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December 5, 2005

Senator Arlen Specter, Chairman
United States Senate Judiciary Committee
SH-711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Senator Specter:

I am writing on behalf of the New York City Bar Association to urge you to oppose the enactment of the Patriot Act reauthorization bill reported by the Conference Committee. We submit that it fails to meaningfully ameliorate many of the most serious threats to civil liberties in the original Patriot Act.

In its letter of September 21, 2005, the Association previously provided its views on the House and Senate bills on the Patriot Act which were the subject of the Conference Committee negotiations. A copy of that letter is attached.

We are deeply disappointed in the Conference Report, which fails adequately to address a number of issues identified in our September 21 letter. We believe the most egregious examples are the conference bill's treatment of Sections 215 and 505. While we focus this letter on those two provisions, we continue to have the concerns about the other provisions discussed in our September 21 letter.

Sections 215 and 505 are among the most serious threats to civil liberties, providing the government with broad powers to obtain detailed information about

innocent Americans and prohibiting the recipients of requests for information made under their provisions from disclosing to anyone but their lawyers the fact that these requests have been made. Recipients of these requests, such as internet service providers and hospitals, may have little incentive to challenge the order, but would be barred from making such a disclosure to the targets of the inquiry about whom the information is sought.

A recent report in the Washington Post discloses that Section 505, which permits the FBI to make such requests without any judicial review, has been used more than 30,000 times each year by FBI field agents to obtain confidential records. The Conference Report fails to remedy the most serious defects in these provisions.

The Association also considers the seven-year sunset provisions in the Conference Report much too long in light of the need for continued legislative oversight and reevaluation of these provisions.

Section 215

As the Association noted in its letter of September 21, 2005, the FISA "business records" provision, as amended by Section 215 of the Patriot Act, raises a number of significant constitutional concerns. Most notably, it greatly broadens the scope of records obtainable through FISA and the likelihood of unjustified searches. It does so by allowing searches without a showing of "particularized suspicion" of the target, and by allowing for extremely limited judicial review of applications. Additionally, section 215 placed a blanket non-disclosure requirement of unlimited duration upon all order recipients. While the Conference Report makes some limited improvements to Section 215, it leaves the most significant constitutional concerns unaddressed.

The Conference Report purports to provide for meaningful judicial review of applications by requiring that they include "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." Conf. Rep. § 106(b)(2)(A). This appears to be a substantial improvement over the current requirement that an order applicant merely aver that the tangible things are sought for an authorized investigation. The effectiveness of this improvement is largely undermined, however, by the Report's provision that items sought pursuant to investigations "to protect against international terrorism or clandestine intelligence activities" are "presumptively relevant" if the applicant shows that they pertain to, *inter alia*, "an individual in contact with, or known to, a suspected agent of a foreign power." In such circumstances, the government applicant will not need to provide a statement of facts from which relevance can be reasonably be determined. This exception is troubling in its breadth and because it is difficult to discern why there is any need for exceptions from the limited requirement that the applicant state facts that provide reasonable grounds for the investigation.

With one minor exception, the Conference Report also fails to address constitutional concerns regarding the gag provisions of Section 215. As the Association discussed in its prior letter, the gag provisions of Section 215, and of Section 505 (discussed below), raise a number of substantial concerns. The non-disclosure obligation applies with respect to every order, whether or not there is actually any need for secrecy in the particular case. Moreover, the non-disclosure obligation is permanent; it persists long after any legitimate need for secrecy has expired. In addition, while there is judicial review of each order application, the review applies only to the basis for the search; it does not apply to whether the government has a legitimate basis for imposing a non-disclosure requirement. Indeed, any time a basis for the search is established, the gag attaches automatically.

The Conference Report would not fix these substantial flaws. There would still be no required demonstration on the part of the government that non-disclosure is necessary. The gag order would continue to automatically attach to all approved orders and would remain in effect permanently. While the Report would allow for judicial review of orders, there is nothing in the Report that would allow for review of whether non-disclosure is warranted. This is a significant departure from established First Amendment principles that heavily disfavor prior governmental restraints on speech and require that the government show that such restraints are narrowly tailored to serve a compelling governmental interest.

The Conference Report would allow recipients to disclose the order to an attorney "to obtain legal advice or assistance with respect to the production of things." Conf. Rep. §106(e). While this is an improvement over the current Section 215, the Report also allows the FBI to require that order recipients notify it prior to making any permitted disclosures. *See id*. The Association is concerned that this provision will have a chilling effect on the recipients that will deter them from seeking such legal assistance.

Section 505

Section 505 of the Patriot Act expanded the FBI's authority to issue national security letters (NSLs) in terrorism and foreign intelligence investigations. As the Association noted in its letter of Sept. 21, the amended NSL provisions raise serious constitutional concerns. Unfortunately, while the Conference Report addresses some of these concerns, it fails to remedy serious constitutional defects relating to the NSL gag provisions. Indeed, in important respects, some of which are discussed below, the Conference Report renders these defects even more severe.

The Association believes that the constitutional defects discussed below are especially serious because it appears that the FBI is using the NSL authorities

extremely aggressively. The effect of Section 505 of the Patriot Act was to permit the FBI for the first time to use NSLs to obtain information about individuals who are not themselves suspected of wrongdoing. The *Washington Post* recently reported that, since Congress enacted the Patriot Act, the FBI has issued more than 30,000 NSLs every year. *See* Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, Washington Post, Nov. 6, 2005. The Association believes that the FBI's aggressive use of this uncommonly intrusive surveillance authority – and the implications of this surveillance for ordinary, law-abiding Americans – makes meaningful reform especially important.

The Association supports the Conference Report insofar as it proposes to permit NSL recipients to obtain judicial review of NSLs before complying with them. *See* Conf. Rep. § 115 (stating that, upon petition, district court "may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful"). This goes part of the way towards addressing First and Fourth Amendment concerns discussed at length by the district court in *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), appeal pending *sub nom Doe v. Gonzales*, No. 05-0570-CV (2d Cir.).

The Conference Report fails, however, to address serious constitutional defects attendant upon the NSL gag provisions. As the Association noted in its Sept. 21 letter, the existing gag provisions are problematic for multiple reasons. As is the case with Section 215 orders, the non-disclosure obligation applies to every NSL, whether or not there is actually any need for secrecy in the particular case. Moreover, in the case of NSLs the obligation is imposed without the involvement of a court. Further, like Section 215 orders, the non-disclosure obligation for NSLs is permanent. The Conference Reports would not cure these significant defects.

First, the Conference Report continues to allow the FBI to impose a non-disclosure obligation unilaterally. The Conference Report would require the FBI to certify on a case-by-case basis that a non-disclosure obligation is warranted because "otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *See* Conf. Rep. § 116(a). However, the non-disclosure obligation would still be imposed in the first instance without the involvement of any court. The Conference Report is clearly inadequate in this respect. As two district courts have recognized, the gag provisions impose prior restraints that are unconstitutional under the First Amendment. *See Doe v. Gonzales*, 386 F.Supp.2d 66, 73-74 (D.Conn. 2005); *Doe v. Ashcroft*, 334 F.Supp.2d at 511-12. Congress should amend the gag provisions to require prior judicial review. Notably, non-disclosure obligations imposed in relation to grand jury subpoenas are imposed, if at all, only after a judicial determination that

secrecy is necessary in the particular case. *See, e.g., In re Grand Jury Proceeding (Fernandez-Diamente),* 814 F.2d 61, 70 (1st Cir. 1987).

While the Conference Report fails to require prior judicial review of non-disclosure orders, it proposes that non-disclosure orders be reviewable upon petition by the NSL recipient. *See* Conf. Rep. § 115. The review contemplated by the Conference Report, however, is illusory. Specifically, the Conference Report would require the court to uphold the non-disclosure obligation only "if it finds that there is *no reason to believe* that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* (emphasis added). The scrutiny contemplated by this provision does not resemble the scrutiny required by the Constitution. As noted above, the First Amendment generally prohibits the imposition of a content-based restraint on speech except where the government can demonstrate that the restraint is narrowly tailored to a compelling government interest. The Conference Report effectively reverses the presumption. Moreover, the Conference Report renders judicial review altogether meaningless by providing that the court must "treat[] as conclusive" the government's certification that the restraint on speech is necessary. *Id.* This provision, by requiring courts to rubber stamp executive decisions to impose prior restraints, not only exacerbates the First Amendment concerns but adds new separation-of-powers concerns. The Association urges that the NSL authorities be amended to provide for meaningful judicial review.

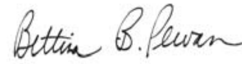
Finally, the Conference Report insufficiently addresses the concern that NSL recipients will be deterred from seeking legal advice. The Conference Report appropriately amends the gag provisions to provide that NSL recipients may make disclosures to attorneys "to obtain legal advice or legal assistance with respect to the request." *See* Conf. Rep. § 116. But as in the case with Section 215 orders, the Conference Report also includes a provision that would allow the government to require NSL recipients to identify to the government any person to whom a disclosure will be made. The Association is concerned that this provision, which bears some resemblance to a licensing scheme, will deter NSL recipients from seeking legal advice to which they are constitutionally entitled.

Sunset Provisions

In addition to the above concerns, the Association also strongly believes that the Conference Committee's proposed sunset provisions of seven years, to 2012, are too long. The Senate version of the bill which provided for a four year term, as did the original Patriot Act, is far more appropriate in view of the Act's serious implications to our fundamental civil liberties. A requirement that Congress reconsider the Act's most far reaching provisions on a shorter timetable will provide both a more effective means of monitoring the Executive's use of them and determining whether there is an ongoing need for them to be continued.

The Association, therefore, strongly urges you to oppose enactment of the bill reported by the Conference Committee.

Sincerely yours,



Bettina B. Plevan

cc: Senator Patrick Leahy, Ranking Member
Senator Orrin G. Hatch
Senator Charles E. Grassley
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator John Cornyn
Senator Sam Brownback
Senator Tom Coburn
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