

## **THE PATRIOT ACT DEBATE SUFFERS FROM EXCESSIVE SECRECY**

“A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both.”

(James Madison, 1832)

Looming over the Patriot Act reauthorization debate is a unique problem. The public (and Congress) must consider whether the Patriot Act’s most controversial provisions that expand the FBI’s investigative power should remain law. It must do so, however, in a vacuum. Unfortunately, the Bush Administration has done everything in its power to suppress even the most basic information about how the Patriot Act is being used. In particular, the government has gone to great lengths to suppress information about the FBI’s use of its expanded power to issue “national security letters” (NSLs).

In early April, Senator Arlen Specter (R-Pa) complained that the Department of Justice (DOJ) refused to reveal specific information about the use of the Patriot Act, even in closed-door briefings to Congress. “This closed-door briefing was for specifics,” said Specter, but “[t]hey didn’t have specifics.”

## **Gags and Censorship**

One of the keys to the secrecy surrounding the Patriot Act is that some of the Act's most controversial provisions include gag provisions. This is true, for example, of Section 505 of the Patriot Act, which vastly expanded the government's ability to issue national security letters in order to obtain customer information from certain types of businesses. Through NSLs, the government can seek sensitive customer records from financial institutions – records including credit report and bank records. It can also seek records from Internet service providers (ISPs) – records including the email addresses you correspond with, the websites you visit, whether you operate an anonymous blog, and what you purchase over the Internet. The target of an NSL need not be suspected of any wrongdoing or criminal activity. Much of the information that can be obtained through an NSL may be protected by the First Amendment. NSLs are issued without judicial authorization, and the statute does not provide any mechanism by which a bank or ISP served with an NSL can challenge the demand for records in court.

Anyone who receives an NSL is gagged indefinitely. By statute, a business that is served with an NSL is prohibited from disclosing to “any person” that the FBI has sought or obtained information. This means that a business served with an NSL cannot discuss it with the customer target and, perhaps most disturbingly, cannot discuss the matter with an attorney. This gag provision has a profound effect on the public's understanding of NSLs because it prevents anyone from understanding precisely how NSLs are being used by the FBI, who is being targeted, and what kinds of information the FBI is routinely seeking.

The gag provision even prevents the public from understanding legal challenges to the NSL statute itself. Despite the gag provision, after being served with an NSL an ISP turned to the ACLU for help. The ACLU challenged both the statute and the actual NSL, arguing that the NSL authority violated the First and Fourth Amendments, and that the gag provision violated the First Amendment. The gag provision forced the ACLU to initially file the case under seal. Eventually the existence of the suit could be disclosed but the ACLU was gagged from disclosing a vast amount of nonsensitive information about the case because the government insisted disclosure would cause harm to national security. Remarkably, the government asserted throughout the litigation that national security would be undermined by the disclosure that the FBI had used its statutory power (that it had served an NSL).

After Judge Marrero in the Southern District of New York struck down the NSL statute, the ACLU was finally allowed to say – because the Judge himself disclosed – that it represented a client that was served with an NSL, and that the government was using a legislatively granted power. The government had redacted references to all such information in every legal document. Perhaps the most absurd censorship occurred when the government insisted on redacting a direct quote from a Supreme Court case. Here's the language that the government insisted on blacking out: "The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." A threat to our safety, indeed.

## **A Campaign of Misinformation**

In September 2004, Judge Marrero issued an eloquent opinion striking down the NSL statute as violative of the First and Fourth Amendments because the statute “has the effect of authorizing coercive searches” that are “effectively immune from any judicial process.” Judge Marrero also struck down the indefinite and blanket gag provision as an unconstitutional prior restraint.

In response to Judge Marrero’s decision, rather than attempt to defend the constitutionality of the NSL power, DOJ embarked upon an active campaign to convince Congress, the press, and the public that Judge Marrero’s landmark decision had absolutely nothing to do with the Patriot Act. To this end, the Justice Department demanded retractions from newspapers that had reported the decision struck down a provision of the Patriot Act, and sent urgent email messages to Congress alerting them that the ACLU and the press had it all wrong. The government’s argument? That the NSL power had existed before the enactment of the Patriot Act, and thus, Judge Marrero had not found a particular power created by the Patriot Act unconstitutional

What this argument ignored was the extent to which the Patriot Act vastly expanded the NSL power, which in turn impacted upon its constitutionality. Prior to the Patriot Act, NSLs could be issued only where the FBI could certify that the target of the NSL was an “agent of a foreign power” – in other words a terrorist or a spy. Now, as a result of the Patriot Act amendments, the FBI can use an NSL to get information so long as it merely certifies to itself that the information is relevant to a terrorism or counterintelligence investigation. This means that the FBI can use an NSL to get information about *anyone*. Despite the government’s public position, the FBI itself had

previously acknowledged in an internal memorandum released to the ACLU under the Freedom of Information Act (FOIA) that “NSLs are powerful investigative tools” and that the Patriot Act “greatly broadened” the FBI’s authority to use them.” Other documents obtained by the ACLU under FOIA indicate that the FBI issued hundreds of NSLs in the fourteen-month period after the Patriot Act was enacted. Due to the gag provision, however, those served with NSLs are not allowed to come forward.

### **Resisting Congressional Oversight and Selective Release of Information**

Many members of Congress are growing impatient with the Administration’s recalcitrance and secrecy tactics. “I think we need to have more public disclosure in examining and assessing the Patriot Act’s impact,” said Sen. Olympia J. Snowe (R-Me). “We are to some extent doing oversight in the dark,” said Sen. Ron Wyden (D-Or). Since the enactment of the Patriot Act, DOJ has consistently refused to fully answer Congressional demands for information about its use of the Act.

Despite its general resistance to Congressional oversight, DOJ has sparingly doled out information about the Patriot Act when it suits the Administration’s purposes. For example, at a recent Patriot Act hearing held by the Senate Judiciary Committee, DOJ released information that it had previously – most notably in litigation brought by the ACLU – insisted was classified, secret, and harmful to national security if disclosed. Attorney General Gonzalez publicly revealed that DOJ had used Section 215 of the Patriot Act dozens of times as of March 30, 2005. Section 215 gives law enforcement agents the ability to, through an order issued by the secret Foreign Intelligence Surveillance court, access any "tangible things," including the business records of

medical offices, libraries, gun stores and other businesses with minimal judicial review.

### **Part of a Larger Theme**

Secrecy is the centerpiece of the Bush Administration's "war on terror." It is evident from the thousands of deportations that have been conducted in secret, and the hundreds of people designated "enemy combatants" who have languished incommunicado for years at Guantanamo Bay. The Bush Administration has reversed the presumption of openness in government, instructing agencies that information should always be withheld from the public under FOIA so long as there was a "sound legal basis" for withholding. There now exists new categories of unclassified information that must not be released to the public, including "sensitive but unclassified," and "for official use only" information. It is well-documented that the amount of information deemed classified has skyrocketed.

The Administration is also using secrecy as a tactic to avoid accountability in the courts. In at least three constitutional challenges currently being litigated by the ACLU, the government has submitted secret, *ex parte* evidence the ACLU is not allowed to see. The Administration is increasingly using a rarely-invoked evidentiary privilege – the state secrets privilege – to dismiss litigation at the pleading stage, arguing that the cases are so sensitive that they should not even be heard by an Article III Judge. The privilege has recently been invoked to dismiss a retaliation claim brought by national security whistleblower Sibel Edmonds who was fired after reporting security breaches at the FBI, to dismiss a legal challenge to the torture endured by Mahar Arar after he was "rendered"

by the United States to Syria, and a race discrimination claim brought by a CIA employee.

### **Excessive Secrecy Makes Us Less Safe**

A 1997 government report issued by Commission on Protecting and Reducing Government Secrecy, chaired by Senator Daniel Patrick Moynihan said it best: “Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate.” It remains to be seen when Congress will more vigorously flex its oversight muscles and the public will stand up and demand a return to transparency, and a modicum of accountability.