Written Statement of
Michael German, Senior Policy Counsel

American Civil Liberties Union
Washington Legislative Office

On

Permanent Provisions of the

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[redacted]

WASHINGTON LEGISLATIVE OFFICE
915 15th Street, NW Washington, D.C. 20005
(202) 544-1681 Fax (202) 546-0738

On October 26, 2001, amid the climate of fear and uncertainty that followed the terrorist attacks of September 11, 2001, President George W. Bush signed into law the USA Patriot Act and fundamentally altered the relationship Americans share with their government.[1] This act betrayed the confidence the framers of the Constitution had that a government bounded by the law would be strong enough to defend the liberties they so

private records and monitor communications, often without any evidence of wrongdoing, the Patriot Act eroded our most basic right the freedom from unwarranted government intrusion into our private lives and thwarted constitutional checks and balances. Put very si

More than nine years after its implementation there is little evidence that the Patriot Act has been effective in making America more secure from terrorists. However, there are many unfortunate examples that the government abused these authorities in ways that both violate the rights of innocent people and squander precious security resources. Three Patriot Act-related surveillance provisions are scheduled to expire in May 2011, which will give the 112th Congress an opportunity to review and thoroughly evaluate all Patriot Act authorities as well as all other post-9/11 domestic intelligence programs and rescind, repeal or modify provisions that are unused, ineffective or prone to abuse. The American Civil Liberties Union encourages Congress to exercise its oversight powers fully, to restore effective checks on executive branch surveillance powers and to prohibit unreasonable searches and seizures of private information without probable cause based on particularized suspicion.

In a September 14, 2009 letter to the Senate Judiciary Committee, the Department Patriot Act authorities [2] Congress should accept this invitation and conduct a thorough evaluation of all government surveillance authorities. The DOJ letter went on to argue for reauthorization of all three provisions without and many other surveillance authorities are unnecessary and unconstitutionally broad.

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

The framers of the Constitution recognized that giving the government unchecked authority to pry into our private lives risked more than just individual property rights, as

background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of [9]

EXCESSIVE SECRECY THWARTS CONGRESSIONAL OVERSIGHT

Just 45 days after the worst terrorist attack in history Congress passed the Patriot

NEW SUNSET DATES CREATE OVERSIGHT AND AMENDMENT OPPORTUNITY

When Congress reauthorized the Patriot Act in 2006, it established new expiration dates for two Patriot Act provisions and for a related provision of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).[18] After a series of reauthorizations these three provisions, **section 206** and **section 215** of the Patriot Act and **section 6001** of the IRTPA, are all set to expire on May 27, 2011. The 112th Congress will revisit these provisions this year, which creates an opportunity for Congress to examine and evaluate ties, as well as any other post-9/11 surveillance or security programs.

Section 206

subject of a wiretap request uses multiple communications devices. The FISC is a secret court established under the Foreign Intelligence Surveillance Act (FISA) that issues classified orders for the FBI to conduct electronic surveillance or physical searches in intelligence investigations against foreign agents and international terrorists. Unlike roving wiretaps authorized for criminal investigations,[19] section 206 does not require the order to identify either the communications device to be tapped nor the individual against whom the surveillance is directed, which is what gives section 206 the Kafkaesque

-the-fact report to the FISC to explain why the government believed the target was using the phones it was tapping. However, it does not require the government to name the target, or to make

wer to intercept a roving series of unidentified devices of an unidentified target provides government agents with an inappropriate level of discretion reminiscent of the general warrants that so angered the American colonists. There is very little public information available regarding how the government uses section 206, though FBI D[(cl)-22oCand f02(fRober TJETBT

there is no reason to believe that the government could not obtain a Title III surveillance

counterterrorism or counter-intelligence investigation. The Patriot Act reauthorization made the NSL provisions permanent.

The NSL statutes now allow the FBI and other executive branch agencies to obtain records about people who are not known or even suspected to have done anything wrong. The NSL statutes also allow the government to prohibit NSL recipients from disclosing that the government sought or obtained information from them. While zation to allow NSL

The ACLU successfully challenged the constitutionality of the original Patriot -disclosure order on every NSL recipient.[34] Upon reauthorization, the Patriot Act limited these gag orders to situations when a special agent in charge certifies that disclosure of the NSL request might result in danger to the national security, interference with an FBI investigation or showed that 97 percent of NSLs issued by the FBI in 2006 included gag orders, and that five percent of [35] While a five percent violation rate may seem small compared to the widespread abuse of NSL authorities documented elsewhere, these audit findings demonstrate that the FBI continues to gag NSL recipients in an overly broad, and therefore unconstitutional manner. Moreover, the IG found that gags were improperly incl issued to cover hundreds of illegal FBI requests for telephone records through exigent letters.[36]

section 215 audits showed the number of FBI requests for section 215 orders were sparse by comparison to the number of NSLs issued. Only 13 section 215 applications were made in 2008.[38]

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

While this portion of the IG report is heavily redacted, it appears that sometime in 2006 the FBI twice as [39] Rather than re-

investigation using three NSLs that were predicated on the same information contained in the section 215 application.[40]

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A former OIPR counsel for intelligence policy argued that while investigations based solely on association with subjects of other national security investigations were [46] It is also important to note that this investigation, based on simple association with the subject of another FBI investigation, was apparently not an aberration. The FBI general counsel told the IG the FBI would

who merely have contact with other subjects of FBI investigations.[47] Conducting

reasonable suspicion of wrongdoing, will only result in wasted effort, misspent security resources and unnecessary violations of the rights of innocent Americans.

lays bare the inherent weakness of any set

would lead to such inappropriate use.

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order has ever challenged its validity, and cites this as evidence the authority is not being abused.[48] This argument ignores the fact that section 215 orders are designed to obtain records held in the possession of third parties, as opposed to the subject of the information demand, so the interest in expending the time and expense of fighting such an order is remote. We know the FBI engaged in massive abuse of NSLs, yet out of over two hundred thousand NSL recipients only a handful ever challenged these demands. Moreover

provide them with an unclassified summary and redacted version of the documents. In August 2009, Judge Marrero ordered the government to partially disclose its secret filing and to release a public summary of its evidence. As a result of a settlement agreement

publicly identify himself and his former company as the plaintiffs in the case..

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

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

In addition, a 2007 ACLU Freedom of Information Act suit revealed that the FBI was not the only agency abusing its NSL authority. The Department of Defense (DOD) does not have the authority to investigate Americans, except in extremely limited circumstances. Recognizing this, Congress gave the DOD a narrow NSL authority, strictly limited to non-compulsory requests for information regarding DOD employees in counterterrorism and counter-intelligence investigations,[60] and to obtaining financial records[61] and consumer reports[62] when necessary to conduct such investigations. Only the FBI has the authority to issue compulsory NSLs for electronic communication records and for certain consumer information from consumer reporting agencies. This authority can only be used in furtherance of authorized FBI investigations. Records obtained by the ACLU show the DOD issued hundreds of NSLs to collect financial and credit information since September 2001, and at times asked the FBI to issue NSLs compelling the production of records the DOD wanted but did not have the authority to obtain. The

investigative authority and to obtain information it was not entitled to under the law. The FBI compliance with these DOD requests even when it was not conducting its own authorized investigation is an apparent violation of its own statutory authority.

MATERIAL SUPPORT FOR TERRORISM PROVISIONS

Laws prohibiting material support for terrorism, which were expanded by the Patriot Act, are in desperate need of re-evaluation and reform. Intended as a mechanism to starve terrorist organizations of resources, these statutes instead undermine legitimate humanitarian efforts and perpetuate the perception that U.S. counterterrorism policies are unjust.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), passed in the wake of the Oklahoma City bombing, criminalized providing material support to

terrorists or terrorist organizations.[63] Title 18 U.S.C. § 2339A makes it a federal crime to knowingly provide material support or resources in preparation for or in carrying out specified crimes of terrorism, and 18 U.S.C. § 2339B outlaws the knowing provision of material support or resources to any group of individuals the secretary of state has designated a foreign terrorist organization (FTO).[64]

And because there is no humanitarian exemption from material support laws (only the provision of medicine and religious materials are exempted), aid workers in conflict zones like Sri Lanka are at risk of prosecution by the U.S. government. Arulanantham explained the chilling effect of these laws:

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

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

Such unjust and counter-

makingmaking

Any suggestion that the government would not use the material support statutes to prosecute purely First Amendment-protected speech is belied by the fact that it already has. In a most notorious example, the government brought charges against University of Idaho Ph.D. candidate Sami Omar Al-Hussayen, whose volunteer work managing websites for a Muslim charity led to a six-week criminal trial for materially supporting terrorism. The prosecution argued that by running a website that had links to other

ry ultimately acquitted Al-Hussayen of all terrorism-related charges.[74]

The material support provisions also impose guilt by association in violation of the Fifth Amendment. Due process requires the government to prove personal guilt that an individual *specifically intended* before criminal sanctions may be imposed.[75] Even with the IRTPA amendments, the material support provisions do not require specific intent. Rather, the statutes impose criminal liability based on the mere knowledge that the group receiving support is an FTO or engages in terrorism. Indeed, a Florida district court judge in *United States v. Al-Arian* warned that

U.S. Court of Appeals for the Ninth Circuit

Fifth Amendment.[82] The government appealed this decision and in 2010 the U.S. Supreme Court reversed, upholding the Patriot Act and IRPTA-enhanced material support provisions as constitutional as applied to these plaintiffs.[83]

SUGGESTED REFORM OF MATERIAL SUPPORT STATUTES

- Amend the material support statutes to require specific intent to further an ful activities before imposing criminal liability.

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- Establish an explicit duress exemption to remove obstacles for genuine refugees and asylum-seekers to enter and/or remain in the United States.

- Provide notice, due process and meaningful review requirements in the designation process, and permit defendants charged with material support to challenge the underlying designation in their criminal cases.

- Broaden the humanitarian aid exemption to the material support statute to ensure that charities can provide legitimate humanitarian aid in conflict zones (currently only medicine and religious materials are exempted from the material support prohibition).

IDEOLOGICAL EXCLUSION

The Patriot Act revived the discredited practice of ideological exclusion: denying

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

States to establish one standard of ideology for citizens and another for foreigners who

lesson.

American Academy of Religion v. Napolitano (previously *American Academy of Religion v. Chertoff*). In July 2004, the Department of Homeland Security (DHS) used the

scholars of Islam and a vocal critic of U.S. policy. Ramadan had accepted a position to teach at the University of Notre Dame. After DHS and the State Department failed to act on a second visa application which would have permitted Ramadan to teach at Notre Dame, he applied for a B Visa to attend and participate in conferences in the U.S. After the government failed to act on *that* application for many months, in January 2006, the American Academy of Religion (AAR), the American Association of University Professors and PEN American Center organizations that had invited Professor Ramadan to speak in the United States filed su
exclusion of Professor Ramadan, as well as the ideological exclusion provision, violated their First Amendment right to receive information and hear ideas, and compromised their ability to engage in an intellectual exchange with foreign scholars. When challenged in court, the government abandoned its allegation that Professor Ramadan had endorsed terrorism.

right to "'hear, speak, and debate with' a visa applicant." The appeals court also found that the government cannot exclude an individual from the U.S. on the basis of "material support" for terrorism without affording him the "opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization." The Second Circuit did not address the constitutionality of the ideological exclusion provision because it agreed with the district court that plaintiffs lacked standing.

In March 2004, the FBI began to suspect Mayfield of involvement in a series of terrorist bombings in Madrid, Spain, based on an inaccurate

failure of these abusive programs can government officials learn from these mistakes and properly reform our national security laws and policies. Finally, only by vigorously exercising its oversight responsibility in matters of national security can Congress reassert its critical role as an effective check against abuse of executive authority.

The Constitution gives Congress the responsibility to conduct oversight, and Congress must fulfill this obligation to ensure the effective operation of our government. Congress should begin vigorous and comprehensive oversight hearings to examine all post-9/11 national security programs to evaluate their effectiveness and their impact on

APPENDIX THE PATRIOT ACT AT A GLANCE

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

- Section 203: Information Sharing. The Patriot Act and subsequent statutes encourage or require information sharing. While it is important for critical details to reach the right people, little is known about the breadth of use and the scope of distribution of our personal information.

- _____. Typical judicial orders authorizing wiretaps, including Foreign Intelligence Surveillance Act (FISA) wiretap orders, identify the person or place to be monitored. This requirement has its roots firmly planted in the original Bill of Rights the giants of our history having insisted on such a concept, now memorialized ularly describing the place to be searched, and the persons or things to be

  tion will expire on December 31, 2009.

- Section 209: Access to Stored Communications. The Patriot Act amended criminal statutes so that the government can obtain opened emails and emails older than 180 days with only a subpoena instead of a warrant.

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

- Section 214: Pen Register/Trap and Trace Orders Under FISA. Pen register/trap and trace devices pick up communication records in real time and provide the government with a streaming list of phone calls or emails made by a person or account. Before the Patriot Act, this section was limited to tracking the communications of suspected terrorists. Now, it can be used against people who are generally relevant to an investigation, even if they have done nothing wrong.

- Section 215: FISA Orders for Any Tangible Thing. These are FISA Court orders for any tangible thing library records, a computer hard drive, a car the government claims is relevant to an investigation to protect against terrorism. Since passage of the Patriot Act, the person whose things are being seized need not be a suspected terrorist or even be in contact with one. These changes are scheduled to expire on Dec. 31, 2009.

- Section 216: Criminal Pen Register/ Trap and Trace Orders. The Patriot Act amended the criminal code to clarify that the pen register/trap and

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

[24] As amended, the NSL statute authorizes the Director of the FBI or his designee (including a Special Agent in Charge of a Bureau field office) to impose a gag order on any person or entity served with an NSL. *See* 18 U.S.C. § 2709(c) □ absent the non- □ States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with □ □ □ *Id*. at § 2709(c)(1). If the Director of the FBI or his designee so certifies, the recipient of the NSL □ any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the [FBI] has sought or obtained a □ □ *Id*. Gag orders imposed under the NSL statute are imposed by the FBI unilaterally, without prior judicial review. While the statute requires a □ t the gag is necessary, the certification is not examined by anyone outside the executive □ □ □ □ *Id*. at § 3511(b)(1). However, in the case of a petition filed □ □ □ □ □ at disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence □ □ □ □ *Id*

[38] Letter from Ronald Weich, Assistant Attorney General, United States Department of Justice, to Harry Reid, Majority Leader, United States Senate (May 14, 2009) (on file with author), *available at* http://www.fas.org/irp/agency/doj/fisa/2008rept.pdf.
[39] 2008 Section 215 Report, *supra* note 28, at 68.
[40] *Id.* at 72.
[41] *Id.* at 73.
[42] *Id.* at 67.
[43] *Id.* at 72.
[44]*Id*.
[45] *Id.* at 71 n.63.
[46] *Id.* at 73.
[47] *Id.* at 72-73.
[48] Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, to Senator Patrick Leahy, Chairman, Committee on the Judiciary, *supra* note 2.
[49] 2008 Section 215 Report, *supra* note 28, at 43.
[50] *Id.* at 45-47.
[51] *Id.* at 47.
[52] *See, Foreign Intelligence Surveillance Act: Closed Hearing Before the H. Permanent Select Comm. on Intelligence*, 110th