

## **LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS**

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

### ***Charities, Foundations, and National Security***

**CHAPTER 1:** Eliminate Unnecessary Barriers to Legitimate Charitable Work

### ***Detention, Interrogation, and Trials of Suspected Terrorists***

**CHAPTER 2:** Closing Guantánamo

**CHAPTER 3:** End Illegal Detention, Torture, and Rendition

**CHAPTER 4:** Prosecute Terrorist Suspects in Accordance with the Law

### ***Immigration and National Security***

**CHAPTER 5:** Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.

**CHAPTER 6:** Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion

**CHAPTER 7:** Misuse of Immigration Detention Laws in Counterterrorism Efforts

### ***Secrecy, Surveillance, and Privacy***

**CHAPTER 8:** Revising Attorney General Guidelines on FBI Investigations

**CHAPTER 9:** Updating the Law Governing the Privacy of Electronic Communications

**CHAPTER 10:** Fusion Centers and the Expansion of Domestic Intelligence

**CHAPTER 11:** Promoting Government Transparency

**CHAPTER 12:** National Security Letters and Section 215 of the USA PATRIOT Act

**CHAPTER 13:** Reform of the National Security Surveillance Laws and Procedures

**CHAPTER 14:** Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents

**CHAPTER 15:** Reforming the State Secrets Privilege

**CHAPTER 16:** Reforming Watch Lists

### ***Separation of Powers and Executive Authority***

**CHAPTER 17:** Assertion of Executive Authority in National Security Matters

**CHAPTER 18:** Executive Privilege and Congressional Oversight

**CHAPTER 19:** Signing Statements

**CHAPTER 20:** War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at [www.constitutionproject.org](http://www.constitutionproject.org), and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

## APPENDIX

### Chapter 12: National Security Letters and Section 215 of the USA PATRIOT Act

#### I. Jurisdiction

- A. **Congress.** Congress has the authority to enact the legislation necessary to correct the problems with National Security Letters. The intelligence and judiciary committees in both the House and Senate share authority over any such legislation.
- B. **Executive Branch.** Even without Congressional action, the President can order the FBI and other elements of the Intelligence Community to adopt reforms. For example, the President could order all agency heads to direct any requests for NSLs through the FBI, which would then determine whether an NSL could be issued, and he could direct the FBI to adopt the minimization procedures outlined above.

#### II. Status of Actions in Legislative, Executive and Judicial Branches:

- A. **Legislative:** Unless reauthorized by December 31, 2009, Section 215 authority will sunset pursuant to the PATRIOT Reauthorization Act. The NSL statutes, and the changes that were made to them after September 11, 2001, do not sunset. The PATRIOT Reauthorization Act (P.L. 109-177), altered the gag provisions in the NSL statutes and Section 215. Specifically, the legislation allowed an NSL or Section 215 recipient to talk with an attorney “to obtain legal advice or legal assistance with respect to his request,” and it added procedures for judicial review of nondisclosure conditions imposed on the recipient. The bill also made other changes to the statutes, but they were largely cosmetic and did not significantly change the standard for issuing an NSL or applying for a Section 215 order. A number of bills have been introduced that would work more significant changes.
1. Bills introduced in the 110th Congress:
    - National Security Letter Reform Act (S. 2088) – This legislation would raise the standards for issuing NSLs and seeking orders under Section 215, and it would time limit the gag that accompanies such orders and letters. – Introduced by Senator Russell Feingold (D-WI); Referred to Senate Committee on the Judiciary where hearings were held; no additional action taken. This is the leading reform bill in the Senate. Companion bill is H.R. 3189.
    - National Security Letters Reform Act (H.R. 3189) – This legislation would also raise the standards for issuing NSLs and seeking orders under Section 215, and it would time limit the gag that accompanies such letters and orders. – Introduced by Rep. Jerrold Nadler (D-NY); Referred to House Committees on Judiciary and Financial Services; Passed 7-3 out of Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties; no additional action taken. This is the leading reform bill in the House. Companion bill is S. 2088.

- National Security Letter Judicial and Congressional Oversight Act (H.R. 1739) – This legislation would require the approval of a Foreign Intelligence Surveillance Court judge or designated United States Magistrate Judge for the issuance of a national security letter – Introduced by Rep. Jane Harman (D-CA); Referred to the House Committees on the Judiciary, Intelligence, and Financial Services; no action.

## 2. Bills introduced in the 109th Congress

- National Security Letter Judicial and Congressional Oversight Act (H.R. 4570) – This legislation, like H.R. 1739 in the 110<sup>th</sup> Congress would have required the approval of a Foreign Intelligence Surveillance Court judge or designated United States Magistrate Judge for the issuance of a national security letter – Introduced by Rep. Jane Harman (D-CA); Referred to the House Committees on the Judiciary, Intelligence, and Financial Services; no action.
- National Security Letter Reform Act (S. 1680) – This legislation would establish judicial review procedures for National Security Letters – Introduced by Sen. John Cornyn (R-TX); Referred to Senate Committee on the Judiciary; no action taken.
- S. 2369 – This legislation would sunset the National Security Letters statutes on Dec. 31, 2009 – Introduced by Sen. Arlen Specter (R-PA); referred to the Senate Committee on the Judiciary; no action taken.
- Stop Self-Authorized Secret Searches Act (H.R. 2715) – This legislation would establish procedural protections for the use of National Security Letters – Introduced by Rep. Jerrold Nadler (D-NY) and Jeff Flake (R-AZ); Referred to House Committees on the Judiciary and Financial Services; no action taken
- SAFE Act of 2005 (S. 737) – This legislation would establish procedural protections for the use of National Security Letters and orders under Section 215 - Introduced by Sens. Larry Craig (R-ID) and Dick Durbin (D-IL); referred to Senate Committee on the Judiciary; no committee action. This bill was the leading legislation to address the civil liberties problems in the PATRIOT Act in connection with re-authorization of the expiring provisions. House companion bill H.R. 2715.
- Electronic Communications Privacy Judicial Review and Improvement Act of 2005 (S. 693) – This legislation would provide for judicial review of national security letters issued to wire and electronic communications service providers – Introduced by Sen. John Cornyn (R-TX); referred to Senate Committee on the Judiciary; no action taken

## 1. Bills introduced in the 108th Congress:

- Proposals to exempt libraries from the reach of National Security Letters
  - SAFE Act of 2003 (HR. 3352) – Introduced by Rep. Butch Otter (R-ID); referred to the House Committees on Judiciary and Intelligence; no action taken.
  - Library and Bookseller Protection Act (S. 1158) – Introduced by Sen. Barbara Boxer (D-CA); referred to the Senate Committee on the Judiciary; no action taken.
  - Library, Bookseller, and Personal Records Privacy Act (S. 1507) - Introduced by Sen. Russell Feingold (D-WI); referred to the Senate Committee on the Judiciary; no action taken.

- Protecting the Rights of Individuals Act (S. 1552) – Introduced by Sen. Lisa Murkowski (R-AK) and Ron Wyden (D-OR); referred to the Senate Committee on the Judiciary; no action taken.
- SAFE Act of 2003 (S. 1709) – Introduced by Sens. Larry Craig (R-ID) and Richard Durbin (D-IL); referred to the Senate Committee on the Judiciary; no action taken.
- Proposals to increase Congressional oversight over the use of National Security Letter authority
  - Domestic Surveillance Oversight Act (S. 436) – Introduced by Sens. Patrick Leahy (D-VT), Chuck Grassley (R-IA), and Arlen Specter (R-PA); referred to the Senate Committee on the Judiciary; no action taken.
- Unlike many of the other surveillance provisions of the PATRIOT Act, NSL authorities did not sunset. Bill were introduced to sunset the NSL sections:
  - Benjamin Franklin True Patriot Act (H.R. 3171) – Introduced by Rep. Dennis Kucinich (D-OH) and Ron Paul (R-TX); Referred to the House Committees on the Judiciary, Education and Workforce, Transportation and Infrastructure, Intelligence, and Government Reform; no action taken
  - SAFE Act of 2003 (HR. 3352) – Introduced by Rep. Butch Otter (R-ID); referred to the House Committees on Judiciary and Intelligence; no action taken
  - Patriot Oversight Restoration Act (S. 1695) – Introduced by Sens. Patrick Leahy (D-VT) and Larry Craig (R-ID); Referred to the Senate Committee on the Judiciary; no action taken.
  - SAFE Act of 2003 (S. 1709) – Introduced by Sens. Larry Craig (R-ID) and Richard Durbin (D-IL); referred to the Senate Committee on the Judiciary; no action taken.

## 2. Hearings in the 110th Congress

- *Hearing on: H.R. 3189, the “National Security Letters Reform Act of 2007”:* *Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary* (April 15, 2008) available at [http://judiciary.house.gov/hearings/hear\\_041508.html](http://judiciary.house.gov/hearings/hear_041508.html)
- *“National Security Letters: The Need for Greater Accountability and Oversight”:* *Hearing Before the S. Comm. on the Judiciary* (April 23, 2008) available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3255>
- *National Security Letters: Closed Hearing of the S. Select Comm. on Intelligence* (June 7, 2007) (no transcript available)
- *“Responding to The Inspector General's Findings of Improper Use of National Security Letters by the FBI”:* *Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary* (April 11, 2007) available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=2679>
- *National Security Letters: Hearing Before the Permanent Select Comm. on Intelligence* (March 28, 2007) (Transcript not available)
- *The Inspector General's Independent Report on the F.B.I's Use of National Security Letters: Hearing Before the H. Comm. on the Judiciary* (March 20, 2007)

B. **Executive:** The FBI issued a handful of guidances on NSLs. Helpfully, they were superseded by the FBI Guidance on National Security Letters issued on June 1, 2007.

C. **Judicial:** The most relevant judicial work on National Security Letters has emerged from the Second Circuit. Prior to the PATRIOT Act reauthorization, two District Court opinions were issued finding 18 U.S.C. § 2709 (the NSL provision that covers records maintained by telephone companies and ISPs) unconstitutional. The first case, *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (*Doe I*) found that § 2709 “violates the Fourth Amendment because . . . it effectively bars or substantially deters any judicial challenge to the propriety of an NSL request.” *Id.* at 475. The court also found that § 2709 constituted a prior restraint and content-based limit on speech which was not “narrowly tailored to promote a compelling government interest,” therefore violating the First Amendment. *Id.* at 511. The second case, *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) (*Doe II*), reached essentially the same conclusion on the First Amendment question, but did not reach the Fourth Amendment issue.

Soon after these decisions, Congress passed reauthorizing legislation for the Patriot Act (P.L. 109-177), which significantly altered 18 U.S.C. § 2709 in an attempt to address the First Amendment concerns raised in *Doe I* and *Doe II*. Specifically, the legislation allowed an NSL recipient to talk with an attorney “to obtain legal advice or legal assistance with respect to his request,” and it added procedures for judicial review of nondisclosure conditions imposed on the recipient of a NSL. After passage of this legislation, the 2d Circuit vacated the portion of *Doe I* dealing with the Fourth Amendment because *Doe I* decided to no longer press that claim. *Doe v. Gonzales*, 449 F.3d 415, 419 (2d Cir. 2006). It then remanded the case for reconsideration of the First Amendment argument in light of the new statutory framework. *Id.* The Court dismissed *Doe II* as moot because the Government decided to allow *Doe II* to reveal his identity, so the case was moot.

On remand from *Doe I*, the U.S. District Court for the Southern District of New York reconsidered the new § 2709, and found that the new statutory provisions still violated the First Amendment. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007). Again, the court held that the nondisclosure features of § 2709 violated the First Amendment as both a prior restraint and content-based restriction on speech not narrowly tailored to a compelling government interest. *Id.* at 386. No additional action on the case has been noted.

In an unrelated case outside the Second Circuit, a District Court found that National Security Letters are not discoverable under Fed. R. Crim. P. 16. *United States v. Amawi*, Case No. 3:06CR719, 2008 U.S. Dist. LEXIS 5676, at \*8-9 (N.D. Ohio Jan. 22, 2008). Few other courts have spoken on National Security Letter issues.