

## Ten Civil Liberties Reforms Still Needed as PATRIOT Act Turns Ten

### 1. Reform the PATRIOT Act

Although, in some instances, the USA Patriot Act has been a useful tool in combating terrorism, it authorizes overly broad executive powers to track, monitor, and search individuals without adequate civil liberties safeguards to prevent abuse. One of the most troubling provisions is the expansion of the use of National Security Letters (NSLs), demand letters signed by government agents requiring disclosure of sensitive information held by banks and telephone and internet providers, with no prior judicial approval. Audits by the Justice Department Inspector General have revealed numerous abuses in the issuance of NSLs.

Additional Patriot Act provisions in need of reform include the:

- “Business records” provision – Should include tighter standards for the government to obtain materials held by certain businesses, including libraries;
- “Lone wolf” provision – Authorizes the secret surveillance of individuals even where there is no evidence that those individuals have any connection to a foreign power or its agents, and which the Justice Department admits has *never* been used since its enactment; and
- “Roving wiretap” provision – Permits the government to monitor multiple phones or email addresses without citing the particular location of the target, and thereby creates real risks that innocent civilians may become inadvertent targets of surveillance.

Although Congress has extended existing provisions of the law until 2015, ***the Patriot Act is still in urgent need of reform.***

### 2. Improve Safeguards for the Government’s Use of Electronic Surveillance Technologies

As ordinary Americans have increasingly come to rely on technological advances in their daily lives, the government has adopted these same tools to secretly monitor individuals’ conduct and activities. Some law enforcement officers want to use technologies such as the internet, cell phones, and GPS devices to monitor virtually anyone, anywhere, and at any time. Similarly, government “data mining” programs that gather and analyze vast quantities of electronic data can offer significant law enforcement benefits but can also pose serious threats to civil liberties. And while these new tools may sometimes be used to prevent and detect crime, laws written before these technological developments became so

prevalent have failed to preserve a proper constitutional balance between law enforcement needs and civil liberties. ***Therefore, it is critical that law enforcement be required to obtain warrants based upon probable cause before conducting electronic surveillance on individuals, and that any government program under which electronic data are collected provides accountability and redress mechanisms, limits the amount of data collected to what is necessary, and ensures that databases are adequately protected.***

### 3. End the Use of the State Secrets Privilege as an Immunity Doctrine

Increasingly in the past ten years, the executive branch has relied upon the state secrets privilege to block litigation of many cases involving national security issues and programs. The state secret privilege is an important legal doctrine that permits the executive branch to protect certain evidence from public disclosure in litigation, when disclosure poses a risk to national security. Unfortunately, the doctrine has evolved into a new and dangerous immunity doctrine. Today, instead of simply relying upon the privilege to protect certain *evidence* from public disclosure, the executive branch has asserted the privilege to completely block litigation of numerous national security *cases*, including all cases challenging operation of the extraordinary rendition and NSA warrantless wiretapping programs. ***The privilege must be reformed to restore the critical role of the courts in reviewing state secrets claims. An independent judge should determine whether the privilege applies, and whether there is sufficient non-privileged evidence for a case to be litigated.*** Reform would enable true national security secrets to be protected from disclosure, while permitting cases to be litigated whenever possible.

### 4. Promote Openness and Accountability in the Government

Despite the fact that it is the fundamental principles of openness, public debate, and accountability that make our nation strong, over the last ten years government agencies have continued and expanded a trend of all too often choosing secrecy and lack of transparency at their expense. Specifically, over-classification of documents inhibits transparency and stands in the way of true accountability. Ironically, this excessive secrecy also presents a very real threat to national security because it needlessly increases the cost and complexity of accessing and using information even within government itself. ***The government must take seriously the fundamental classification review currently***

*underway, and work to reverse the incentives that now encourage over-classification of government information.*

#### 5. Limit the Overbroad Reach of the Material Support Laws

Existing laws prohibiting “material support” to terrorist organizations are a critical weapon in our efforts to combat terrorism. However, the current laws sweep far too broadly, and even criminalize pure speech furthering only lawful, nonviolent ends. Although the Supreme Court upheld this broad interpretation of the material support laws in *Holder v. Humanitarian Law Project*, the Court did *not* find that such an interpretation is required. ***It is thus critical that Congress or the executive branch act to limit the scope of these provisions, thereby removing the barriers to peace-building organizations and legitimate humanitarian aid groups seeking to operate in terrorist-controlled areas.*** The material support laws also raise constitutional concerns regarding the process by which groups and individuals are designated as “terrorist.” They give the executive branch extraordinarily broad discretion to designate individuals and groups, and provide little process to those who have been designated. Thus, ***Congress or the executive branch must act to provide a meaningful opportunity to challenge these designations.***

#### 6. Restore Checks and Balances in Deciding to Use Force Abroad

The Constitution requires the President to obtain the authorization of Congress prior to initiating the use of force abroad except for a limited range of defensive purposes. Even though the nature of the threats to our national security has changed dramatically over the last several decades, that fact alone does not justify any change in the constitutional principles by which our government should decide whether to initiate the use of force abroad. And while the decision to enter into wars in Afghanistan and Iraq were undertaken with at least some congressional involvement, the Obama administration’s decision to enter into hostilities in Libya had not even the patina of congressional debate or authorization. ***The proper constitutional balance of war powers must be restored, so that, going forward, the President will not be able to initiate the use of force abroad without express authorization from Congress.***

#### 7. Ensure Civilian Trials for Terrorism Suspects

Our traditional federal civilian courts have proven to be the most effective venues for trying complex terrorism cases; over 400 terrorism-related suspects have faced trial in our federal court system since 2001. In contrast, military commissions remain constitutionally flawed and have completed only six cases in ten years. Despite these facts, Congress has made trying terrorism suspects in civilian court

increasingly difficult, and new efforts would require military commission trials for all foreign terrorism suspects. ***Congress and the Obama administration must work together to preserve all of our options, including the use of federal courts, in our fight against terrorism.***

#### 8. Avoid Expansion of Indefinite Detention Beyond Guantanamo

The past ten years have seen the creation of a system of indefinite detention in Guantanamo without charge, supported by both Presidents Bush and Obama. Now, more than 10 years after September 11<sup>th</sup>, Congress seeks to codify this practice and expand indefinite detention without charge well beyond Guantanamo. This new legislation would authorize the indefinite detention of suspects regardless of their place of capture—whether on U.S. soil or abroad—and would even authorize the detention of U.S. citizens. ***Such a constitutionally suspect system would not only result in protracted litigation and delay of justice, but would also undermine U.S. counterterrorism efforts, and should be avoided.***

#### 9. Prevent Over-Militarizing Counterterrorism and Detainee Policies

In recent years there has been a push to over-militarize U.S. counterterrorism efforts, including efforts to require military custody of certain individuals captured pursuant to the 2001 Authorization for the Use of Military Force, regardless of where they are apprehended. Civilian law enforcement has repeatedly proven effective at identifying, investigating, capturing, and interrogating terrorism suspects, but now some in Congress want to require all terrorism suspects be turned over to the military. Moreover, these proposals would allow the military to act as law enforcement within U.S. borders, and hamstringing the effective intelligence-gathering efforts by the FBI and state and local law enforcement agencies. ***Such proposals would remove one of our most effective counterterrorism tools from our tool box—the use of federal, state and local law enforcement—and must be rejected.***

#### 10. Conduct Comprehensive Examination of Detainee Treatment Policies

Despite public outrage and collective shock over the abuses at Abu Ghraib, as well as allegations of detainee abuse by U.S. officials in Afghanistan, Guantanamo Bay, and other sites, ***neither the Bush nor the Obama administrations have authorized a thorough inquiry to examine detainee treatment. Americans deserve a non-partisan, transparent, comprehensive understanding of what is both known and unknown about past and current policies regarding detainee treatment.***