justice Department is representing: First, administrative subpoenas are limited to specific categories of cases. Second, grand jury subpoenas can be challenged by the judge overseeing the grand jury whereas challenges to NSLs require a whole separate action in federal court, an action that is highly unlikely as discussed below.

⁶⁰Republican Senator Pat Roberts has authored a bill which seeks to extend the PATRIOT Act, and would give the FBI new powers to issue administrative subpoenas in national security investigations. However, unlike 505 NSLs, these would be available for any type of record – it is not limited to phone, internet, credit or financial records. Instead, it has the breadth of the infamous Section 215 request for records, and the lack of judicial oversight of the National Security Letter. This new combination will give the FBI whole new unchecked authority. In fact, as written, the “records” subject to seizure are not even limited to businesses. There is nothing in the draft legislation that would prevent the FBI to request a private individual to turn over documents in his or her possession. A copy of the bill is available at <http://www.eff.org/patriot/sunset/sunset_bill_draft_20050517.pdf>.

⁶¹12 U.S.C.A. § 3414(d) (2005).

⁶²Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments, CRS, Apr. 15, 2005, at 22.

The Southern District of New York has already struck down the telephone and toll NSL statute because it violates the Fourth Amendment by completely barring the recipient's access to the courts. The court found that is "improbable," given the language of the NSL, that a reasonable person would think they could not comply or would know that they have a right to contest the NSL.⁶³ The court also found the statute violated the First Amendment by placing a prior restraint on speech through the non-disclosure provision.⁶⁴

6. Sec. 802 - Definition of domestic terrorism.

Section 802 of the USA Patriot Act created a category of crime called "domestic terrorism," which makes criminal any activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United States" when the actor intends to "influence the policy of a government by intimidation or coercion." Previously, there was no analogous provision in statutory law. The overly broad nature of this provision is reason for concern when examined in light of its potential application to and effect on peaceful protests. The broad language of section 802 could potentially be used to punish participants of such peaceful demonstrations as a Greenpeace rally or the Million Man March, both of which fall squarely within the First Amendment, but which could also be the scene of an accidental injury and subsequent prosecution under this provision.

7. Sec. 805 - Material support for terrorism

Section 805 of the Act makes it a federal crime to provide material support for terrorist activities. In general, "material support" is defined as financial resources, expert advice or assistance, assets, housing, personnel, training, or communications equipment.⁶⁵ Section 805 added the terms "expert advice and assistance" to this list. This provision raises numerous, serious concerns.

The material support statute has repeatedly been found to be unconstitutional. On December 3, 2003, the U.S. Court of Appeals for the Ninth Circuit ruled that the portions of the law prohibiting 'personnel' and 'training' from being provided were void for vagueness.⁶⁶ This is because the term 'personnel' could criminalize persons who merely write or publish pamphlets for a designated foreign terrorist organization; similarly, the term 'training' could criminalize a person who instructs a foreign terrorist organization on how to petition the United Nations.

⁶³Doe v. Ashcroft, 334 F.Supp.2d 471, 501 (S.D.N.Y. 2004).

⁶⁴Mr. Nadler offered an amendments to section 505, including one to require regular reports on its use; one moderating the indefinite gag order on Section 505 requests; and one allowing a 505 recipient to challenge the order in court. Ms. Waters offered an amendment to exempt medical records from Section 505.

⁶⁵18 U.S.C. § 2339A.

⁶⁶Humanitarian Law Project v. Ashcroft, 352 F.3d 382 (9th Cir. 2003).

The specific amendment added by Section 805 was enjoined in a limited case by a lower court for similar reasons. In 2004, the U.S. District Court for the Central District of California held that the prohibition on providing ‘expert advice and assistance’ was vague because it could encompass the plaintiff’s provision of medical and legal advice to a terrorist organization.⁶⁷ The court enjoined the government from enforcing this provision against the plaintiffs.⁶⁸

In July of 2003, a federal District Court judge in New York threw out charges of material support for terrorism against lawyer Lynne Stewart who was charged with funneling messages from her imprisoned client, Sheik Omar Abdel Rahman.⁶⁹ She was charged with violating the prohibition against providing communications equipment and personnel. Judge Koeltl ruled the law was unconstitutionally vague, especially the personnel provision, such that Ms. Stewart could not have known what was prohibited. Furthermore, he held “the government fails to explain how a lawyer, acting as an agent of [an alleged foreign terrorist] client....could avoid being subject to criminal prosecution as a ‘quasi-employee.’”⁷⁰

Finally, in June 2004, a federal jury in Idaho acquitted University of Idaho graduate student Sami Al-Hussayen of all charges of material support. The government charged Al-Hussayen, a citizen of Saudi Arabia, of providing material support for his operating and maintaining Internet sites for the Islamic Assembly of North America and for funneling donations to the group. Importantly, this group was *not* on the list of terrorist groups, and the links Al-Hussayen posted were also available on the government’s own website. Significantly, in each instance, the courts found COMPLETELY LEGAL ACTIVITIES would violate Section 805.

C. General Concerns with PATRIOT Act Reauthorization

Beyond the specific concerns outlined above, we are also concerned with the Committee’s general failure to provide a general sunset provision, or to provide for any sort of additional general oversight power by the Congress with respect to the Justice Department regarding the PATRIOT Act.

1. Lack of A General Sunset

⁶⁷Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004).

⁶⁸The court refused to find the prohibition to be overbroad and thus declined to enjoin its enforcement entirely.

⁶⁹Opinion and order re: USA v. Sattar, al-Sirri, Stewart and Yousry (J.G. Koeltl, 02CR00395).

⁷⁰Id, at p. 18.

If we have learned one thing over the last four years, it is that the Justice Department feels it is above accountability to this Congress in relation to the so called “war on terror,” and that we, its Committee of jurisdiction, will not get answers to our questions unless the Justice Department is compelled to come before us and justify its use of the more dangerous provisions of the PATRIOT Act. However, our reasonable attempts to retain our oversight through periodic sunsets were thwarted completely on party-line votes:

- Mr. Scott and Mr. Nadler offered second degree amendments that would have put a four year and six year sunset on Section 206, the John Doe Roving Wiretap, and Section 215, Intelligence orders for any tangible thing, respectively They were rejected in favor of a ten-year amendment that is so far in the future, its review will be almost meaningless.
- Mr. Schiff offered an amendment to sunset the Lone Wolf provision, which was originally passed in the Intelligence Reform bill only 8 months ago. We believe making this provision permanent so soon and without any information on its use is unwise and we therefore supported Mr. Schiff’s proposal to review this broad new provision in three years. This too was rejected in favor of permanency.
- Mr. Nadler and Ms. Lofgren, in the spirit of comity, offered an amendment to set all of the expiring provisions on a ten year sunset cycle. It was flatly rejected by the majority.

Considering that many of the Majority’s members spoke in favor of sunsets throughout our 12 hearings, we were disappointed that they were swayed into objecting to even the most reasonable of amendments. That all of these new powers have been made largely permanent contributed to our collective decision not to support this bill.

2. Lack of General Oversight

In addition, there is a need for additional congressional oversight of the PATRIOT Act. There are numerous reporting requirements under the Electronic Communications Privacy Act, the Foreign Intelligence Surveillance Act and National Security Letters. However, many of those are classified, and therefore cannot even be publicly discussed. These classified accounts effectively protect the Administration from having to answer for the use of the authorities in any way that they can be held accountable for--and they have been exploited by the Majority to at once claim that we have oversight capabilities, yet no abuses are known.

Moreover, the Administration claims that any public accounting would put our nation at risk of further terror attacks. However, we have heard no logical arguments about why simply reporting the number of times an authority has been used puts anyone at risk. Knowing that John Doe Roving Wiretaps have been used 49 times, for example, does nothing to further terrorist causes. Knowing that nearly 90 percent of “sneak and peek” warrant were used in non-terrorist cases does not put us at risk of another attack.

Besides, this argument is completely undercut by the Administration's selective declassification of numbers and examples when it is politically convenient for it to do so. We have asked for numbers and examples for years and have been repeatedly told that the information was classified. Then, in April of this year, when it became clear that many members of this House and in the Senate would not be acquiesced by hollow reassurance, numbers and anecdotes suddenly became available.

However, anecdotes are not oversight. Non-terror examples of how a provision has been used has no bearing on whether they should be renewed, and as this bill has it, renewed as-is and without any new protections. We are sure the Justice Department can find one or two feel-good stories for each provision of the U.S. code, but that is not the point. Oversight is about deciding whether, *on the whole and after examining the totality of the circumstances*, a provision's usefulness outweighs the privacy and other rights it infringes upon. Regrettably, the Justice Department has not given us enough information to make that determination.

In addition, we find it hard to believe that the number of times a section of the PATRIOT Act has been used suddenly became no longer a security threat earlier this year without any change in the law or our standing in the fight against terror. Clearly, these provisions were wrongly classified from the beginning if they could be released for political reasons in the Administration's efforts to reauthorize the PATRIOT Act. This sort of bad faith on the Administration's part clearly calls for statutorily mandated reporting requirements.

H.R. 3199 also does nothing to address the myriad of concerns related to the unwarranted amount of secrecy that surrounds the original PATRIOT Act. The PATRIOT Act keeps secret, even from Congress, how many of the powers are being used, prohibits recipients of search orders from disclosing they even received such an order, including to their attorney, and allows the government to secretly search people's homes and seize their property. The Minority attempted to remedy many of these egregious secrecy provisions, but was thwarted in all of its attempts to provide reasonable measures to allow for more light to be shed on the government's actions.⁷¹

The PATRIOT Act allows the government to keep secret, even from Congress, how many of these authorities are being used. While there are reporting requirements the Department of Justice must adhere to, as discussed in more detail above, they have on numerous occasions

⁷¹For example, Mr. Berman offered an amendment that would have required reporting on data-mining practices, which to date, this Congress only finds out about through news reports after personal information is leaked or otherwise abused. He withdrew that amendment after it became clear it would not pass. Mr. Conyers offered an amendment that would have required reporting on the disclosure of electronic communications, a reporting requirement that was included in the Judiciary passed bill in 2001 and supported unanimously, but was later stripped by the Rules Committee without explanation. Mr. Conyers' amendment failed. Similarly, Mr. Schiff offered an amendment that would have required public reporting on the use of National Security Letters and the Sneak and Peek authority, two provisions that the Justice Department has been secretive about. That amendment failed on party lines as well.

either refused to provide they necessary information or have given the Congress only useless information. For example, it was only after a FOIA request by the ACLU was upheld that the DOJ released any information about its use of Section 505 National Security Letters. However, what the DOJ released was a six-page document *with every single line blacked out*. Thus, while we know the DOJ is using this authority often, that is all we know, and further attempts to gain information have been thwarted. Similar refusals to provide even descriptive statistics on the use of many provisions are, unfortunately, quite common.

As an additional safeguard, Ms. Lofgren introduced an amendment which would ensure that a person's right to challenge their detention is not undermined by any Act of Congress. Her amendment specified that no Act of Congress passed since 9/11, including the PATRIOT Act, shall be construed to suspend the right to apply for a writ of habeas corpus. It would simply have protected a right that was deemed so important that it was included in the U.S. Constitution. However, after initially passing on a voice vote, the Majority moved to reconsider, and the amendment was overturned on a straight party-line vote.

IV. The Legislation Does Nothing to Address the Many Unilateral Abuses of The Administration in the War Against Terror

Since we were given the ability to review the PATRIOT Act, we feel it also provided an opportunity to review all of the U.S.'s actions in the broader War on Terror as it is impossible to discuss the PATRIOT Act without referencing other administrative actions that have occurred since 9/11.

Unfortunately, the majority flatly rejected our attempts to review other actions by the United States government, including unilateral actions that were taken so as to circumvent even small protections that existed in the USA PATRIOT Act. It is clear that numerous abuses have occurred and we fear the majority's unwillingness to address them will only lead to further abuses in the years to come.

A. Material witness statute

An undisclosed number of the individuals detained after September 11, 2001, have been arrested on material witness warrants pursuant to the Department's authority under 18 U.S.C. § 3144. Although the Department refuses to reveal the exact number of individuals who have been held as such witnesses, a November 2002 *Washington Post* article identified 44 material witnesses and asserts that almost half of them never testified before a grand jury.⁷² In its May 13 letter to the Committee, the Department put the number of material witnesses detained as of January 2003 in conjunction with September 11 to be fewer than 50.⁷³ The Justice Department has subsequently refused to update that number.

⁷²Steven Fainaru & Margot Williams, *Material Witness Law has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1.

⁷³May 13 Letter at 50.

The Department has refused to provide any further information on those being held as material witnesses, claiming that it cannot do so because of the grand jury secrecy rules and sealing orders that have been entered by the courts, and has refused to release the orders themselves. Press reports, however, indicate that many individuals have been held as material witnesses for significant periods of time prior to testifying before grand juries, if they testified at all.

This implies the government is using the material witness statute not to secure testimony, but to secure the detention of individuals it cannot connect with terrorism or other crimes. It appears the department is holding detainees despite the fact it could secure their testimony by deposition, which the statute provides for.⁷⁴ It also appears from news articles that at least two individuals, Mohammed El-Yacoubi and Abdulmuhssin El-Yacoubi, were held as material witnesses in connection with a grand jury investigation in which they were the targets of the investigation.⁷⁵

The Inspector General has agree to investigate how the statute was wrongly applied to Brandon Mayfield, arrested for bombing a train in Madrid, and what role his Muslim faith played in the FBI's decision to hold him as a material witness.

The material witness statue was scheduled to be part of a bipartisan oversight plan crafted in September of 2003. After several months of effort, committee staff were unable to convince their Republican counterparts that action was necessary. While we had drafted an extensive bipartisan letter inquiring about all the policies and statistics about the use of this statute, just before delivery the majority refused to sign the letter and claimed it was no longer concerned about the statute because the warrants were signed by a judge and therefore couldn't possibly be abused.

B. Torture

We now know that the Justice Department led the effort to legally excuse acts of torture. The abuse of Iraqi and other prisoners was not just the work of a few rogue soldiers, but the obvious consequence of the Justice Department declaring that the President and his military are accountable to no one. A number of legal opinions generated by the Justice Department were either leaked or formally released by the President last year. They include:

- January 22, 2002 Department of Justice memorandum regarding "Application of Treaties and Laws to al Qaeda and Taliban Detainees"
- February 1, 2002 Attorney General Letter to President regarding status of Taliban detainees;

⁷⁴See, e.g., *United States v. Awadallah*, 2002 U.S. Dist. LEXIS 1430, 01 CR 1026 (SAS), at *96-97 (S.D.N.Y. Jan. 31, 2002).

⁷⁵Jerry Seper, *Israel Bars Entry to Men INS Cleared*, WASH. TIMES, Apr. 1, 2002; Chuck Raasch, *Virginia City is Newest Front in Terror War*, INDIANAPOLIS STAR, Mar. 31, 2002.

- February 7, 2002 Department of Justice memorandum regarding “Status of Taliban forces Under Article 4 of the Third Geneva Convention of 1949”
- February 26, 2002 Department of Justice memorandum regarding “Potential Legal Constraints applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan”
- August 1, 2002 Department of Justice letter regarding application of Convention Against Torture and Rome Statute on the International Criminal Court
- August 1, 2002 Department of Justice memorandum regarding “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A.”

In tandem, these documents argued that 1) the Geneva Conventions and other international laws banning torture did not apply to our detainees, 2) if they did, they could be construed so narrowly that events such as those at Abu Ghraib are not legally “torture,” and 3) even if those acts could be defined as “torture,” the Administration and its military are not liable under the President’s Commander-in-chief authority and other defenses. On December 30, 2004, the Justice Department released a new memo that improved upon its previous rulings: it redefined what “torture” was under the law to no longer require excruciating and agonizing pain equivalent to organ failure or death, and reversed its previous position that those committing torture could be shielded from criminal liability by good intentions.⁷⁶ It did not however, explicitly revoke the previous memos’ holding that the President’s Commander-in-chief authority was not bound by any American or international law.

It is within the Justice Department’s discretion whether to prosecute contractors who are implicated in the scandal, and to date, has indicted one person for criminal assault for killing a detainee within his custody.⁷⁷ And while “the Justice Department has received a number of criminal referrals involving allegations of prisoner mistreatment by CIA operatives,” it has not brought any charges.⁷⁸ Finally, the Justice Department does have the authority to charge members of the military for their criminal acts over seas if either a) they are no long in the military, or b) committed the acts with non-military accomplices.⁷⁹ This authority may be appropriate to exercise in the instances where the military is refusing to charge its members even in contradiction with the recommendations of its own investigators. For example, 17 soldiers

⁷⁶The new memo is available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

⁷⁷U.S. v. Passaro, No. 04-CR-211-1, (E.D.N.C.), indictment available at <http://news.findlaw.com/cnn/docs/torture/uspassaro61704ind.html>.

⁷⁸Richard B. Schmitt, *U.S. May Still Charge “Enemy Combatant, Gonzales Says*, L.A. TIMES, Mar. 8, 2005.

⁷⁹Military Extraterritorial Jurisdiction Act, Pub. L. No. 106–523 (Nov. 22, 2000).

were recently found to be responsible for the death of three detainees, yet their commanders will not press charges; only one was discharged and one was given a letter of reprimand.⁸⁰

C. Rendition

Maher Arar, was detained by the INS during a layover at JFK airport in New York. After authorities were unable to obtain any intelligence from Arar or establish a connection between him and Al Qaeda, Deputy Attorney General Larry Thompson ordered him deported to Syria—despite his professed Canadian citizenship and his request return to Canada. Arar was jailed and tortured in Syria for ten months before his release in October 2003. No one was ever able to connect him in any way to terrorism or to Al Qaeda.

Even if Arar was correctly labeled a threat to national security, he was free to request deportation to Canada, and was entitled to be sent somewhere he would not be harmed.⁸¹ The Attorney General’s Office argues that removing Arar to Canada would have been prejudicial to national security, and that it was justified in returning Arar to Syria under the prevailing statute.⁸² However, even if the Attorney General had found reason to deny Arar deportation to Canada, he might have sent him to any country in the world. The law provides that if all other statutorily defined options are inappropriate, the Justice Department may send an alien to any country willing to receive him.⁸³ There may have been a tactical advantage in turning Arar over to the Syrian government, but there was no legal requirement to do so.

Deportation to Syria when imprisonment and torture are imminent stands in violation of both U.S. and international law. The International Convention Against Torture prohibits the

⁸⁰Douglas Jehl, *Pentagon Will Not Try 17 G.I.’s Implicated in Prisoners’ Deaths*, NY TIMES, Mar. 26, 2005.

⁸¹Current law allows for an expedited removal of foreign nationals on “security and related grounds,” for A) generally subversive activity, B) terrorist activity or C) generally threatening foreign policy (8 U.S.C. § 1182(a)(3)). On a finding of one of the above three grounds by an immigration court, the Attorney General reviews the decision. If he approves and finds that “disclosure of the information would be prejudicial to the public interest, safety or security,” he can order immediate removal without hearing or inquiry (8 U.S.C. § 1225(c)). The Attorney General is empowered to disregard such a request only in narrowly defined, technical circumstances. 8 U.S.C. § 1231(b)(2)(C) provides that the Attorney General may deny an alien deportation to a designated country if he finds: (i) that the alien failed to designate a country promptly, (ii) that the designated country fails to respond to a deportation request within thirty days, (iii) that the designated country is not willing to accept the alien, or, (iv) that removal to the designated country is prejudicial to the United States.

⁸²8 U.S.C. § 1231(b)(2)(D) (If the Attorney General does not deport an alien to the country of his choice, the alien is to be returned to a nation in which he is a national or citizen, given the nation accepts).

⁸³8 U.S.C. §1231(b)(2)(E)(vii).

removal of a person to another state “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁸⁴ Federal law affirms the convention and condemns extradition to a country in which “there are substantial grounds for believing the person would be in danger of being subjected to torture.”⁸⁵ The State Department recognizes the Syrian government’s use of torture tactics—including electrical shock, removal of fingernails, and objects forced into the rectum.⁸⁶

Arar’s case is not unique. Estimates puts the number of renditions at over a hundred, although their secrecy prevents us from knowing the extent of their use. The Administration keeps saying it does not use torture and does not render suspects, yet lay employees admit that it was a common place activity. Until three months ago, Michael Scheuer was a senior intelligence analyst for the CIA; he has now come forward to explain that,

They don't have the same legal system we have. But we know that going into it ...And so the idea that we're gonna suddenly throw our hands up like Claude Raines in 'Casablanca' and say, 'I'm shocked that justice in Egypt isn't like it is in Milwaukee,' there's a certain disingenuousness to that.⁸⁷

A former Justice Department lawyer even admits that, “The Convention only applies when you know a suspect is more likely than not to be tortured, but what if you kind of know? That’s not enough. So there are ways to get around it.”⁸⁸ In fact, the Convention says nothing about a legal standard of “more likely than not” – the correct standard is “substantial grounds.” The “more likely than not” standard is a highly constrained interpretation of the Convention that obviously fails to honor its spirit (and appears intended to do just that). And a recently retired FBI agent has said, ““They loved that these guys would just disappear off the books, and never be heard of again...They were proud of it.””⁸⁹

D. Enemy Combatants

⁸⁴International Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 3.

⁸⁵ 8 C.F.R. § 235.8. *See also*, Pub. L. 105-277, Div. G, Title XXII, Section 2242. There are exceptions to the policy (8 U.S.C. § 1231(b)(3)(B)), but the Justice Department would have had to demonstrate reasonable grounds to believe Arar is a credible danger to national security.

⁸⁶Country Reports on Human Rights Practices, 2002, available at: <http://www.state.gov>.

⁸⁷*CIA Flying Suspects to Torture?*, CBSNews.com, Mar. 6, 2005.

⁸⁸Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 8, 2005.

⁸⁹*Id.*

The Justice Department is authorized to give legal advice in response to a request from the President, federal agencies, and military departments.⁹⁰ Under this authority, the Justice Department laid the legal grounds for the indefinite and illegal detention of enemy combatants by advising that al Qaeda and Taliban forces were not entitled to protection under the Geneva Conventions. The Department also determined that individuals arrested in the United States both citizens and non-citizens, were not entitled to the protection of the sixth amendment and if certified as enemy combatants, could be held by the military incommunicado without access to lawyers or the court for so long as the government deemed it necessary. Instead of meeting the procedures required under the Constitution and our international agreements, the Administration has constructed a farce of process and fairness.

Most importantly, the Office of Legal Counsel has advised that these detainees fall somewhere between civilians and soldiers and therefore are devoid of the protections that apply to either.⁹¹ This is in clear conflict with 50 years of legal precedent that has held that a person “cannot fall outside of the law.”⁹² Instead of simply holding individualized hearings about whether each detainee is a prisoner of war or just a “protected person” – as required by the Geneva Conventions – and then providing the appropriate judicial procedures, the Defense Department now holds newly imagined Combatant Status Review Tribunals (CSRT) and Annual Review Board procedures that don’t meet the international obligations for the treatment of either group.⁹³

A federal court has recently ruled that at least one of these procedures—the CSRT – violates the detainees’ Fifth Amendment rights to due process.⁹⁴ The court found particularly troubling that the detainee Another federal court has found that the military commissions are also in violation of the law, because they do not meet Geneva Convention requirements.⁹⁵ It held that until the detainees are adjudicated either POW’s or protected persons, they must be afforded the rights under the

Afraid that Administration will deport more of these detainees to countries where they may be tortured, attorneys have secured a preliminary injunction keeping the government from

⁹⁰28 U.S.C. §§ 511-513 (2004).

⁹¹See supra, discussion of memo advising the Administration on the laws of war.

⁹²International Committee of the Red Cross, “Commentary: IV Geneva Convention Relative to the Protection of Civilian Person in Time of War,” (Geneva: 1958).

⁹³See letter from Congressman John Conyers, Jr. to The Honorable Gordon R. England, regarding the legality of detention at Guantanamo, November 9, 2004, on file with the House Judiciary Committee Democratic Staff.

⁹⁴In re Guantanamo Cases, 355 F.Supp.2d 443 (D.D.C.) (finding that the deck was so stacked against the detainees that the hearings were near meaningless).

⁹⁵Hamdan v. Rumsfeld, 344 F.Supp.2d 152 (D.D.C. 2004).

removing Guantanamo detainees without giving the detainee's attorney at least 30-day notice of its intent to release or transfer the detainee.⁹⁶ This is in light of the fact that 200 detainees have already been transferred overseas, 65 of whom on the condition that they be further detained by the country of receipt.⁹⁷

E. Selective Enforcement of Immigration Provisions/ Racial Profiling

The Justice Department's racial profiling guidelines exempt terrorism investigations from the general ban on the use of these tactics. While the Department widely used racial profiling – the interview program of middle eastern men who came into the country before 9/11, the interview of 50,000 Iraqis, the FBI's counting of mosques and Muslims, and the registration of over 83,000 middle eastern men under NSEERS – we have received no useful intelligence information and have prosecuted only a handful of people for terrorism related charges. In fact, the GAO found that the information gathered from such programs sits around in federal databases without any specific plans for use.⁹⁸ This has led to former Attorney General John Ashcroft to admit that racial profiling doesn't work. During a press conference, he admitted that Al Qaeda is using Europeans, Africans and South Asians. In fact, they recruit from "any nationality inside target countries." However, the Department continues to profile and selectively enforce laws on the basis of race, nationality and religion.

F. Excessive Collection of Personal Data

Since the passage of the PATRIOT Act, the press has reported massive FBI collections of personal information about individuals suspected of no wrongdoing. It is unclear what precise authority the FBI relied upon to collect this data, or the extent to which investigative powers granted by the PATRIOT Act were used by the bureau to amass this information.

For example, in December 2003, the press reported that "[t]he FBI has been checking hotel and airline records against terrorist watch lists in advance of a New Year's Eve celebration expected to draw 300,000 to Las Vegas."⁹⁹ Though FBI conceded the personal records had not borne out a particular threat, a FBI spokesman was quoted as saying, "[t]he information we're getting, the names, are being run by all the different watch lists[.] People can take comfort that anything and everything that can be done is being done."¹⁰⁰ An article in the Las Vegas Review-Journal suggests that the information may have been collected pursuant to Section 505

⁹⁶Abdah v. Bush, 2005 WL 711814 (D.D.C. Mar. 29, 2005).

⁹⁷Abdah v. Bush, 2005 WL 589812 (D.D.C. Mar. 12, 2005).

⁹⁸Justice Department's Project to Interview Aliens After September 11, 2001, GAO, GAO-03-459, April 2003 at 6.

⁹⁹Ken Ritter, Associated Press, *In Vegas Matching Airline, Hotel Records with Terror Lists*, AP, Dec. 31, 2003.

¹⁰⁰*Id.*

of the PATRIOT Act: "[c]asino operators said they turned over the names and other guest information on an estimated 270,000 visitors after a meeting with FBI officials and after receiving national security letters requiring them to yield the information."¹⁰¹

Likewise, last spring the New York Times reported that "[i]n the days after the Sept. 11 terrorist attacks in 2001, the nation's largest airlines, including American, United and Northwest, turned over millions of passenger records to the Federal Bureau of Investigation[.]"¹⁰² An FBI official told the newspaper that the agency requested the data "under the bureau's general legal authority to investigate crimes and that the requests were accompanied by subpoena, not because that was required by law or because the bureau expected resistance from the airlines, but as a 'course of business' to ensure that all proper procedures were followed."¹⁰³ The Electronic Privacy Information Center later learned through its Freedom of Information Act litigation that the FBI in fact collected 257.5 million passenger records, and has since incorporated them into its permanent investigative databases.¹⁰⁴ It is unclear whether authorities granted by the PATRIOT Act enabled the FBI to collect this vast amount of information, and if so, which provisions.

G. Unauthorized Detention of Aliens

Following the terrorist attacks in New York City and Washington, D.C., the Attorney General directed the FBI and other members of federal law enforcement to utilize "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities."¹⁰⁵ But in so doing, the FBI took advantage of our nation's immigration laws by detaining aliens for extended periods of time without any real authority and committing abuses to those same aliens during their detainment.

The "hold until cleared" policy that Department of Justice ("DOJ") officials communicated to the Immigration and Naturalization Services ("INS") and FBI applied to all of the "September 11 detainees" who the FBI categorized as either being "of interest," "of high interest," or "of undetermined interest." In a September 27, 2001 e-mail, DOJ Senior Counsel observed that while those individuals found to be legally present in the United States may only

¹⁰¹Rod Smith, *Sources: FBI Gathered Visitor Information Only in Las Vegas*, LAS VEGAS REVIEW-JOURNAL, Jan. 7, 2004, at 1A.

¹⁰²John Schwartz and Micheline Maynard, *Airlines Gave FBI Millions of Records on Travelers After 9/11*, NY TIMES, May 1, 2004 at A10.

¹⁰³*Id.*

¹⁰⁴See Hardy Declaration; Leslie Miller, *FBI Keeping Records on Pre-9/11 Travelers*, AP, Jan. 15, 2005.

¹⁰⁵Memorandum from Attorney General John Ashcroft to United States Attorneys entitled "Anti-Terrorism Plan" (September 17, 2001).

be held so long as law enforcement was pursuing criminal charges or a material witness warrant against them, any others “believed to be involved in the attacks . . . may be detained, *at least temporarily*, on immigration charges.”¹⁰⁶ In all, more than 1,200 citizens and aliens nationwide were detained pursuant to this policy within two months of the attacks, and that number may even be substantially higher given that a senior official in the Department’s Office of Public Affairs stopped reporting the cumulative totals based on the belief that the “statistics were becoming too confusing.”¹⁰⁷

What’s more, during this detention period, these individuals were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families and embassy officials; remained in detention despite having no involvement in terrorism; and were physically or verbally abused or mistreated in other ways. This included officers who “slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time,”¹⁰⁸ all of which was captured on videotape. Despite being seen on videotape, these officers denied any involvement upon Inspector General inquiry.¹⁰⁹ Finally, even when officials permitted detainees to meet with counsel, the Office of Inspector General found that several officers illegally recorded these meetings in clear violation of the Fourth and Sixth Amendments.¹¹⁰

H. Closed Immigration Trials

Ten days after the 9/11 attack on the United States, the Attorney General implemented new procedures for handling immigration cases involving aliens linked to the government’s ongoing investigation of the September 11th attacks and other terrorist activity against the United States. These immigration matters were identified as “Special Interest Cases.” In conjunction with that effort, the Chief Immigration Judge instructed immigration judges and court administrators to close to the public hearings involving Special Interest Cases, and to bar access to the related administrative record and docket information. These instructions were justified as part of the effort to protect national security and public safety by preventing sophisticated terrorist organizations like Al Qaeda from learning about the government’s ongoing terrorism investigation.

¹⁰⁶OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* 38-39 (April 2003) (emphasis added).

¹⁰⁷ *Id.* at 1.

¹⁰⁸ OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, *SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK* 46 (Dec. 2003).

¹⁰⁹ *Id.* at 46-47.

¹¹⁰ *Id.* at 31-33.

On May 28, 2002, the Department published an interim regulation that provided a mechanism for the government to ask an immigration judge to place a protective order over information that, while not classified, was sensitive and could damage law enforcement or national security interests if released beyond the parties to a specific immigration proceeding. If a protective order is granted, the alien, counsel, and anyone else approved by the government, are given full access to the protected information, but they are not permitted to disclose the information to others. The alien may challenge the admissibility of the evidence and may appeal the granting of the protective order as part of an appeal to the Board from the immigration judge's decision. The public may attend all portions of the alien's hearing, except those parts where the protected information is discussed. A violation of the protective order could render the alien ineligible for discretionary relief and could subject the alien's attorney to disciplinary procedures.

I. The Attorney General's Guidelines on Domestic Surveillance

On May 30, 2002, Attorney General Ashcroft announced revisions to four sets of internal guidelines that govern how the FBI conducts its investigations.¹¹¹ The Attorney General undertook his efforts without the benefit of congressional input, citing the need to strengthen the ability of FBI agents in the field to detect and prevent future acts of terrorism. Critics of the revisions, however, believe they will do little, if anything, to improve the FBI's ability to combat terrorism. Indeed, many believe that the revisions will do nothing more than invite the FBI to

¹¹¹The four sets of guidelines that were revised include:

- I. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Investigations;
- II. The Attorney General's Guidelines Regarding the Use of Confidential Informants;
- III. The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations; and
- IV. The Memorandum for the Heads and Inspectors General of Executive Departments and Agencies: Procedures for Lawful, Warrantless Monitoring of Verbal Conversations.

The changes undertaken by Attorney General Ashcroft begin with the change in the guideline's title to the *FBI Guidelines on General Crimes Racketeering Enterprises and Terrorism Enterprises*. Moreover, the Attorney General also "reportedly" changed the central role of the FBI by stating, "[t]he highest priority is to protect the security of the nation and the safety of the American people against the depredations of terrorists and foreign aggressors." He tried to emphasize this change by drafting a new introduction to the guidelines that states that there are "a number of changes designed to . . . facilitate the FBI's central mission of preventing the commission of terrorist acts against the United States and its people."

engage in the type of abuses that precipitated the issuance of the guidelines in the first place.

The new guidelines give the FBI much broader authority to investigate potential terrorist enterprises. In addition to extending time parameters and devolving authority to the SACs, the guidelines allow investigations to be conducted with no annual review and when no evidence of criminal activity is present.

The most drastic changes undertaken by Attorney General Ashcroft are outlined in Section VI (see, “Counter Terrorism Activities and other Authorizations”) of the new guidelines, which impact First and Fourth Amendment rights. Among other things, that section specifically authorizes activities that will detect information about terrorism and other crimes “even in the absence of checking of leads, preliminary inquiry, and full investigation.” For instance, the guidelines authorize the collection and use of information from databases either public, commercial or non-profit, otherwise known as “data mining.” Second, agents are authorized to “attend any place or event on the same terms and conditions as the public generally.” Third, the FBI can “conduct research including online research, accessing online sites and forums, on the same terms as the public generally.”¹¹² Finally, the guidelines explicitly declare that files kept as a result of any investigations conducted under the newly enacted guidelines, including those authorized in Section VI, are not subject to the protections of the Privacy Act.

The revisions also relax restrictions against the use of intrusive techniques in preliminary inquiries and general investigations. In addition to removing terms and phrases cautioning against the use of intrusive techniques that may invade the privacy of and reputation of subjects of preliminary inquiries, the guidelines state, “*the FBI shall not hesitate to use any lawful techniques consistent with these guidelines, even if intrusive, where the intrusiveness is warranted in light of the seriousness of a crime, or the strength of the information indicating its commission or potential future commission.*” The guidelines, also remove the requirement for supervisory approval for the use of these intrusive techniques. Many of these safeguards had been implemented as far back as 1976 with the introduction of the Levi Guidelines to address civil liberty concerns. Regrettably, Attorney General Ashcroft turned a blind eye to these concerns.

Finally, the Ashcroft guidelines considerably relax the supervisory role of FBI HQ for all criminal investigations. For example, the guidelines permit field agents to extend the duration of preliminary inquiries for up to one full year without first having to obtain approval from FBI HQ. Furthermore, as pointed out in the previous section, the guidelines permit these agents to obtain such extensions while also enabling them to utilize many of the more intrusive investigative

¹¹²In an attempt to address some civil liberties concerns, the Attorney General included language in this section that prohibited FBI agents from conducting online searches using the names of individuals, except when incidental to topical research such as authors or parties to cases. The guidelines further state that, “[t]he law enforcement activities authorized in this part do not include maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States.”

techniques. The combination of these two changes vests field agents with excessive authority and runs counter to many initiatives announced by Director Mueller to promote increased coordination between field offices and FBI HQ.

J. Mis-Classification of Terrorism Investigations

We are also disappointed that the majority has refused to look into the continuing efforts by the Administration to misclassify terrorism investigations. We hope that the U.S. will find and catch those who we know to be terrorists. However, it does no one any good for the Administration to lie about how many terrorism-related cases it has brought. In June 2005, the Washington Post reported that only 39 people – not the 200 implied by President Bush – have been convicted of terrorism-related crimes since 9/11. In fact, 180 of the people charged in these "terrorism probes" had no demonstrated connection to terrorism or terrorist groups; most people were convicted of minor crimes such as making false statements. Similarly, 60 of 62 "terror prosecutions" in New Jersey in 2002 were against Middle Eastern men who paid others to take school-related English proficiency tests for them. However, the majority has refused to take any action to determine how successful our terrorism investigations and our war on terrorists actually has been, and, if these numbers are true, what steps are needed to make sure we actually are able to catch and prosecute terrorists.

K. Safe Havens for Terrorist Assets

Another concern we have with the underlying legislation is that it fails to deal with the current law problems limiting the ability of victims and their families to obtain compensation for the damages they have suffered.

While, it may seem difficult to conceive of situations where the United States prevents its citizens from seeking justice for terrorist acts, there are several examples of how the current Administration sought to barr victims from obtaining legal judgment. First, the Administration barred the Iran hostages held from 1979-1981 from satisfying their judgment against the government of Iran. In 2000, they initiated a suit against Iran under the terrorist State exception to the Foreign Sovereign Immunity Act. While a federal district court held Iran to be liable, the U.S. government intervened and argued that the case should be dismissed because Iran had not been designated a terrorist state at the time of the hostage incident and because the Algiers Accords that led to the hostage release required the United States to bar the adjudication of suits based on that incident.¹¹³ As a result, the hostages received no compensation for their suffering.

Second, American servicemen who were harmed in a Libyan sponsored bombing of the La Belle disco in Germany were obstructed from obtaining justice for the terrorist acts they suffered. While victims of the attack pursued settlement of their claims against the Libyan government, the Administration lifted sanctions against Libya without requiring as a condition

¹¹³Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002), aff'd 333 F.3d 228 (D.C.Cir. 2003), cert. denied 124 S.Ct. 2836 (2004).

the determination of all claims of American victims of terrorism. As a result of this action, Libya abandoned all talks with the claimants. Further, because Libya was no longer considered a state sponsor of terrorism, the American servicemen and women and their families were left without recourse to obtain justice. The La Belle victims received no compensation for their suffering.

In addition, a group of American prisoners who were tortured in Iraq during the Persian Gulf war were barred by the Bush Administration from collecting their judgment from the Iraqi government.¹¹⁴ Although the 17 veterans won their case in the District Court of the District of Columbia, the Administration argued that the Iraqi assets should stay frozen in the U.S. bank account to aid in the reconstruction of Iraq.¹¹⁵ Claiming that the judgment should be overturned, the Administration deems that building Iraq is more important than the suffering of fighter pilots who during their 12 year imprisonment suffering beatings, burns, and threats of dismemberment.

Finally, the World Trade Center victims were barred from obtaining judgment against the Iraqi government. In their claim against the Iraqi government, the victims were awarded \$64 million against Iraq in connection with the September 2001 attacks. However, they were rebuffed in their efforts to attach the vested Iraqi assets. While the judgment was sound, the Second Circuit Court of Appeals affirmed the lower court's finding that the Iraqi assets, now transferred to the U.S. Treasury, were protected by U.S. sovereign immunity and were unavailable for judicial attachment.

We would hope that any final legislation would address this issue and allow U.S. victims of terrorism to obtain justice from terrorist supporting nations.

V The Legislation Does Not Provide Law Enforcement with the Resources and Tools It Needs to Meaningfully Combat Terrorism

Two of the most important keys to winning the war against terrorism include providing sufficient funding and resources to law enforcement officials so that they can adequately protect the homeland and closing current loopholes in existing law which make it easier for would-be terrorists to gain access to dangerous weaponry and materials. Regrettably, HR 3199 does absolutely nothing to address either of these important issues.

¹¹⁴David G. Savage, *Justices Are Asked to Reject POWs' Case Against Iraq*, L.A. Tiems, March 23, 2005.

¹¹⁵Ultimately, the Second Circuit overturned the matter stating, (1) the United States should have been allowed to intervene in the district court even post judgment because of its policy concerns; (2) we were correct that the President was not granted the authority by Congress to nullify non-sanctions/appropriations laws, including our jurisdictional statute (FSIA), in the April 2003 Emergency Wartime Supplemental Appropriations Act; but, (3) the court sua sponte ruled that because of an intervening change in law in a separate case in January 2004 (*Cicippio-Puleo*), the decision in *Acree* had to be vacated.

A. Preventing Terrorists from Buying Guns

America's gun laws are wide open compared to the rest of the developed world. Foreign groups promoting various forms of armed conflict, including "jihad" have advised would-be warriors that, because of its lax gun laws, the United States is the ideal place to get guns and firearms training to prepare for armed conflict.

The overseas groups understand that, with little more than a credit card and a driver's license, terrorists can outfit themselves with military grade firepower - including 50 caliber sniper rifles, assault weapons, and exotic ammunition.

While they are not "weapons of mass destruction," any gun in the hand of a terrorist is a danger to Americans. But, shockingly, our current gun laws have an alarming loophole that allows suspected and actual members of terrorist organizations to legally purchase guns.

In fact, according to a recently released GAO report¹¹⁶, over the course of a nine-month span last year, a total of fifty-six (56) firearm purchase attempts were made by individuals designated as known or suspected terrorists by the federal government.

In forty-seven (47) of those cases, state and federal authorities were forced to permit such transactions to proceed because officials were unable to find any disqualifying information (such as a prior felony conviction or court-determined 'mental defect') in the individual applicant's background.

To address this problem, during the course of the Committee's consideration of HR 3199, Mr. Conyers and Mr. Van Hollen offered an amendment to make the transfer of a firearm to someone the person knows is on the Justice Department's Violent Gang and Terrorist Organization File (a.k.a. the "terrorist watch list") fall under the prohibition of providing "material support" to terrorists. As the name implies, this is a list of known violent gang and terrorist organization members. It seems apparent that if the U.S. is willing to wage war in order to keep WMDs out of the hands of possible terrorists, the U.S. should keep domestic guns out of the hands of terrorists in the United States.

Unfortunately, this amendment failed by a vote of 15-22. Shockingly, a number of Republicans stated they opposed the amendment because it would harm the Second Amendment rights of known terrorists. While they are perfectly willing to intrude on Americans' free speech rights, search their houses without warrants and without cause, and to lock people up indefinitely without charging them of any crime, these same Members argued that a terrorist's right to bear arms was more important than trying to stop terrorists from buying guns and potentially using them for another deadly attack on the United States.

B. Preventing the Sale and Manufacture of .50-caliber Guns

¹¹⁶G.A.O. REP. NO. 05-127, at 3 (2005).

While current law does regulate the transfer of certain firearms including machine guns, it does not regulate the sale of .50-caliber sniper rifles which are advertised by their manufacturers as capable of shooting down aircraft. These weapons are important for military use, but are currently also available for purchase by the general public, including terrorists. We know that in the 1980s Essam Al-Ridi purchased .50-caliber rifles in Texas and then shipped them to Osama bin Laden. Similarly, in 1989, a gunrunner named Florin Krasniqi came to the U.S. to purchase .50-caliber rifles and subsequently shipped them to the Kosovo Liberation Army.

Capable of inflicting a devastatingly accurate impact from well over a mile away, the U.S. Army handbook on urban combat states that 50 caliber sniper rifles are intended for use as anti-materiel weapons, designed to attack bulk fuel tanks and other high-value targets from a distance, using "their ability to shoot through all but the heaviest shielding material." These weapons are a serious threat for use against civil aviation, hazardous cargo transport vehicles and rail cars carrying hazardous materials such as chlorine gas. And needless to say, their ability to emit powerful projectiles accurately over long distances make 50 caliber rifles a favorite weapon of war lords, drug cartels and terrorists due to its unparalleled potential for damage.

During the course of the Committee's consideration of HR 3199, Ms. Lofgren introduced an amendment which would have made it a crime under the material support provision of the Patriot Act to transfer a .50-caliber sniper rifle to any person the transferor knows to be a member of Al Qaeda. Obviously, such an amendment would provide an important mechanism to help keep dangerous, high-powered weapons out of the hands of known terrorists. However, once again, the Republicans voted down this necessary and commonsense measure to help protect the United States from harm.

C. Regulating the Sale of Smokeless and Black Powder

Alarmed by a manifesto issued by confessed Olympic bomber Eric Rudolph justifying violence to stop abortions, the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is now urging clinics to evaluate and enhance their security. Yet while the ATF warns potential targets of this threat, supporters of HR 3199 refuse to do anything through this legislation to stop the virtually unregulated sale of the two substances most commonly used in improvised explosive devices in the United States-smokeless powder and black powder.

Smokeless powder-Rudolph's weapon of choice in the Olympic Park bombing-is used by people who like to "reload" their own ammunition. Black powder is used in muzzle-loading guns for hunting and historical re-enactments. Because smokeless powder qualifies as "small arms ammunition and components thereof" it is exempt from the federal law regulating the manufacture and sale of explosives.

Commercially manufactured black powder in quantities of less than 50 pounds is also exempt. Rudolph reportedly bought the smokeless powder he packed into the Olympic Park bomb from a Tennessee gun dealer, one of approximately 60,000 federally licensed firearms dealers (FFLs) in America.

After the September 11th attacks, ATF became concerned that other terrorists would

utilize the explosives loophole exploited by Rudolph. The agency started a campaign urging FFLs to “Be Aware for America,” and in a July 2004 letter ATF reminded dealers, “Some of the products you may carry in your inventory, such as black powder and smokeless powder, could be used in acts of violence. While smokeless powder and black powder generally are exempt from the Federal explosives laws, these products are often used to make illegal or ‘improvised explosives devices’ and pipe bombs.”

Unfortunately, thanks to the powerful gun lobby, for now this mild entreaty to gun dealers appears to be the full extent of the federal government’s efforts to prevent terrorists from getting smokeless or black powder.

D. Increasing Grants to First Responders

Another problem in the war on terror is that the United States has no sufficient allocated money to keep our country safe. Local and state law enforcement officers have been laid off, schools are getting more dangerous by the second, and not enough persons have been hired to perform intelligence, terrorism and homeland security duties.

In local communities across the United States, the first line of defense against terrorists and other violent crime is the local police department. More police on the streets could be useful in thwarting potential terrorist attacks and also protecting the community from the more conventional violent criminals and violent crimes.

During the 1990s, the Clinton Administration implemented the Office of Community Oriented Policing Services (COPS). The goal of the program was to put 100,000 new police officers on the streets of America’s communities. A new GAO Report indicates that the COPS program did cause the level of violent crimes in America to decline. During the time that agencies were spending COPS funds, violent crime declined.¹¹⁷ For example, between 1994 and 2001, the number of violent crimes declined from about 1.9 million to about 1.4 million (or about 23 percent), and the violent crime rate per 100,000 population declined from 714 to 504 (or about 29 percent).¹¹⁸

Mr. Weiner and Ms. Sanchez therefore offered an amendment to expand the grants available for such measures. Their amendment would increase funding for first responders in state and local communities, provide for retention funds to keep law enforcement in depressed areas, and increase funding for school security as well as intelligence, terrorism, and homeland security programs. Unfortunately, the Republicans derailed this amendment by raising a point of order on the grounds of germaneness.

E. Securing Our Nation’s Ports

The “soft underbelly” of our national security defensive against terrorism is the security

¹¹⁷G.A.O. REP. NO. 05-699 at 2 (2005).

¹¹⁸Ibid.

of our nation's ports. This fact has been repeated in numerous studies and even cited in the documentary *Fahrenheit 911* by Michael Moore. According to a report in the *New York Times*, an audit on spending for port security shows "far too little money appropriated; much of the appropriated money not spent; and much of the money that was spent going for the wrong things."¹¹⁹ Just recently, the United States Coast Guard estimated that scanning equipment for the six million shipping containers that enter the United States every year would cost \$5.4 billion over the next 10 years; however, federal port security grant programs have only allocated less than \$600 million since 2002.¹²⁰

It is only a matter of time before terrorists will exploit this weakness and possible transport biological/chemical weapons and/or weapons of mass destructions into the United States using cargo containers. In 2002, terrorists had a 82.5 percent chance of doing this completed undetected. This is an unacceptable risk to the American government and people.

F. Eliminating Trade with Terrorist Countries

The United States government has successfully targeted various front organizations in the United States that send funds to terrorist causes all over the world; however, phoney Islamic charities are not the only organizations in the United States that have done business with countries that sponsor terrorism. According to a *60 Minutes* report, "there are U.S. companies that are helping drive the economies of countries like Iran, Syria, and Libya, all places that have sponsored terrorism."¹²¹ William Thompson, New York City comptroller, has identified three companies, Halliburton, Conoco-Phillips, and General Electric, that have invested in these "rouge countries."¹²² Halliburton is the same company that Vice President Richard Cheney ran from 1995 to 2000, "during which time Halliburton Products and Services set up shop in Iran. Today, its sells about \$40 million a year worth of oil field services to the Iranian government."¹²³ According to Bob Herbert, Halliburton has had a "history of ripping off the government" and made "zillions doing business in countries that sponsor terrorism, including members of the 'axis of evil' that is so despised by this president."¹²⁴

Currently, United States law prohibits US companies from doing business with nations that sponsor terrorism.¹²⁵ However, some U.S. companies have found a loophole in the law and are "deliberately bypassing U.S. sanction laws by the use of the 'foreign subsidiary' loophole, thereby providing terrorist states with more revenue to finance terrorist operations."¹²⁶ U.S.

¹¹⁹*Follow the Port Security Money*, N.Y. TIMES, February 28, 2005.

¹²⁰*Ibid.*

¹²¹*Doing Business with the Enemy*, 60 MINUTES (2004), at <http://www.cbsnews.com/stories/2004/01/22/60minutes/main595214.shtml>.

¹²²*Ibid.*

¹²³*Ibid.*

¹²⁴Bob Herbert, *Dancing with the Devil*, N.Y. TIMES, May 22, 2003.

¹²⁵International Emergency Economic Powers Act, § 35, 50 U.S.C. § 1701 (2003).

¹²⁶*Lautenberg to Offer Amendment to the FSC-ETI Bill*, SEN. LAUTENBERG'S WEBSITE

Congressman Henry Waxman found that Halliburton in particular has circumvented the law by setting up subsidiaries in places such as the Cayman Islands.¹²⁷

In an effort to close the loophole, U.S. Senator Frank Lautenberg offered S.A. 3151, an amendment to the International Emergency Economic Powers Act, that redefined corporate entities subject to U.S. sanction law to include “not only U.S. companies and all foreign branches, but also foreign subsidiaries controlled over 50 percent by their parent American company.”¹²⁸ This amendment would have stopped companies like Halliburton who have subsidiary companies that conduct business with countries like Iran and Lybia. The amendment was defeated in the U.S. Senate by one vote in 2004.

G. Penalyzing Those who Leak Classified Information

This Administration and the Republican majority in Congress have continually accused Democratic Members of Congress, as well as many Americans citizens, of “aiding the terrorists” by speaking out against actions and policies that appear extreme and unnecessary. However, these same individuals have remained silent when it has been discovered that members of the Administration and others have knowingly leaked classified information that identifies covert operatives and literally put their lives at risk.

Current U.S. law concerning such leaks is insufficient to protect those who put their lives at risk every day for this country. Many have noted that it is difficult to meet the requirements necessary to be found in violation of this law. As a result, Mr. Wexler offered an amendment to fix this problem. The Wexler amendment would penalize anyone who reveals any information that might identify an intelligence officer or source and put their lives in danger. However, the Republicans defeated this amendment by voice vote.

H. Improving the Terrorist Watch List

Finally, there is true need for an accurate and up-to-date Terrorist Watch List such that it can be effectively used to identify and catch suspected and known terrorists. To this end, it is important to ensure that the list does not misidentify people and therefore divert needed resources away from catching the true terrorists.

Mr. Van Hollen introduced an amendment which would require the Inspector General to report to Congress on the progress of the Terrorist Screening Center in developing procedures by which to remove misidentified names from the Terrorist Watch List. This amendment is important on two fronts: (1) it will ensure that resources are not spent tracking the wrong people, and (2) it will protect Americans and other persons who are mistakenly identified as terrorists by providing a mechanism for them to clear their name. The much publicized case of Senator Edward Kennedy spending many hours to clear his name from this list highlights the problem confronting ordinary citizens. And, our counterterrorism officers need to be assured that they

(2004), ¹²⁷<http://www.hillcountry.com/~lautenberg/press/2003/01/2004422BO8.html>.

¹²⁸ *Lautenberg to Offer Amendment to the FSC-ETI Bill, supra* note 6.

can focus on stopping those who truly intend to do harm to the United States. This amendment was rejected by the majority.

Considering that the majority often suggests we are in a perpetual war against terrorists, including terrorists who wish to attack the United States, we are disappointed that they flatly rejected amendments which would directly help the United States fight terrorists and prevent terrorism. That all of these reasonable measures to ensure our safety were rejected contributed to our collective decision not to support this bill.

VI Description of Amendments Offered by Democratic Members

During the mark-up thirty-nine (39) amendments were offered by Democratic members. The following section provides a brief description of each of these amendments:

1. *Nadler Amendment*

Description of Amendment: The amendment would amend section 215 of the PATRIOT Act to allow for recipients to challenge the orders, and to allow recipients to petition to set aside the non-disclosure requirement. It would also limit Section 215 order to those certified as “agents of a foreign power.”

Vote on Amendment: The amendment was defeated by a vote of 23 - 12. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Waters, Delahunt, Weiner, Sanchez, Van Hollen, Wasserman Schultz, Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Lofgren, Schiff.

2. *Scott Amendment*

Description of Amendment: The amendment dealt with the limitation on authority to delay notice of search warrants. This amendment would strike “reasonable period” from section 3103a of Title 18, U.S.C. and replace with “seven calendar days” and applications thereafter to be extended by the court for an additional 30 calendar days for good cause shown to the court.

Vote on Amendment: The amendment was withdrawn.

3. *Waters Amendment*

Description of Amendment: The amendment stated that national security letters would not be issued to a health insurance company.

Vote on Amendment: The amendment was defeated by a vote of 23 - 14. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Waters, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Wasserman Schultz.

4. *Scott Amendment*

Description of Amendment: The amendment is a second degree amendment to the Lungren Amendment. The Lungren Amendment sunsetted Sections 206 and 215 of the PATRIOT Act in 2015. The Scott Amendment would sunset these provisions in 2009

Vote on Amendment: The amendment was defeated by a party line vote of 21 - 15. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Waters, Meehan, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz, Nays: Representatives Sensenbrenner, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert.

5. *Nadler Amendment*

Description of Amendment: This a second degree amendment to the Lungren amendment. It would sunset Sections 206 and 215 in 2011.

Vote on Amendment: The amendment was defeated on a party line vote of 9-18. Ayes: Representatives Conyers, Nadler, Scott, Watt, Meehan, Delahunt, Schiff, Sanchez, Nays: Representatives Sensenbrenner, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Issa, Forbes, King, Feeney, Gohmert.

6. *Nadler and Lofgren Amendment*

Description of Amendment: This amendment would sunset the remaining 14 expiring provisions in 2015.

Vote on Amendment: The amendment was defeated on a party line vote of 12-21. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Lofgren, Meehan, Delahunt, Weiner, Schiff, Sanchez, Van Hollen; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert.

7. *Van Hollen and Conyers Amendment*

Description of Amendment: This amendment would close the gun buying loophole by prohibiting the knowing sale of firearms to persons on the Violent Gang and Terrorist Organization File.

Vote on Amendment: The Amendment was defeated by 15-22. Ayes: Representatives Conyers, Berman, Nadler, Scott, Lofgren, Waters, Meehan, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Boucher.

8. *Berman and Delahunt Amendment*

Description of Amendment: This amendment would require a report on the use of data-mining technology and procedures, as well as measures to protect privacy with the use of data-mining.

Vote on Amendment: The amendment was withdrawn.

9. *Schiff and Waters Amendment*

Description of Amendment: This amendment would allow only the FBI Director to obtain medical records, and records from libraries and bookstores under Section 215 of the PATRIOT Act.

Vote on Amendment: The amendment was withdrawn.

10. *Wexler Amendment*

Description of Amendment: This amendment adds the revealing of information about the identity of a covert operative to the list of predicate offenses for providing material support for terrorism.

Vote on Amendment: The amendment was withdrawn

11. *Schiff Amendment*

Description of Amendment: This amendment would add to the list of activities which, if done willfully, will result in violating the statute which prohibits the planning of terrorist attacks on mass transportation (18 USC 1993(a)(3)).

Vote on Amendment: The amendment was agreed to by voice vote.

12. *Lofgren Amendment*

Description of Amendment: This amendment would prohibit the sale of .50-caliber sniper rifles to a person known to be a member of Al Qaeda

Vote on Amendment: This Amendment failed on a party line vote of 13-22. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Waters, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert.

13. *Weiner and Sanchez Amendment*

Description of Amendment: This Amendment would increase grants to first responders, as well as grants for school security and retention grants for local law enforcement.

Vote on Amendment: This amendment was ruled non-germane.

14. *Lofgren Amendment*

Description of Amendment: This amendment would require the Inspector General of the Department of Justice to review the detentions of persons under the material witness statute (18 USC 3144) in its reports required by Section 1001 of the PATRIOT Act.

Vote on Amendment: This amendment was agreed to unanimously, on a vote of 34-0.

15. *Schiff Amendment*

Description of Amendment: This amendment would amend section 105(c) of the Foreign

Intelligence Surveillance Act (Section 206 of the PATRIOT Act) to require that where the identity of the target of surveillance is not known, a specific description is provided of the target.

Vote on Amendment: This amendment failed on a party line vote of 15-22. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Waters, Meehan, Delahunt, Wexler, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert.

16. *Nadler and Jackson Lee Amendment*

Description of Amendment: This amendment would amend Section 206 of the PATRIOT Act to make FISA wiretaps like criminal wiretaps in that the FBI must choose between obtaining either a roving wiretap or a “John Doe” wiretap.

Vote on Amendment: The Amendment was withdrawn.

17. *Watt Amendment*

Description of Amendment: This amendment allows targets of nationwide search warrants to challenge them in the district where the warrant is served.

Vote on Amendment: This amendment was defeated by a vote of 14-24: Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Waters, Meehan, Delahunt, Wexler, Weiner, Sanchez, Van Hollen; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Schiff, Wasserman Schultz.

18. *Schiff Amendment*

Description of Amendment: This amendment (a) adds to the list of predicate offenses which are considered “federal crimes of terrorism”; (b) allows for the forfeiture of property involved in the trafficking of weapons of mass destruction; and (c) adds numerous crimes related to terrorism to the list of offenses for which oral and wire communications may be intercepted under 18 U.S.C. 2516.

Vote on Amendment: This amendment was agreed to by voice vote.

19. *Lofgren Amendment*

Description of Amendment: This amendment would ensure that no law passed after 9/11, including the PATRIOT Act, would suspend the writ of habeas corpus.

Vote on Amendment: This amendment was initially agreed to by voice vote. There was then a successful vote in favor of reconsidering the amendment. The amendment then was defeated on a party line vote of 14-23. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert,

20. *Schiff Amendment*

Description of Amendment: This amendment would eliminate the nondisclosure requirement of a Foreign Intelligence Surveillance Court order for business records from a library, bookstore, or for medical records, when an individual is a citizen of the United States, at the conclusion of investigation.

Vote on Amendment: The amendment failed by a recorded vote of 13 yeas and 20 nays. Ayes: Representatives Conyers, Berman, Boucher, Scott, Waters, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz, Goodlatte; Nays: Representatives Sensenbrenner, Coble, Smith, Gallegly, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks.

21. *Wexler Amendment*

Description of Amendment: This amendment would add to Section 805 on Material Support for Terrorism in the PATRIOT Act the act of revealing identifying information about a U.S. covert operative.

Vote on Amendment: This amendment failed on a voice vote.

22. *Schiff Amendment*

Description of Amendment: This amendment would obligate all funds authorized for the Victims of Crime Fund, through the Victims of Crime Act of 1984, to be used.

Vote on Amendment: This amendment was ruled non-germane.

23. *Watt and Waters Amendment*

Description of Amendment: This amendment would strike section 8(c) of H.R. 3199 to eliminate the nondisclosure requirement of a Foreign Intelligence Surveillance Act Court order for business records in a national security case unless law enforcement in an “application for such an order provides specific and articulable facts giving the applicant reason to believe that disclosure would result” in adverse affects specified in the amendment.

Vote on Amendment: This amendment failed on a vote of 13-23. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Waters, Delahunt, Wexler, Weiner, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Schiff.

24. *Scott Amendment*

Description of Amendment: This amendment would entitle a person who prevails on a challenge of the legality of a section 215 order to reasonable attorneys fees, if any, incurred by the person in pursuing the challenge.

Vote on Amendment: The amendment failed by a party line vote of 14 -22. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Waters, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives

Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert.

25. *Schiff Amendment*

Description of Amendment: This amendment would sunset Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (“lone wolf”) in 2008.

Vote on Amendment: This amendment failed on a party line vote 14-22. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Weiner, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert

26. *Nadler, Jackson Lee and Waters Amendment*

Description of Amendment: This amendment would limit the length of delays for delayed notification search warrants under Section 213 of the PATRIOT Act. Delays would be limited to 30 days, with extensions of up to 60 days.

Vote on Amendment: This Amendment was withdrawn.

27. *Jackson Lee Amendment*

Description of Amendment: This amendment would amend Section 218 of the PATRIOT Act to provide that notice be given to the target of a search if the target is a U.S. person who is found not to be an agent of a foreign power.

Vote on Amendment: This amendment failed on a party line vote of 10-23. Ayes: Representatives Conyers, Nadler, Scott, Watt, Jackson Lee, Waters, Weiner, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert

28. *Flake and Nadler Amendment*

Description of Amendment: This amendment would amend Section 213 of the PATRIOT Act to provide that delays in notification can last for 180 days, with extensions of up to 90 days.

Vote on Amendment: This amendment was agreed to by voice vote.

29. *Conyers Amendment*

Description of Amendment: This amendment would (a) treat electronic communications interception like wire and oral communications under 18 US 2515; (b) require a report on the disclosure of contents of electronic communications by the A.C. to the Congress; and (c) increase to \$10,000 the amount recoverable under 18 USC 2707(c).

Vote on Amendment This amendment was defeated on a party line vote of 14-23. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives

Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert

30. *Nadler Amendment*

Description of Amendment: This amendment would authorize disclosure of a National Security Letter to “qualified persons,” including one’s attorney. It also provides that the non-disclosure period will last 180 days, with extensions of up to 90 days, if the government proves disclosure would result in a clear harm.

Vote on Amendment: This amendment was defeated 14-23. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert

31. *Schiff Amendment*

Description of Amendment: This amendment would grant citizenship to alien spouses and children of certain victims of the 9/11 attacks.

Vote on Amendment: This amendment was ruled non-germane.

32. *Scott Amendment*

Description of Amendment: This amendment amend section 105(c) of the Foreign Intelligence Surveillance Act to require surveillance may be directed at a place or facility only for such time as the applicant believes that such facility or place is being used, or about to be used by the target of the surveillance.

Vote on Amendment: The amendment failed by a party line vote of 13 yeas to 23 nays. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Weiner, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert

33. *Schiff Amendment*

Description of Amendment: This amendment would require a report on the use of National Security Letters (Section 505 of the PATRIOT Act) by the Attorney General for the preceding year.

Vote on Amendment: This amendment failed by a party line vote of 15-21. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks

34. *Jackson Lee Amendment*

Description of Amendment: This amendment would prohibit medical records from being obtained with a Section 215 order.

Vote on Amendment: This amendment failed by a vote of 12-24. Ayes: Representatives Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Wexler, Weiner, Sanchez, Van Hollen, Nays: Representatives Sensenbrenner, Hyde, Coble, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Schiff, Wasserman Schultz

35. *Van Hollen Amendment*

Description of Amendment: This amendment requires a report by the DOJ Inspector General on procedures and guidelines to ensure the accuracy of the Terrorist Watch List, including how to remove misidentified persons.

Vote on Amendment: This amendment failed on a party line vote of 15-23. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Meehan, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert

36. *Nadler Amendment*

Description of Amendment: This amendment allows for the recipient of a National Security Letter to disclose receipt of the Letter to a “qualified person,” including one’s attorney.

Vote on Amendment: This Amendment failed on a party line vote 16-23. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert

37. *Scott Amendment*

Description of Amendment: This amendment would exempt humanitarian support such as medical services, food and water from the prohibition on providing Material Support to Terrorists (Section 805 of the PATRIOT Act).

Vote on Amendment: This amendment failed on a vote of 7-31. Ayes: Representatives Conyers, Scott, Watt, Jackson Lee, Waters, Meehan, Delahunt; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Berman, Nadler, Wexler, Weiner, Schiff, Sanchez, Van Hollen, Wasserman Schultz

38. *Jackson Lee Amendment*

Description of Amendment: This amendment would require a report by the Inspector

General of DOJ under Section 1001 of the PATRIOT Act on any authorities used that go beyond the Attorney General Guidelines written in 1989, such as racial profiling.

Vote on Amendment: This amendment failed on a vote of 13-25. Ayes: Representatives Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Wexler, Weiner, Sanchez, Van Hollen, Wasserman Schultz; Nays: Representatives Sensenbrenner, Hyde, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Baucus, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert, Berman, Delahunt

39. *Nadler and Scott Amendment*

Description of Amendment: This amendment amends the National Security Letter statutes to allow recipients to challenge them in court. It also requires pen register and trap-and-trace orders under Section 214 to be limited to terrorism or espionage investigations.

Vote on Amendment: This amendment was defeated on a voice vote.

VII. Conclusion

There is no more difficult task we have as legislators than balancing our nation's need for security against our citizens' civil liberties. By passing this bill which largely ignores the most serious abuses of the PATRIOT Act, ignores the unilateral misuse of power by the Administration, and fails to provide adequate resources and funding to those on the "front line" in the fight against terrorism, we believe we will be failing in our task.

If we are serious about combating terror in the 21st century, we must move beyond symbolic gestures and begin to make the hard choices needed to protect our nation. Unfortunately, this legislation does not make those choices. The lessons of September 11 are that if we allow law enforcement to do their work free of political interference, if we give them adequate resources and modern technologies, we can protect our citizens without intruding on their liberties.

The bill before us today does not meet this test. It is our hope that we can come together on the House Floor and in conference and craft a bill that fights terrorism the right way, consistent with our constitution and our values, and in a manner that serves as a model for the rest of the world. For all of the aforementioned reasons, we respectfully dissent.

APPENDIX A, SECTION-BY-SECTION SUMMARY OF THE USA PATRIOT ACT of 2001, H.R. 3162

TITLE I: ENHANCING DOMESTIC SECURITY

Section 101: Counterterrorism fund-- establishes a counterterrorism fund to rebuild any Justice Department component that has been damaged or destroyed as a result of a terrorism incident; provide support for investigations and to pay terrorism-related rewards; and conduct terrorism threat assessments.

Section 102: Sense of Congress condemning discrimination against Arab and Muslim Americans

Section 103: Increased funding for the FBI's technical support center – Authorizes \$200 million for each of FY 2002, 2003, and 2004 for the technical support center.

Section 104: Requests for military assistance to enforce prohibition in certain emergencies – Allows military to assist state and local law enforcement with domestic chemical weapons emergencies.

Section 105: Expansion of National Electronic Crime Task Force Initiative – Directs the Secret Service to develop a national network with electronic crime task forces based on the New York Electronic Crime Task Force model.

Section 106: Presidential Authority – Expands International Economic Emergency Powers Act to allow the President to confiscate and vest properties of an enemy when United States is engaged in military hostilities or has been subject to an attack by that enemy. It allows classified information, used to make a determination regarding national security or terrorism cases, to be submitted and in camera to the reviewing court of such determinations.

TITLE II: ENHANCED SURVEILLANCE PROCEDURES

Section 201: Authority to Intercept Wire, Oral, and Electronic Communications Relating to Terrorism – Adds terrorism offenses to the list of predicates for obtaining title III wiretaps.

Section 202: Authority to Intercept Wire, Oral, and Electronic Communications Relating to Computer Fraud and Abuse Offenses – Adds computer fraud and abuse offenses to the list of predicates for obtaining title III wiretaps.

Section 203: Authority to Share Criminal Investigative Information – Allows intelligence information obtained in grand jury proceedings to be shared with any law enforcement, intelligence, immigration, or national security personnel as long as notice is given to the court after the disclosure. Recipient can only use information in conduct of their duties subject to disclosure limitations in current law. Intelligence information obtained from wiretaps can be shared with law enforcement, intelligence, immigration, or national security personnel. Recipients can use the information only in the conduct of their duties and are subject to the limitations in current law of unauthorized disclosure of wiretap information. Attorney General must establish procedures for the release of this information in the case of a U.S. person. Intelligence information obtained in intelligence operations can be disclosed to intelligence personnel in performance of their duties.

Section 204: Clarification of Intelligence Exceptions from Limitations on Interception and Disclosure of Wire, Oral, and Electronic Communications -- Explicitly carves out foreign

intelligence surveillance operations from the protections of ECPA.

Section 205: Employment of Translators by the FBI – Authorizes the FBI to expedite employment of translators.

Section 206: Roving Surveillance Authority under FISA – Expands FISA court orders to allow “roving” surveillance in manner similar to Title III wiretaps.

Section 207: Duration of FISA Surveillance of Non-United States Persons who are Agents of a Foreign Power -- Currently, the duration for a FISA surveillance may initially be ordered for no longer than 90 days but later can be extended to one year. This section changes the initial period for electronic surveillance from 90 to 120 days and extensions from 90 days to one year; and for searches from 45 to 90 days.

Section 208: Designation of Judges – Increases number of FISA judges from 7 to 11 and requires that at least 3 judges reside within 20 miles of the District of Columbia.

Section 209: Seizure of Voice Mail Pursuant to Warrants -- Provides that voice mails can be accessed by the government with a court order in the same way e-mails currently can be accessed and authorizes nationwide service with a single search warrant for voice mails.

Section 210: Scope of Subpoenas for Records of Electronic Communications -- Broadens the types of records that law enforcement can subpoena from electronic communications service providers by requiring providers to disclose the means and source of payment, including any bank account or credit card numbers, pursuant to a subpoena.

Section 211: Clarification of Scope – Broadens the scope of the subscriber records disclosure statutes to treat cable companies that provide Internet service the same as other Internet Service Providers and telephone companies.

Section 212: Emergency Disclosure of Electronic Communications -- Permits Internet Service Providers to disclose voluntarily stored electronic communications of subscribers in the event immediate danger or death or serious bodily injury to a person requires such disclosure. Also otherwise allows law enforcement to compel disclosure to third parties using a court order or a search warrant.

Section 213: Authority for Delaying Notice of Execution of a Warrant -- Broadens authority of law enforcement to delay notification of search warrants in criminal investigation if prior notification would have an adverse result and if notification is given a reasonable period after the search. Based on codification of Second Circuit decision.

Section 214: Pen Register and Trap and Trace Authority under FISA -- Currently, when the Attorney General or a designated attorney for the government applies for a pen register or trap and trace device under FISA, the application must include a certification by the applicant that (1) the information obtained would be relevant to an on-going intelligence investigation, and (2) the information demonstrates that the phone covered was used in communication with someone involved in terrorism or intelligence activities that may violate U.S. criminal law or with a foreign power or its agent whose communication is believed to concern terrorism or intelligence activities that could violate U.S. criminal laws. The conference report deletes second prong, but limits the use of these tools to protection against international terrorism or clandestine intelligence activities and provide that the use of these tools may not be based solely on First Amendment activities.

Section 215: Access to Records and Other Items under FISA – (1) requires a FISA court order to obtain business records; (2) limits the use of this authority to investigations to protect against international terrorism or clandestine intelligence activities; and (3) provides that investigations of U.S. persons may not be based solely on First Amendment activities.

Section 216: Authorities Relating to the Use of Pen Register and Trap and Trace Devices – Extends the pen/trap provisions so they apply not just to telephone communications but also to Internet traffic, so long as they exclude “content.” Excludes ISP’s from liability, gives Federal courts the authority to grant orders that are valid anywhere in the United States instead of just their own jurisdictions, and provides for a report to Congress on this “Carnivore” device.

Section 217: Interception of Computer Trespasser Communications – Allows persons “acting under color of law” to intercept communications if the owner of a computer authorizes it, and the person acting under color of law is acting pursuant to a lawful investigation. Section 815 also excludes service provider subscribers from definition of trespasser, limits interception authority to only those communications through the computer in question.

Section 218: Foreign Intelligence Information -- Permits FISA surveillance and search requests if they are for a “significant” intelligence gathering purpose (rather than “the” purpose under current law).

Section 219: Single Jurisdiction Search Warrants for Terrorism – Permits Federal judges to issue search warrants having nationwide effect for investigations involving terrorism.

Section 220: Nationwide Service of Search Warrants for Electronic Evidence -- Permits a single court having jurisdiction over the offense to issue a search warrant for e-mail that would be valid in anywhere in the United States.

Section 221: Trade Sanctions (IR Committee) – Adds Taliban to list of entities potentially subject to sanctions and retains congressional oversight in current law.

Section 222: Assistance to Law Enforcement Agencies – Prohibits technology mandates on entities to comply with this Act. Provides for cost reimbursement of entities assisting law enforcement with title III pen trap orders.

Section 223: Civil Liability for Certain Unauthorized Disclosures -- Increases civil liability for unauthorized disclosure of pen trap, wiretap, stored communications or FISA information. Also requires administrative discipline of officials who engage in such unauthorized disclosures.

Section 224: Sunset – 201, 202, 203(b), 204, 206, 207, 209, 212, 214, 215, 217, 218, 220, will sunset in four years -- at the end December 31, 2005. Conference agreement to narrow those investigations that survive sunset to particular investigations based on offenses occurring prior to sunset.

Section 225: Immunity for Compliance with FISA Wiretap – Provides immunity for civil liability from subscribers, tenants, etc. for entities that comply with FISA wiretap orders. – dropped Administration proposal allowing FBI to use wiretap information on U.S. citizens it obtained overseas in violation of the Fourth Amendment.

TITLE III: FINANCIAL INFRASTRUCTURE

Other provisions to be supplied by Financial Services conference. Provisions below from House Judiciary Committee bill.

Section 301: Laundering The Proceeds of Terrorism – Expands the scope of predicate offenses for laundering the proceeds of terrorism to include “providing material support or resources to terrorist organizations,” as that crime is defined in 18 U.S.C. § 2339B of the criminal code.

Section 302: Extraterritorial Jurisdiction [International Relations Committee] – Applies the financial crimes prohibitions to conduct committed abroad in situations where the tools or proceeds of the offense pass through or are in the United States.

TITLE IV: PROTECTING THE BORDER
SUBTITLE A – PROTECTING THE NORTHERN BORDER

Section 401: Ensuring Adequate Personnel on the Northern Border: Authorizes the waiver of any FTE cap on personnel assigned to the INS to address the national security on the Northern Border.

Section 402: Northern Border Personnel: Authorizes the appropriation of funds necessary to triple the number of Border Patrol, INS and Customs Service personnel in each State along the northern border. The bill also authorizes \$50 million each to the INS and Customs Services for purposes of making improvements in technology for monitoring the northern border and acquiring additional equipment at the northern border.

Section 403: Requiring Sharing by the Federal Bureau of Investigation of Certain Criminal Record Extracts with Other Federal Agencies in Order to Enhance Border Security:

Requires the Justice Department and FBI to provide the State Department and INS information contained in its National Crime Information Center files to permit INS and State to better determine whether a visa applicant has a criminal history record.

Section 404: Limited Authority to Pay Overtime: Strikes certain prohibitions on the paying of overtime to INS employees.

Section 405: Report on the Integrated Automated Fingerprint Identification System for Points of Entry and Overseas Consular Posts: Requires the Justice Department to report to Congress on the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System and other identification systems.

SUBTITLE B: ENHANCED IMMIGRATION PROVISIONS

Section 411: Definitions Relating to Terrorism: Broadens the terrorism ground of inadmissibility to include (a) any representative of a political or social group that publicly endorses terrorist activity in the United States, (b) a person who uses his position of prominence within a country to endorse terrorist activity or persuade others to support terrorist activity, (c) the spouses and children of persons engaged in terrorism, and (d) any other person the Secretary of State or Attorney General determines has been associated with a terrorist organization and who intends to engage in activities that could endanger the welfare, safety, or security of the United States. This bill broadens the definition of "terrorist activity" to include the use, not only of explosives and firearms, but other dangerous devices as well. Further, it broadens the definition of a terrorist "engaging in a terrorist activity" to include anyone who affords material support to an organization that the individual knows or should know is a terrorist organization, regardless of whether or not the purported purpose for the support is related to terrorism. It also broadens the types of organizations that may be designated or redesignated as a foreign terrorist organization by the Secretary of State to comport with definitions of terrorism found elsewhere in the law.

Section 412: Changes in Designation of Foreign Terrorist Organizations: Expands the ability of the Attorney General to mandatorily detain those aliens that he certifies may pose a threat to national security, pending the outcome of criminal or removal proceedings.

Section 413: Multilateral Cooperation Against Terrorists: Enhances the Government's ability to combat terrorism and crime worldwide by providing new exceptions to the laws regarding

disclosure of information from visa records. The bill grants the Secretary of State discretion to provide such information to foreign officials on a case-by-case basis for the purpose of fighting international terrorism or other crimes. It also allows the Secretary to provide countries with which he negotiates specific agreements to have more general access to information from the State Department's lookout databases where the country will use such information only to deny visas to persons seeking to enter its territory.

Section 414: Visa Integrity and Security: Includes a sense of the Congress that in light of the terrorist attacks, the Attorney General must expedite the implementation of the integrated entry and exit data system authorized by Congress in 1996.

Section 415: Participation of Office of Homeland Security on Entry Task Force: Includes the Office of Homeland Security in the development and implementation of the integrated entry and exit data system authorized by Congress in 1996.

Section 416: Foreign Student Monitoring Program: Requires the Attorney General to fully implement and expand foreign student monitoring program authorized by Congress in 1996.

Section 417: Machine Readable Passports: Requires the Secretary of State to perform annual audits and report to Congress on the implementation of the machine-readable passport program.

Section 418: Prevention of Consulate Shopping: Requires the Secretary of State to review how consular officers issue visas to determine if consular shopping is a problem.

SUBTITLE C: PRESERVATION OF IMMIGRATION BENEFITS FOR VICTIMS OF TERRORISM

Adds new subtitle (sections 421-428) to the Administration's proposal to preserve the immigration benefits of the victims of the September 11th terrorist attacks and their family members. For some families, spouses and children may lose their immigration status due to the death or serious injury of a family member. These family members are facing deportation because they are out of status: they no longer qualify for their current immigration status or are no longer eligible to complete the application process because their loved one was killed or injured in the September 11 terrorist attack. Others are threatened with the loss of their immigration status, through no fault of their own, due to the disruption of communications and transportation that has resulted directly from the terrorist attacks. Because of these disruptions, people have been and will be unable to meet important deadlines, which will mean the loss of eligibility for certain benefits and the inability to maintain lawful status, unless the law is changed. The bill:

A Creates a new special immigrant status for people who were in the process of securing permanent residence through a family member who died, was disabled, or lost employment as a result of the terrorist activities of September 11, 2001;

A Provides a temporary extension of status to people who are present in the United States on a "derivative status" (the spouse or minor child) of a non-immigrant who was killed or injured on September 11, 2001;

A Provides remedies for people who will be adversely effected or will lose their right to apply for benefits because of their inability to meet certain deadlines through no fault of their own and as a result of the September 11, 2001 terrorist attack (visa waiver, diversity lottery, advance parole and voluntary departure);

A Provides immigration relief to the widows/widowers and orphan children of citizens and legal permanent residents who were killed in the September 11 attacks by allowing

applications for permanent resident status to be adjudicated;

A Prevents children from aging out of eligibility for immigration benefits were the delay was the result of the September 11 attacks;

A Provides for temporary administrative relief to allow the family of people who were killed or seriously injured in the terrorist attacks who are not otherwise covered by this subtitle; and

A Prohibits any benefits from being provided to anyone culpable for the terrorist attacks on September 11 or any family member of such person.

TITLE V: REMOVING OBSTACLES TO INVESTIGATING TERRORISM

Section 501: Attorney General’s Authority to Pay Rewards -- Ensures non-terrorism rewards are subject to budgetary caps.

Section 502: Secretary of State Rewards (IR Committee) – Amends the Department of State's reward authority so that rewards may be offered for the identification or location of the leaders of a terrorist organization, increases the maximum amount of a award from \$5 million to \$10 million, and allows the Secretary to further to increase a reward to up \$25 million if the Secretary determines that offering the payment of such additional amount is important to the national interest. Also provides a sense of congress that the Secretary should offer a \$25 million award for Osama bin Laden and other leaders of the September 11th attack. Broadens the AG’s authority to offer rewards without caps for information related to terrorism.

Section 503: DNA Identification of Terrorists -- Requires persons convicted of terrorism offenses also to submit to DNA samples.

Section 504: Coordination with Law Enforcement – Allows Federal law enforcement conducting electronic surveillance or physical searches to consult with other Federal law enforcement officers to protect against hostile acts, terrorism, or intelligence activities.

Section 505: Miscellaneous National-Security Authorities – In counterintelligence investigations, the Director of the FBI or his designee, not lower than the Deputy Assistant Director, may request telephone, financial, or credit records of an individual if he certifies that the information sought is (1) relevant to an authorized foreign counterintelligence investigation, and (2) that there are “specific and articulable” facts finding that the person/entity from whom the information is sought is a foreign power or its agent.

Section 506: Extension of Secret Service Jurisdiction – Allows Secret Service to coordinate with Justice Department to investigate offenses against U.S. government computers.

Section 507: Disclosure of Educational Records (Education and Workforce) – Allows the release of student education records if it is determined by the Attorney General or Secretary of Education (or their designee) that doing so could reasonably be expected to assist in investigating or preventing a federal terrorism offense or domestic or international terrorism.

Section 508: Disclosure of NC Information -- Same as 507, but covers surveys conducted by the Education Department.

TITLE VI: PROVIDING FOR VICTIMS AND PUBLIC SAFETY OFFICERS

SUBTITLE A: AID TO FAMILIES OF PUBLIC SAFETY OFFICERS

Section 611: Expedited Payment for Public Safety Officers Involved in the Prevention, Investigation, Rescue, or Recovery Efforts Related to a Terrorist Attack -- Expedites

payment of
benefits to victims, their families, and public safety officers.

Section 612: Technical Correction with Respect to Expedited Payments for Heroic Public Safety Officers – Makes technical correction to Nadler bill, which passed into law in mid-September 2001.

Section 613: Public Safety Officer Benefit Program Payment Increase. Increases public safety officer benefits from \$100,000 to \$250,000.

Section 614: Office of Justice Programs – Adds to the list of programs within OJP.

SUBTITLE B: AMENDMENTS TO THE VICTIMS OF CRIME ACT OF 1984

This subtitle makes changes to the administration of – and authorizes additional funding for – the crime victims fund.

TITLE VII: INCREASED INFORMATION SHARING

This Subtitle expands regional information sharing to facilitate Federal-state-local law enforcement responses to terrorism.

TITLE VIII: STRENGTHENING THE CRIMINAL LAWS AGAINST TERRORISM

Section 801: Terrorist Attacks and Other Acts of Violence Against Mass Transportation Systems – Establishes a new Federal offense for attacking a mass transportation system.

Section 802: Definition of Domestic Terrorism – Creates a definition for “domestic terrorism” for the limited purpose of providing investigative authorities (i.e., court orders, warrants, etc.) for acts of terrorism within the territorial jurisdiction of the United States. Such offenses are those that are “(1) dangerous to human life and violate the criminal laws of the United States or any state; and (2) appear to be intended (or have the effect) – to intimidate a civilian population; influence government policy intimidation or coercion; or affect government conduct by mass destruction, assassination, or kidnaping (or a threat of).”

Section 803: Prohibition Against Harboring Terrorists – Makes it an offense when someone harbors or conceals another they know or should have known had engaged in or was about to engage in federal terrorism offenses.

Section 804: Jurisdiction over Crimes Committed at U.S. Facilities Abroad -- Extends the special and maritime criminal jurisdiction of the United States to offenses committed abroad by or against U.S. nationals.

Section 805: Material Support for Terrorism -- Permits prosecution under current crime of material support for terrorism to occur in “any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law,” and includes the provision of “monetary instruments” as “material support.”

Section 806: Assets of Terrorist Organizations – Extends forfeiture and confiscation authority to “all assets, foreign or domestic” that are owned or controlled by “any person, entity or organization engaged in planning or perpetuating any act of domestic terrorism or international terrorism against the United States, citizens or residents . . . or their property.”

Section 807: Technical Clarification Relating to Provision of Material Support to Terrorism --Makes clear that whoever provides material support or resources to terrorists or foreign terrorists organizations may be subject to criminal liability under § 2339A or § 2339B.

Moreover, proposed section 407 of the Administration’s legislation seemed to gut the congressional approval requirement and confer upon the President the independent power to impose agricultural and medical sanctions on terrorists “wherever they are located.”

Section 808: Definition of Federal Crime of Terrorism – Adds new highly egregious offenses to existing definition of “Federal crime of terrorism,” thereby ensuring that “coercing government” is an element of the offense along with other predicates. Also, added predicates are narrowed to those being the most egregious.

Section 809: No Statute of Limitation for Prosecuting Terrorism Offenses -- Provides that terrorism offenses may be prosecuted without time limitations, however, more focused list of offenses will continue to carry an 8-year statute of limitations except where they resulted in, or created a risk of, death or serious bodily injury.

Section 810: Alternative Maximum Penalties for Terrorism Crimes – Provides alternative maximum prison terms for terrorism crimes, including imprisonment for any term of years or for life.

Section 811: Penalties for Terrorist Conspiracies -- Adds a new section to the terrorism chapter of

the criminal code to provide that the maximum penalties for conspiracies to commit terrorism are equal to the maximum penalties authorized for the objects of such conspiracies (similar approach is found in the criminal code with respect to drug crimes).

Section 812: Post-Release Supervision of Terrorists -- Authorizes longer supervision periods, including lifetime supervision, for persons convicted of terrorism crimes (a similar approach is found in the drug crimes statute, which imposes a term of supervised release of at least 10 years, instead of 5 years, in cases where there is a prior conviction).

Section 813: Inclusion of Acts of Terrorism Crimes as Racketeering Activity – Provides that any terrorism-related crimes can be RICO predicates..

Section 814: Deterrence and Prevention of Cyberterrorism – Alters damage and civil liability triggers for computer hacking offenses. Also eliminates mandatory minimums in current law for computer hacking offenses.

Section 815: Additional Defense to Civil Actions Relating to Preserving Records in Response to Government Requests – Eliminates any ISP liability to customers for turning customer records over to law enforcement pursuant to any statutory authorization.

Section 816: Development and Support of Cybersecurity Forensic Capabilities – Requires the Attorney General to establish regional computer forensic laboratories.

Section 817: Biological Weapons -- Makes it an offense for a person to possess a biological weapon that is not reasonably justified, under the circumstances, by a prophylactic, protective, bona fide research, or other peaceful purpose.

TITLE IX: IMPROVED INTELLIGENCE

Section 901: Responsibilities of Director of Central Intelligence Regarding Foreign Intelligence Collected under FISA

-- Authorizes the Director of the CIA to establish requirements and priorities for collecting foreign intelligence, and to provide assistance to the Attorney General in ensuring that information derived from electronic surveillance or physical searches is properly disseminated. The DCI cannot direct, manage, or undertake electronic surveillance or physical search operations unless otherwise authorized by statute or executive order.

Section 902: Inclusion of International Terrorist Activities within Scope of Foreign Intelligence under the National Security Act -- Includes international terrorist activities within the scope of foreign intelligence under the National Security Act.

Section 903: Sense of Congress -- Sense of Congress on the establishment of intelligence relationships to acquire information on terrorists.

Section 904: Temporary Authority to Defer Submittal to Congress of Reports on Intelligence and Intelligence-Related Matters -- Grants DCI temporary authority to delay submittal of reports to Congress on intelligence matters.

Section 905: Disclosure to Director of Central Intelligence of Foreign Intelligence-Related Information with Respect to Criminal Investigations -- Requires the Attorney General to disclose to the CIA Director foreign intelligence acquired by the Justice Department in the course of a criminal investigation, except when disclosing such information would jeopardize an ongoing investigation.

Section 906: Foreign Terrorist Asset Tracking Center -- Requires the DCI, the AG, and the Secretary of the Treasury to report to Congress by February 1, 2002, on the desirability of a Foreign Asset Tracking Center to track terrorist assets.

Section 907: National Virtual Translation Center -- Requires the DCI and the FBI to report to Congress on the establishment of a National Virtual Translation Center.

Section 908: Training of Government Officials Regarding Identification and Use of Foreign Intelligence -- Requires DCI and AG to establish program to train officials to handle foreign intelligence information.

TITLE X: MISCELLANEOUS

Section 1001: Review of the Department of Justice -- Requires DOJ Inspector General to designate one official to receive complaints of civil liberties and civil rights abuses and to report such abuses to Congress semi-annually.

APPENDIX B, SUMMARY OF 16 EXPIRING PROVISIONS

Below is a summary of each of the sixteen sections set to expire this year pursuant to section 224 (the sunset does not apply to on-going investigations), an explanation of how each has been used, and any concerns related to such authorities:

Sec. 201 - Authority to intercept wire, oral, and electronic communications relating to terrorism

This section adds terrorism offenses to the list of predicates for title III wiretaps. Title III is used for criminal investigations.

Sec. 202 - Authority to intercept wire, oral, and electronic communications relating to computer fraud and abuse offenses

This section adds computer fraud and abuse offenses as predicates for title III wiretaps.

Sec. 203(b) and (d)- Authority to share electronic, wire, and oral interception information; Authority to share foreign intelligence information.

Section 203 (b) allows the government to share information from criminal wiretaps and electronic surveillance with federal law enforcement, immigration, and national security personnel as long as notice is given to the court after the disclosure. The recipient can use information only in the conduct of their duties subject to disclosure limitations in current law.

Section 203 (d) allows the FBI to share intelligence information with other federal law enforcement, immigration, and national security personnel. The Attorney General must establish procedures for the release of this information in the case of a U.S. person.

Sec. 204 - Clarification of intelligence exceptions from limitations on interception and disclosure of wire, oral, and electronic communications

This section carves out foreign intelligence surveillance operations from the Electronic Communications Privacy Act, which imposes limits on the placement of wiretaps.

Sec. 206 - Roving surveillance authority under the Foreign Intelligence Surveillance Act

This section allows the FBI to use roving wiretaps under FISA. This means that the FBI can obtain a single court order to tap any phone they believe a foreign agent would use, instead of getting separate court orders for each phone. The government need not name the target.

Sec. 207 - Duration of FISA surveillance of non-United States persons who are agents of a foreign power

This section lets the FBI obtain FISA search and surveillance orders for longer periods of time than they could have prior to the PATRIOT Act:

1. Wiretap orders relating to an agent of foreign power increased from 90 days to 120 days, and subsequent extensions were increased from 90 days to a year;
2. Physical searches of non-U.S. persons who are agents of a foreign power increased from 45 days to 120 days, and subsequent extensions were left at one year intervals;
3. All other physical searches—including those against U.S. persons--were extended from 45 to 90 days, and subsequent extensions were left at one year intervals.

These can be compared to wiretaps in the criminal context that are authorized and extended for only 30 days at a time.¹²⁹

Sec. 209 - Seizure of voice mail messages pursuant to warrants

This section provides that the FBI can access voice mails the same way it accesses e-mails and authorizes nationwide service with a single search warrant.

Sec. 212: Emergency Disclosures of Communications held by Phone Companies and Internet Service Providers

This section permits telephone companies and Internet Service Providers (ISPs) to disclose to the government, without penalty, customer communications and records if they think there is a danger of death or serious injury. This section precludes liability regardless of whether the company innocently stumbles on the information itself and approaches the government, or whether law enforcement initiates the disclosure itself. Because this section directly amended Title 18 of the U.S. Code, it can be used in any run-of-the-mill criminal investigation and has no ties to terrorism cases. In fact, all of the examples cited by the Justice Department are non-terror cases, including a bomb threat against a school, numerous kidnaping cases, and computer hacking threats.¹³⁰

Sec. 214 - Pen register and trap and trace authority under FISA

This section made it easier for the FBI to get a pen register or trap-and-trace under FISA.¹³¹ The FBI needs to prove the order is needed to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities. Prior to the PATRIOT Act, the FBI needed to establish that the telephone line in question had been used or was about to be used in connection with terrorism or a crime; this requirement was deleted. Before section 214, the government had to prove that the target

¹²⁹USA PATRIOT Act: Sunsets Report, April 2005, Department of Justice.

¹³⁰See Report From the Field: The USA PATRIOT Act at Work, U.S. Department of Justice, July 2004.

¹³¹A pen register is used to record the phone numbers that are dialed from a target phone. A trap-and-trace is used to record the phone numbers of the incoming calls to a target phone.

was an agent of a foreign power; now, they need only prove that the information is related to a terror or intelligence investigation. This extremely broad qualification of a FISA pen register/trap and trace order has led many groups to oppose it.¹³²

Sec. 215 - Access to records and other items under the Foreign Intelligence Surveillance Act

This section expanded the FBI's ability to obtain business records under FISA. Before the Act, the government could seek records only from hotels/motels, storage facilities and car rental companies; now, it can seek "any tangible thing" from any business. To obtain such records, the FBI Director (or his designee) must seek an order from the Foreign Intelligence Surveillance Court and specify that the records are sought for foreign intelligence information not concerning a U.S. person or are sought to protect against international terrorism or intelligence gathering. Upon receipt of such a request, the court must grant the order. Recipients are prohibited from disclosing to anyone but their attorneys that they have received a section 215 request.

Sec. 217 - Interception of computer trespasser communications

This section allows persons "acting under color of law" to intercept computer communications if a computer owner authorizes it, and if the person acting under color of law is acting pursuant to a lawful investigation.

Sec. 218 - Foreign intelligence information

This section says the FBI needs to aver that a "significant" purpose of a FISA order request is to gather foreign intelligence; before the Act, the FBI needed to show that obtaining foreign intelligence was the "primary purpose" of the order.

The effect of letting the status quo continue is that evidence obtained from a FISA warrant under FISA's statutory "probable cause" standard can be given to non-terror criminal prosecutors who are governed by the higher standard of 4th Amendment probable cause. In fact, the lower standard FISA warrant can be sought for criminal prosecution purposes, as long as terrorism or national intelligence is some small part of the reason. The long-standing policy of not letting criminal prosecutors direct intelligence investigations has been vitiated.

Sec. 220 - Nationwide service of search warrants for electronic evidence

This section allows a single court to issue a search warrant for electronic evidence that is valid nationally. According to the Department's May 13, 2003 letter, it has used this authority to track a fugitive and to track a hacker who stole trade secrets from a company and then extorted money from it.¹³³

¹³²See, for example, Electronic Privacy Information Center "The USA PATRIOT Act," at www.epic.org/privacy/terrorism/usapatriot/.

¹³³*Id.* at 24.

Sec. 223 - Civil liability for certain unauthorized disclosures

This section was included by Rep. Barney Frank to increase civil liability for unauthorized disclosure of pen/trap, wiretap, e-mail, or FISA information. In its May 13, 2003 letter to the Committee, the Department stated there had been no administrative disciplinary proceedings or civil actions under section 223.

Sec. 225 - Immunity for compliance with FISA wiretap

This section immunizes private parties who comply with FISA court orders or “requests for emergency assistance” otherwise authorized under FISA. Immunity already existed for criminal cases, and this section intended to provide the same for people who cooperated with officials in terror or intelligence cases.

“Lone Wolves” as Agents of a Foreign Power

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 created the so-called “lone wolf” provision of FISA redefining the “agent of a foreign power” to include those who “engage in international terrorism or activities in preparation therefore.” In other words, agents of a foreign power no longer need to have any connection to a foreign power. This is limited to non-U.S. persons, although a leaked “PATRIOT II” bill authored by the Justice Department would have expanded the lone wolf provision to cover U.S. persons as well.

The purpose of FISA always has been espionage and terrorism surveillance against foreign governments, foreign groups, or individuals associated with such governments or groups. Section 6001 expanded FISA to include any single person who engages in a violent act that (1) transcends national boundaries and (2) is intended to coerce the government or a civilian population.

When this provision passed committee in the markup of H.R. 10, it had a rebuttable presumption that a FISA judge could invoke when the target had no ties to foreign governments whatsoever. That provision was removed before the bill went to the floor.

John Conyers, Jr.
Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Sheila Jackson Lee
Maxine Waters
Martin T. Meehan
William D. Delahunt
Robert Wexler
Anthony D. Weiner
Linda T. Sánchez
Chris Van Hollen
Debbie Wasserman Schultz

