

**Statement of the Constitution Project  
Submitted to the Senate Judiciary Committee  
in Connection with the September 23, 2009 Hearing on  
Reauthorizing the USA Patriot Act: Ensuring Liberty and Security**

**September 29, 2009**

The Constitution Project submits this statement to urge Congress to enact critical reforms to the USA Patriot Act, to ensure that we protect both national security and Americans' privacy rights and civil liberties. As Congress considers the three provisions of the Patriot Act set to expire on December 31<sup>st</sup> – those covering business record orders, surveillance of a so-called "lone wolf" terrorist, and "roving" wiretaps – it should take the opportunity to revisit and reform these provisions and others that fail to include proper safeguards to protect individual rights. In particular, the provision governing national security letters (NSLs) should be reformed. Passage of the USA Patriot Act Sunset Extension Act of 2009 would be an important step toward serving these goals.

The Constitution Project is a bipartisan organization that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. In advance of this year's reauthorization of the Patriot Act, the Constitution Project's Liberty and Security Committee released a report entitled *Statement on Reforming the Patriot Act*. The statement is signed by twenty six policy experts, former government officials, and legal scholars of all partisan affiliations. It calls on Congress to amend the Patriot Act to include more robust protections for constitutional rights and civil liberties and provides specific policy recommendations. The USA Patriot Act Sunset Extension Act, introduced last week, is consistent with these recommendations, and we fully support his proposals for reform.

**The History of the Patriot Act and the Need for Reform**

The Patriot Act was hastily drafted in the wake of the September 11<sup>th</sup> terrorist attacks and contained many provisions which granted new, extraordinarily broad law-enforcement powers to the executive branch. The Patriot Act contains provisions that allow the government to conduct surveillance and gather documents from third parties, in some instances without being required to first seek judicial approval. Some of these provisions contain "gag" orders, preventing third parties who receive orders to turn over documents from disclosing that they have received such an order.

Granting the executive branch such unfettered law enforcement authority raises serious constitutional concerns, and in fact we have seen abuses of this authority in the eight years since the Patriot Act was passed. For example, audits by the Justice Department Inspector General (IG) released in 2007 and 2008 have revealed numerous abuses in the issuance of national security letters (NSLs). The IG audits demonstrated that FBI agents had used NSLs in many cases where they were not authorized, including using them against individuals insufficiently related to any FBI investigation and issuing

inappropriate “blanket NSLs” in violation of FBI policy. The audits also revealed that the FBI had used “exigent letters” not authorized by law to quickly obtain information without ever issuing the NSL that it promised to issue to cover the request. Such abuses will be perpetuated unless Congress acts to reform the Patriot Act to bring it in line with tradition constitutional norms.

### **Key Reforms in the USA Patriot Act Sunset Extension Act of 2009**

#### National Security Letters

- **Standard for Obtaining an NSL:** Under current law, a national security letter can be obtained by simply having an official certify that the information sought is relevant to an authorized investigation. Section 6 of the USA Patriot Act Extension Act of 2009 would require the official to also provide a statement of facts showing that there is reason to believe the information sought is relevant to an authorized investigation. This is a critical reform, although the Constitution Project recommends that Congress go even further, and require that the government provide specific and articulable facts showing that there is reason to believe the records sought *pertain to an agent of a foreign power*.
- **Limitations on the Duration of “Gag” Orders:** Section 4 of the USA Patriot Act Extension Act of 2009 would strip the government of the power to issue “gag” orders of indefinite duration in connection with an NSL. The bill would allow the government to issue a nondisclosure order lasting no longer than one year, with the order being renewable for one-year intervals thereafter if the government is able to demonstrate the continued need for nondisclosure. While the Constitution Project’s report goes even further and recommends limiting the duration of nondisclosure orders to 30 days, extendable only by a court based upon a showing of necessity, this provision of the USA Patriot Act Sunset Extension Act would be an important step forward in ending indefinite gag orders.
- **Judicial Review of “Gag” Orders:** Currently, the Patriot Act does not provide for judicial review of nondisclosure orders attached to NSLs. Section 5 of the bill would establish a procedure by which the recipient of an NSL can challenge the validity of the nondisclosure order. The Constitution Project supports this effort to provide meaningful judicial review of nondisclosure orders.
- **Sunset Provisions:** Section 2 of the USA Patriot Act Extension Act of 2009 establishes a sunset date for the NSLs provision. The NSL provision is not presently scheduled to sunset, and adding a new sunset date would help promote a vigorous system of checks and balances. The establishment of a sunset provision would allow Congress to revisit the NSL provision in 2013 to further assess the need for reform.

### Business Records Provision

- **Standards for Accessing Business Records:** Section 215 of the Patriot Act allows the government access to “certain business records” held by third parties if those records are relevant to a foreign intelligence or international terrorism investigation. Before the Foreign Intelligence Surveillance Act (FISA) court will grant an agent the authority to issue such an order, the government must demonstrate that the records it seeks are in fact relevant to an authorized investigation. However, under current law, records are presumptively relevant. Section 3 of the USA Patriot Act Sunset Extension Act would eliminate this presumption, and would require the government to make a factual showing to support the issuance of a Section 215 order, including facts showing that the records sought pertain to an agent of a foreign power or a person in contact with such an agent. This reform is consistent with the Constitution Project’s recommendations for tightening the standard for issuing Section 215 orders and would provide meaningful judicial review of this broad law enforcement power.
- **Judicial Review of Nondisclosure Orders:** Under current law, the recipient of an order under Section 215 must wait a year to challenge the validity of a nondisclosure order. Section 5 of the bill would allow the recipient of an order issued under Section 215 the right to challenge a nondisclosure order as soon as it is received.
- **Minimization:** Section 5 of the USA Patriot Act Sunset Extension Act would require that a FISA court approve minimization procedures in any instance where the collection of business records under section 215 involves the gathering of information concerning a U.S. person. This would further the Constitution Project’s recommendation for the adoption of robust minimization procedures to ensure that the scope of orders issued under Section 215 is no greater than necessary to accomplish the investigative purpose.

### Lone Wolf and Roving Wiretap Provisions

- **Sunset Provisions:** Section 2 of the USA Patriot Act Extension Act of 2009 would set a new sunset period for the “lone wolf” and roving wiretap provisions. These new sunsets would ensure further close oversight by Congress, and are therefore welcome reforms. In its report, *Statement on Reforming the Patriot Act*, the Constitution Project recommends further reforms to these provisions, such as requiring detailed and public reporting on the use, if any, of the lone wolf provision. This is especially important now in light of the Department of Justice’s recent admission that it has never found it necessary to use this provision.

## Requirements for Public Reporting and Audits

- **Public Reporting:** The bill would require annual public reporting on the use of NSLs as well as public reports on the aggregate numbers of requests for surveillance under FISA that includes breakdowns by category of surveillance. These provisions would help promote effective oversight and accountability.
- **Audits:** Section 9 of the USA Patriot Act Extension Act would require additional audits of the use of NSLs, and audits on the use of Section 215 orders, by the Justice Department's Inspector General. The 2007 and 2008 audits were extremely helpful in revealing abuses of the NSL authority. This provision would provide a critical tool to promote accountability and avoid future abuses.

In short, the USA Patriot Act Sunset Extension Act of 2009 would provide key reforms to safeguard constitutional values and civil liberties, while still giving law enforcement the tools to effectively investigate terrorists. The Constitution Project looks forward to seeing Congress enact these important reforms.

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