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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

Michael O'Neill, Chief Counsel and Staff Director
Bruce A. Cohen, Democratic Chief Counsel and Staff Director

December 12, 2005

Honorable Larry E. Craig
Honorable John E. Sununu
Honorable Lisa Murkowski

Honorable Richard J. Durbin
Honorable Russell D. Feingold
Honorable Ken Salazar

Dear Colleagues:

I am in receipt of your November 17 letter outlining your concerns about the draft Conference Report reauthorizing the USA PATRIOT Act. My purpose in writing is to explain how the final Conference Report addresses the issues you have identified; or, where the issues are not addressed, to explain why I am nonetheless comfortable with the bill. Ultimately, my aim is to demonstrate to you that the bill is one civil libertarians can, and should, embrace.

Addressing each of your concerns in turn:

1. Section 215

- **The draft Conference Report would allow the government to obtain sensitive personal information on a mere showing of relevance. This would allow government fishing expeditions. As business groups like the U.S. Chamber of Commerce have argued, the government should be required to convince a judge that the records they are seeking have some connection to a suspected terrorist or spy.**

Although the Conference Report does authorize the FISA court in certain narrow circumstances to issue an order under Section 215 upon a showing of relevance, I respectfully disagree that the result is a provision more open to abuse. In fact, the additional protections we have obtained in the Conference Report make Section 215 unquestionably more protective of civil liberties and privacy rights than current law, and likely even more protective of those rights than the Senate bill.

First, it is important not to overstate the significance of the fact that the FISA court, in extraordinary circumstances only, will allow a 215 order upon a showing of relevance to a terrorism investigation. The relevance standard will apply only in extraordinary circumstances because the Conference Report channels all applications for Section 215 orders into the three categories delineated in the Senate bill. By providing a presumption of relevance when the government can demonstrate a connection to a suspected terrorist or spy, the bill ensures that requests falling outside the three categories

will be the exception and not the rule. Indeed, the presumption ensures that law enforcement will face an uphill battle in any effort to obtain a 215 order that does not fall into one of the three categories and thereby provides an incentive for the FBI to use the tool only when it can show a connection to a suspected terrorist or spy. Some flexibility was necessary because the Justice Department was able to demonstrate, in a classified setting, that circumstances arise in which it is necessary to obtain an individual's records in an authorized investigation in which it is not possible to demonstrate that the individual is working on behalf of a foreign power or a known terrorist organization.

In addition, the Conference Report includes a number of safeguards against abuse of Section 215 that neither the Senate bill nor the House bill contained. First, the Conference Report would require a comprehensive audit by the Justice Department's famously independent Inspector General of law enforcement's use of Section 215. The Inspector General's reports will examine the use of Section 215 both before and after reauthorization of the PATRIOT Act. Second, the Conference Report would permit, for the first time, public reporting of the total number of 215 orders sought and granted. A third safeguard against the possibility of fishing expeditions is the Conference Report's provision that Section 215 orders may not be used for the purpose of conducting threat assessments. This requirement ensures that Section 215 will be used only during those authorized investigations that have progressed beyond the initial stages. A fourth new safeguard is that every order under Section 215 will require minimization procedures that sharply curtail the retention and dissemination of information concerning United States citizens. These minimization procedures will prevent the government from stockpiling information on American citizens or from maintaining records on citizens who are only incidental to the investigation.

Finally, it is important to point out that the conferees obtained all of these additional protections without sacrificing the critical improvements over the current Section 215 that made the Senate's PATRIOT bill attractive to so many: (1) the requirement of a statement of facts to accompany an application for an order under Section 215; (2) the express vesting of discretion in the FISA judge to review, and to reject, the FBI's application for a 215 order; (3) the express right of recipients to consult legal counsel and seek judicial review of 215 orders; (4) the requirement of approval by senior FBI officials before the government can seek library records, medical records, educational records, gun records, and other sensitive documents; (5) the enhanced reporting to Congress on the use of Section 215, including specific information concerning requests for the most sensitive documents; (6) the requirement that 215 orders can compel the production only of those tangible things that could be obtained under a grand jury subpoena or other orders issued by federal courts; and (7) the inclusion of a four-year sunset provision to guarantee that Congress will revisit Section 215 at a later time.

- **The draft Conference Report does not permit the recipient of a Section 215 order to challenge its automatic, permanent gag order. Courts have held that similar restrictions violate the First Amendment. The recipient of a Section 215 order is entitled to meaningful judicial review of the gag order.**

After extensive discussion of this issue by the conferees, I was able to conclude that the statutory scheme that the Conference Report establishes would permit adequate judicial review of the nondisclosure requirement.

Primarily, this review occurs because an order under Section 215 cannot issue without advance approval by the FISA court. This review is not only important as a practical matter, in that it guarantees judicial scrutiny of the confidentiality provision in each 215 order; but it could well prove dispositive in any First Amendment challenge. In fact, one federal court that invalidated the nondisclosure requirement of an NSL on First Amendment grounds specifically singled out the absence of explicit judicial review in the present law as the principal reason the regime governing nondisclosure of orders under Section 215 was preferable. *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 515 (S.D.N.Y. 2004) (“Furthermore, these provisions are not quite as severe as those contained in the NSL statutes because, with one narrow exception for certain FISA surveillance orders [that is not relevant here], they apply in contexts in which a court authorizes the investigative method in the first place.”); *cf. Doe v. Gonzales*, 386 F. Supp. 2d 66, 80 (D. Conn. 2005) (criticizing the law governing NSLs on First Amendment grounds because it “provides no judicial review of the NSL or the need for its non-disclosure provision”).

2. National Security Letters

- **The draft Conference Report does not provide meaningful judicial review of an NSL’s gag order. It requires the court to accept as conclusive the government’s assertion that a gag order should not be lifted, unless the court determines the government is acting in bad faith. The recipients of NSLs are entitled to meaningful judicial review of a gag order.**

As an initial matter, the ability to challenge the issuance of an NSL remains the same as that necessary for challenging a grand jury subpoena. A party challenging an NSL may be successful if it is shown that compliance with the NSL would be unreasonable, oppressive, or otherwise in violation of the law. The provision at issue relates only to the question of whether the recipient of the NSL may disclose that fact. In that situation, the deference a court must show to the government is not nearly as broad as stated. Specifically, the court is required to treat a government certification with deference only when the government asserts that removing the nondisclosure requirement would endanger the national security of the United States or interfere with diplomatic relations. Even so, the court is able to invalidate the nondisclosure requirement in the

event the government acts in "bad faith." In all other circumstances, the Conference Report makes no provision for any special deference to the government.

Furthermore, it is important to note that substantively identical language was included in the Senate bill, which passed this body by unanimous consent. *See* S.1389 § 8(b)(2) ("In reviewing a nondisclosure requirement, the certification by the Government that the disclosure may endanger the national security of the United States or interfere with diplomatic relations shall be treated as conclusive unless the court finds that the certification was made in bad faith."); *see also* H.R.3199 § 16.

The conference adopted an important additional safeguard ensuring that the presumption will be used only sparingly. Under the Conference Report, the Attorney General, the Deputy Attorney General, an Assistant Attorney General, the Director of the FBI, or an official of similar stature in another agency must personally make the requisite certification in order to obtain the conclusive presumption. This is in contrast to the House bill, which allowed this certification to be made by the Special Agent in Charge of any one of the FBI's 56 field offices, and the Senate bill, which provided for certification by "the Government," generally. In light of this additional safeguard over and above what was in either bill, as well as additional public reporting and Inspector General reports concerning NSLs, my hope is that this provision will not prevent you from supporting the Conference Report.

- **The draft Conference Report makes it a crime, punishable by up to one year in prison, for individuals to disclose that they have received an NSL, even if they believe their rights have been violated. Violating an NSL gag order should only be a crime if the NSL recipient intends to obstruct justice.**

The final Conference Report addresses this concern in full. After intense negotiations involving various Senators and House Members and the Senate and House leadership, the one-year misdemeanor for knowing and disclosure of an NSL was struck from the bill. Consistent with your request, violation of the NSL nondisclosure provision is only a crime if the NSL recipient intends to obstruct justice.

At the same time, I did want to take the opportunity to clarify some facts about the NSL nondisclosure requirement, which will not have the onerous impact on individual rights that is implied. First, in contrast to current law, NSLs will not automatically carry an injunction against disclosure; it is only when the government certifies that disclosure may result in a danger to national security or to the physical safety of an individual, or in interference with an investigation or diplomatic relations, that confidentiality is even on the table. Second, the Conference Report explicitly provides that individuals can disclose the existence of the NSL both to those to whom such disclosure is necessary to comply with the request and, critically, to an attorney "to obtain legal advice or legal assistance with respect to the request." Thus, an individual who believes her rights have been violated will be able to consult counsel to explore her options for redressing any grievance. Third, and also in contrast to current law, the

Conference Report includes a detailed mechanism for judicial review of the nondisclosure requirement. The end result is that any individual whose rights may have in fact been violated will have a forum in which to petition for relief.

3. Sunsets

- **The draft Conference Report includes seven-year sunsets, which are too long. Congress should have the opportunity to again review the controversial provisions of the Patriot Act before the final year of the next presidential term. Four-year sunsets would ensure accountability and effective oversight.**

The final Conference Report addresses this concern in full. After intense negotiations involving various Senators and House Members, the Senate and House leadership, and the Administration, the seven-year sunsets were reduced to four years.

In addition, Section 106A of the Conference Report, which does not have an analogue in either bill and was generated during the conference, provides that the Inspector General of the Department of Justice will conduct two comprehensive audits of the use of Section 215. Together with the sunsets, these provisions go farther than even the Senate bill did in ensuring that the Justice Department is fully accountable for its use of Section 215. The Inspector General is known, justifiably, for his thorough, independent-minded, and hard-hitting reports, so there is every reason to think that these inquiries will be an effective check on the Justice Department. Moreover, the release of each report will be occasion for front-page news stories, Congressional briefings, and public hearings—all of which will generate fresh political will and opportunity to rectify any problematic aspects of Section 215.

- **The draft Conference Report does not sunset the NSL authority. In light of recent revelations about possible abuses of NSLs, the NSL provision should sunset in no more than four years so that Congress will have an opportunity to review the use of this power.**

NSLs have been used since at least the 1970s. No evidence exists suggesting their use has ever been abused, nor until now has anyone requested NSLs be subject to a sunset. Neither the House nor the unanimously passed Senate bill contained a sunset provision for NSLs. Nevertheless, the Conference Report contains new accountability provisions and creates additional opportunities for oversight. As with Section 215, the Conference Report requires audits by the Inspector General of law enforcement's use of NSLs. Section 119 of the Conference Report, which was generated during the conference, requires two such comprehensive audits. These audits should have much the same effect as a sunset.

Despite recent press reports, there is no evidence that NSLs have been abused. Much of the relevant information about NSLs is classified, so any individual news story will understandably omit critical information that is available lawmakers. Thus, I

strongly encourage you or your staff to contact the Intelligence Committee if you are interested in the complete picture concerning the use of NSLs. I think you will be satisfied, as I was, that the media coverage vastly overstates any such "problems."

4. Sneak and Peek Warrants

- **The draft Conference Report requires the government to notify the target of a "sneak and peek" search no earlier than 30 days after the search, rather than within seven days, as the Senate bill provides and as pre-Patriot Act judicial decisions required. The Conference Report should include a presumption that notice will be provided within a significantly shorter period in order to better protect Fourth Amendment rights. The availability of additional 90-day extensions means that a shorter initial time frame should not be a hardship on the government.**

As you know, I was able to include in the Senate bill a 7-day limit on the period in which notice can be delayed in delayed-notice search warrants. The House bill, of course, adopted a limit of 180 days, and the House was insistent on not going any lower than 90 days—a period that, it was argued, is consistent with the analogous limit for Title III wiretaps. Moreover, while it is true that the Second Circuit indicated that 7 days was a presumptively reasonable period of delay, the Fourth Circuit countenanced an initial delay of 45 days. Still, my twin objectives in conference were to retain a shortened delay period and to mitigate the significant problem of courts permitting open-ended notification delays.

The Conference Report provides that the maximum period for which notice can initially be delayed is 30 days. Although this period is a few weeks longer than the 7-day time limit from the Senate bill, it is considerably shorter than the 180 days permitted in the House bill and is a significant improvement over the original PATRIOT Act, which included no limits on the period of delay other than what was "reasonable." We were also able to eliminate the possibility of open-ended delays by mandating that notification occur on a date certain. In addition, the Conference Report preserves from the Senate bill both public reporting provisions and the requirement that extensions of the delay period be granted only upon an updated showing of the need for further delay.

Finally, it is important to be mindful of the very limited scope of this issue. Even in the national emergency following September 11, 2001, delayed-notice searches were exceedingly rare. Indeed, the Justice Department has estimated that delayed-notice warrants constituted less than one-fifth of one percent of all search warrants executed by Department components between enactment of the PATRIOT Act and January 31, 2005.

I appreciate the opportunity to explain my views regarding the Conference Report, and I remain grateful for your insights on these important issues. The Conference Report goes far in achieving the aims of the original Senate bill; namely, it permits law

enforcement the necessary tools to protect the country against terrorist acts while at the same time safeguarding the civil liberties we all cherish. In particular, what sets the Conference Report apart from even the Senate bill is its detailed reporting requirements to Congress and the public and its interposition of judicial review on some of the more controversial provisions. Requiring both detailed reporting and Inspector General audits will enable the Congress, as well as the public, to guard vigilantly against any possible governmental incursions upon civil liberties.

Very truly yours,

A handwritten signature in black ink, appearing to read "Arlen Specter". The signature is fluid and cursive, with the first name "Arlen" being more prominent than the last name "Specter".

Arlen Specter

Via Facsimile