

September 30, 2009

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions,

On behalf of a diverse group of public interest and other advocacy organizations, we strongly urge you to support amendments from S.1686, the Judiciously Using Surveillance Tools In Counterterrorism Efforts (JUSTICE) Act, during tomorrow's Patriot Act reauthorization mark if and when they are offered. We commend Chairman Leahy and Senators Cardin and Kaufman for introducing the USA PATRIOT Act Reauthorization Act and recommend adding additional privacy protections during your scheduled markup.

These amendments are necessary to protect the privacy of law-abiding Americans. The powers granted under the PATRIOT Act and other post-9/11 surveillance authorities are extraordinary ones, designed to meet an extraordinary threat. Where such powers are properly targeted to the terrorist threat we face, they are appropriate. However, the looser the nexus between the powers granted to the government and a factual basis to suspect terrorist activity, the more likely that the privacy of innocent Americans will be violated – and the less likely that there will be any national security benefit. Indeed, some of the authorities under the PATRIOT Act are so poorly targeted to a terrorist threat, they have been used only a handful of times or not at all.

The most important provisions that should be included in a reported bill should:

- Provide greater protections for National Security Letters. The JUSTICE Act makes a number of important reforms to the National Security Letter (NSL) statutes. NSLs are letters the government provides to telephone companies, banks, credit agencies, and similar institutions (the “recipients”) to obtain certain communications, financial, and credit records about individuals without a court order. While authority for National Security Letters does not expire this year, the Department of Justice Inspector General found substantial NSL abuses, and a federal appeals court has ruled that the gag order provisions of the National Security Letter statute violate the First Amendment, demonstrating a clear need for reform. Provisions in the JUSTICE Act would:
 - Raise the standard for issuance. The Leahy-Cardin-Kaufman bill makes some improvements to the standard the government must meet in order to obtain communication, financial and credit records, but the bill still permits the government to obtain records when the subject of those records has no ties to an agent of a foreign power, such as a member of a terrorist organization. The JUSTICE Act would require the government to have reason to believe that the subject of the records has some connection to an agent of a foreign power or the activities of such a person.

- Limit the type of information that can be obtained by NSLs. Both the current statutes and the Leahy-Cardin-Kaufman bill permit the use of NSLs to obtain basic subscriber information such as name, address and billing information, as well as transactional records held by the recipient, such as to-and-from calling information. Transactional records are much more sensitive than basic subscriber information and should be available only with a Section 215 court order or with criminal process. The JUSTICE Act would implement that important safeguard.
- Limit the situations where non-disclosure orders can be imposed on recipients. In Doe v. Holder, the Second Circuit held that the current NSL non-disclosure provision, which gives the government nearly unfettered discretion to impose a gag order on any NSL recipient, violates the First Amendment. The Leahy-Cardin-Kaufman bill correctly shifts the burden back to the government to justify a gag order to a court and permits the court to evaluate the facts of the case independently. However, in identifying the circumstances that may justify a gag order, the Leahy-Cardin-Kaufman bill—like the current law—permits an overly broad “national security” justification. The JUSTICE Act provides much-needed specificity to this exemption, clarifying that it applies only if the denial of a gag order would tip off a suspect or his or her associates to the government’s investigation. This is in addition to other justifications recognized by the JUSTICE Act: endangering the life or safety of any person, flight from prosecution, destruction of or tampering with evidence, interference with diplomatic relations, or the intimidation of a potential witness. Finally, the JUSTICE Act would also direct that the gag order be narrowly tailored to prevent the above listed harms.
- Permit the court to disclose information to a recipient challenging a nondisclosure order. The JUSTICE Act NSL amendment would also give a court the discretion to share information relating to the NSL with a recipient challenging a gag order under the rules in the Classified Information Procedures Act, a decades old law that has been proven effective in protecting both classified information and the rights of litigants. This provision would not extend to sharing information with the actual subject of the records.
- Require mandatory minimization of information obtained by NSLs. The JUSTICE Act directs the Attorney General to promulgate guidelines that would govern the acquisition, retention, and dissemination of NSL information, so that information obtained about Americans is subject to enhanced protections and information obtained in error is not retained. Similar guidelines are mandated under the Foreign Intelligence Surveillance Act and have not proven burdensome.
- Limit the use of emergency NSLs. The JUSTICE Act also tightens the standards by which a records-holder (such as a telephone or credit company) can voluntarily disclose information to the government. The current statute permits disclosure to the government, without some process such as a subpoena or an NSL, if the record-holder believes in good faith that an emergency involving danger of death or injury to any person exists. The amendment in the JUSTICE Act would add two common-sense restrictions: a requirement that the belief be reasonable and a requirement that the

danger be imminent. It would also create a new emergency provision for financial records.

- Impose a ban on bulk collection conducted under the Foreign Intelligence Surveillance Act (FISA) Amendments Act. The JUSTICE Act would amend last year's FISA Amendments Act to ensure that foreign intelligence surveillance conducted under that law be limited to collecting international communications of foreign intelligence interest and not conducted in a dragnet fashion that could sweep in communications of literally millions of innocent Americans. This amendment passed in the Senate Judiciary Committee's mark of the FISA Amendments Act in 2008.
- Require minimization of Americans' communications that are collected unlawfully. The JUSTICE Act would limit the government's use of information about Americans obtained under FISA Amendments Act procedures that the FISA Court later determines to be unlawful, while giving the court flexibility to allow such information to be used in appropriate cases.
- Repeal the FISA Amendments Act provision immunizing telecommunications companies for illegal spying. The FISA Amendments Act allows the Attorney General to direct a court to dismiss any case against any telecommunications provider alleged to have illegally provided assistance to the intelligence community, based only on his certification that the alleged conduct did not occur, was lawful, or was authorized by the President. Judges and juries should decide the facts and the law, not the Attorney General. The JUSTICE Act would respect the separation of powers by allowing the courts to rule on the legality of the telecoms' participation in the National Security Agency's warrantless wiretapping program.
- Protect charitable giving from criminal prosecution. The material support statute criminalizes giving anything of value to a designated terrorist organization. However, it is broad enough to criminalize charitable activities such as giving food and water to civilians in war torn countries where working with a designated group is the only practical way to reach noncombatants. The JUSTICE Act would impose an intent requirement so that individuals can be prosecuted only if they intend their donations to further the terror-related activities of the organization.
- Limit delayed notice search warrants. The current statute governing delayed notice criminal search warrants, also called "sneak and peek" warrants, permits the government to execute such a warrant if contemporaneous notice of the search would endanger the life or physical safety of an individual, result in flight from prosecution, result in the destruction of or tampering with evidence, or result in the intimidation of potential witnesses. While these justifications are sensible, there is also a catch-all that permits a "sneak and peek" warrant where contemporaneous notice would "seriously jeopardize an investigation." This catch-all is both problematically vague and unnecessary, given that the more specific justifications adequately list the various ways in which an investigation can be seriously jeopardized. The JUSTICE Act would eliminate this loophole while maintaining the current list of potential harms justifying delayed notice. It would also shorten the initial delay from 30 days to seven, and subsequent extensions from 90 days to 30.
- Eliminate the "lone wolf" provision. FISA originally permitted secret foreign intelligence surveillance and searches of agents of foreign powers, defined as those working with or for

foreign governments, companies and terrorist organizations. The heightened risk posed by foreign organizations was the justification for permitting searches and surveillance on less than a traditional Fourth Amendment requirement of probable cause to believe a crime was or is being committed. The lone wolf provision destroyed that nexus and the statute now permits searches and seizures whenever there is probable cause to believe that a non-U.S. Person is preparing for or engaging in international terrorism. If the government can meet this standard, a criminal warrant can and should be obtained. The JUSTICE Act would let this provision, which has never been used, expire.

- Ease the burden on recipients of court orders. The current law allows the government to get a court order for stored communications or records in a court other than the district in which the business, company, or other entity receiving the court order resides. The JUSTICE Act would permit the recipient to challenge the order in the district in which it resides, thereby reducing the burden of traveling and litigating an order in a far off court and discouraging the government from forum shopping for the court with the lowest standard.
- Require a description of a target of roving wiretaps. The “John Doe wiretap” provision of FISA allows the government to wiretap communications devices used by targets even if their precise identities are not known. The “roving wiretap” provision allows the government to wiretap any communications device that could be used by the target, including public telephones, library computer terminals, or other devices used by multiple individuals. Taken together, these provisions permit the FISA court to issue surveillance orders that specify neither the person nor the device to be wiretapped. The JUSTICE Act places sensible limits on this authority. “John Doe wiretaps” would still be permissible, but only if the government identified the communications devices to be wiretapped. And “roving wiretaps” would still be permitted, but the government would first be required to ascertain that the target was in fact using the device—a common-sense limitation that already exists when the government seeks to use a “roving wiretap” in regular criminal investigations.
- Raise the standards for obtaining criminal pen register and trap and trace orders. The current intelligence and criminal statutes allow the government to obtain pen register and trap and trace orders, which enable the government to capture basic call information (including the numbers called, the length of calls, etc.), merely by certifying that the information sought is relevant to an investigation. The JUSTICE Act would require that there be specific and articulable facts giving reason to believe that the records pertain to someone who is either a subject of a criminal investigation or an agent of a foreign power, the activities of such an individual, or someone in contact with one.

In addition to incorporating these heightened protections, we urge the committee to reject any amendments that would infringe on the privacy rights of Americans without any corresponding benefit to national security. In particular, we urge rejection of any amendment that would grant the government even more authority to collect information on individuals without an adequate basis to suspect those individuals of terrorism or other illegal activity.

Thank you for considering our recommendations.

Sincerely,

American Association of University Professors
American Booksellers Foundation for Free Expression
American Civil Liberties Union
American Library Association
American-Arab Anti-Discrimination Committee (ADC)
Arab American Institute
Association of Research Libraries
Bill of Rights Defense Committee
Brennan Center for Justice
Center for Democracy and Technology
Center for Media and Democracy
Competitive Enterprise Institute
Council on American-Islamic Relations
Defending Dissent Foundation
Electronic Frontier Foundation
Government Accountability Project
National Association of Criminal Defense Lawyers
National Coalition Against Censorship
OMB Watch
Open Society Policy Center
PEN American Center
People For the American Way
Privacy Lives

Cc: Senate Judiciary Committee