

June 15, 2004

Honorable Porter J. Goss
108 Cannon House Office Building
Washington, DC 20515

Honorable James Sensenbrenner
2449 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Goss and Sensenbrenner:

We, the undersigned organizations, write in opposition to H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003," which contains expansions of USA PATRIOT Act and FISA authorities. We commend the Judiciary Committee for its oversight of the USA PATRIOT Act and its commitment to look carefully at the implementation of PATRIOT Act authorities in connection with Congress' consideration of the sunset provisions of the PATRIOT Act next year. We believe that consideration of H.R. 3179, should be postponed until Congress has conducted a comprehensive evaluation of the Patriot Act authorities. This political season is not the appropriate time to expand the government's surveillance powers.

We also have concerns about the procedures in the House concerning this bill. News reports indicate that the bill's provisions may be included as part of the Intelligence Authorization Bill at what is scheduled to be a mark-up closed to the public. While we are pleased that the Judiciary Committee held a subcommittee hearing on the bill, the Intelligence Committee has held no hearings (public or closed) on the bill, and we do not believe these substantial expansions of the government's surveillance powers should be considered in a closed Intelligence Committee mark-up. Before proceeding, Congress should hear from law enforcement experts, civil liberties groups, and constitutional scholars about the impact of these proposals, and should do so in an open session.

To date, the Justice Department has failed to demonstrate how the provisions of H.R. 3179 advance national security interests. All of the provisions of the bill infringe on rights of privacy and other civil liberties.

1. Creating new penalties to enforce secret FBI letter demands for confidential records. The bill enhances the government's power to secretly obtain personal records without judicial review under National Security Letters (sections 2 and 3). As you know, the PATRIOT Act and additional legislation passed last year vastly expanded the scope of records that can be obtained using National Security Letters. They now reach travel agents, car and boat dealerships, jewelers and casinos, as well as credit reports, financial records and electronic communications transactional records, (e.g. billing records). At the same time, the PATRIOT ACT eliminated the previous requirement that the FBI identify the individual about whom it was seeking information and have some basis to believe that such person may be a terrorist or spy. Instead, the FBI can now secretly obtain entire

databases containing all kinds of information about innocent people with no judicial review whatsoever. Currently there is no reporting on the use of NSLs and no process for recipients to challenge or modify burdensome or overbroad requests. The automatic and permanent “gag rule” makes it difficult if not impossible for anyone to even know if the authority is being abused.

H.R. 3179 would provide for criminal penalties and other mechanisms to enforce what, in our view, are vastly overbroad powers. Congress should consider adding enforcement mechanisms to NSLs only after thoroughly reviewing their current use and restoring the requirements that the FBI identify whose records it is seeking and articulate a basis for suspecting that person.

2. *Allowing secret surveillance and searches of individuals without any showing that they are connected to a foreign government or terrorist group.* The bill would allow secret electronic surveillance and secret searches under the Foreign Intelligence Surveillance Act of persons acting alone, without any connection to a foreign terrorist group or government. This “lone wolf” provision is contained in section 4. The Department of Justice has demonstrated absolutely no need for this expansion of its extraordinary powers under FISA. To grant this expansion would violate basic Fourth Amendment principles.

Congress originally approved the FISA with the explicit requirement that it would only be used against individuals acting on behalf of foreign governments or groups. This connection to a foreign power is essential to the constitutionality of FISA, which contains lower probable cause standards than are required in criminal cases and fewer safeguards against abuse, most notably because the government can keep secret forever the fact that an individual has been surveilled or searched under FISA.

The bill would expand FISA beyond its intended scope and allow it to be used against an individual who may be planning a crime but has no connection to a foreign power. In those circumstances, the Fourth Amendment requires that criminal procedures be used; to allow FISA surveillance would be unconstitutional under Supreme Court jurisprudence and the reasoning of the 2002 FISA Court of Review decision.¹

While the present bill applies only to non-citizens, if enacted, this violation of Fourth Amendment standards could soon be made applicable to citizens. Indeed the Justice Department proposed applying the lone wolf amendment to citizens in the leaked draft of PATRIOT II. The Congress should not head down that road with H.R. 3179.

Encouraging the use of already scarce investigative resources under FISA to target individuals acting alone increases the risk that, once again, the FBI will miss those truly dangerous individuals who are acting in concert with other terrorists and are thereby capable of inflicting grave damage to our national security.

¹ See *United States v. United States District Court*, 407 U.S. 297 (1972) (“Keith case”).

3. *Expanding the use of secret evidence and secret surveillance information in immigration proceedings.* The second amendment to FISA in H.R. 3179 (section 6) would allow the *secret use* of information obtained from secret intelligence surveillance and searches in any immigration proceeding without even telling the individual that he had been overheard or subjected to a secret search. Doing so would deprive an individual of the opportunity to challenge the legality of the surveillance and the right to challenge the veracity and validity of the information being used against him.

The government already has the authority to do all this in the case of alleged alien terrorists under the 1996 Alien Terrorist Removal Proceedings Act, 8 U.S.C. secs. 1531–1537. But HR 3179 would extend this authority, which is of dubious constitutionality even when applied only against suspected terrorists, to any individual, including legal permanent residents, without even the minimal safeguards provided in the 1996 law.

In doing so, the amendment would violate fundamental due process rights. As the House Judiciary Committee recognized in passing the Secret Evidence Repeal Act in 2000, the Supreme Court has ruled that “There are literally millions of aliens within the jurisdiction of the United States. The fifth amendment, as well as the 14th amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary or transitory is entitled to constitutional protection.” *Matthews v. Diaz*, 426 U.S. 67, 77 (1976).²

Given the substantial expansion of FISA authorities in the PATRIOT Act, it is especially important not to eliminate the existing *already minimal* protections when the government seeks to use FISA information to deport an individual. There are many fewer due process protections available in immigration proceedings than in criminal proceedings, even though immigration proceedings may result in substantial deprivations of liberty. Given the relaxed hearsay and due process requirements already existing in immigration proceedings, this amendment would enable the government to use FISA information against an individual with no check as to whether the information was illegally obtained and, even more significantly, absolutely no check as to the accuracy or reliability of the information itself.

4. *Requiring judges to hold secret ex parte hearings in criminal cases.* The bill limits the ability of judges to deal appropriately with classified information in criminal cases, even though the government has made absolutely no showing that there is any problem under current law. Section 5 of the bill would amend the Classified Information Procedures Act (18 U.S.C. App. 3), which governs discovery of classified information in criminal trials and was enacted to protect national security information. Under current law, a court may let the government make an *ex parte* written request during pre-trial discovery to make substitutions for classified information. Again, the Department of Justice has described no instances in which a judge has inappropriately refused to let the

² See H.R.Rep. No. 106-981, Secret Evidence Repeal Act of 2000, 106th Cong., 2nd Sess. (Oct. 18, 2000).

government make an *ex parte* request, much less demonstrated any harm from any such refusal.

Nevertheless, HR 3179 would amend CIPA to *require* a judge to allow the government to make an *ex parte* request and allow such *ex parte* proceedings to be conducted orally without any written record. By reducing a judge's ability to manage the discovery process when classified information is involved, the proposal would remove a necessary check on potential government abuse. The proposal represents an unwarranted erosion of judicial authority in the conduct of criminal trials.

We urge you to reject H.R. 3179 and to conduct the necessary oversight on the implementation of the PATRIOT Act before considering further amendments expanding government powers

Sincerely,

American-Arab Anti-Discrimination Committee
American Association of Law Libraries
American Booksellers Foundation for Free Expression
American Civil Liberties Union
American Conservative Union
American Immigration Lawyers Association
American Library Association
Amnesty International USA
Arab American Institute
The Arab Community Center for Economic and Social Services
Asian American Community Service Association, Inc.
Asian Law Caucus
Association of American Physicians & Surgeons
Association of Research Libraries
Bill of Rights Defense Campaign, Pittsburgh, PA
Bill of Rights Defense Campaign, New York City, NY
Bill of Rights Defense Committee
Bill of Rights Defense Committee, Clatsop County, OR
Bill of Rights Defense Committee, Durham, NC
Bill of Rights Defense Committee, Minnesota
Bill of Rights Defense Committee, Ukiah Valley, CA
Bill of Rights Defense Committee, Port Orford, OR
Bill of Rights Defense Coalition, Prince George's County, MD
Center for Community Health Research, Hispanic Health Council
Center for Constitutional Rights
Center for Democracy and Technology
Center for National Security Studies
Common Cause
Consumer Action

Consumer Federation of California
Council on American-Islamic Relations (CAIR)
DC Collective for South Asians, Washington DC
Doctors for Disaster Preparedness
Drug Policy Alliance
Electronic Frontier Foundation
Electronic Privacy Information Center
Fairfax County Privacy Council
Federation of American Scientists
First Amendment Foundation
Free Congress Foundation
Freedom to Read Foundation
Friends Committee on National Legislation (Quaker)
Human Rights First
Human Rights Watch
Japanese American Citizen's League
Lawyers' Committee for Civil Rights
Lutheran Immigration and Refugee Service
The Multiracial Activist
National Asian Pacific American Legal Consortium
National Association of Criminal Defense Lawyers
National Black Police Association
National Committee Against Repressive Legislation
National Korean American Service & Education Consortium
National Immigration Forum
National Immigration Project
Pakistani American Public Affairs Committee
Peace & Justice Center of Sonoma County
Peace & Justice Coalition of Prince George's County, MD
People for the American Way
Presbyterian Church (USA) Washington Office
Privacy Activism
Privacy Rights Clearinghouse
Open Society Policy Center
Oxford Citizens for Peace and Justice, OR
The Rutherford Institute
Sacramento Coalition to Stop the Patriot Act
Sikh Coalition
Sikh Mediawatch and Resource Task Force
Social Workers For Peace and Justice, Western Massachusetts
Square One Media Network
Strength Through Peace
Tampa: Safe AND Free
Therapists for Peace and Justice
This Republic Can
Unitarian Universalist Service Committee

United Sikhs
Women's International League for Peace and Freedom, Sacramento Valley Branch
Worldview, Ltd.

Cc: Members of the House Judiciary and Intelligence Committees