



June 17, 2005

Dear Senator:

The Patriot Act has been the subject of fierce public debate. That debate has taken on fresh urgency as the Congress considers the fate of those provisions of the Act that will sunset at the end of this year if they are not reauthorized.

To assist policymakers and the public in moving forward, we convened a small working group of former executive and legislative branch officials from both political parties, with expertise in counterterrorism law and practice, in an effort to reach consensus on what should be done with regard to the expiring provisions.

Those deliberations resulted in the unanimous recommendations set forth in the attached letter. While we may hold differing views on particular provisions, based on the facts as we know them and the law as it stands today, all of us believe that reauthorization of the expiring provisions with the recommended amendments represents a reasonable compromise which, taken as a whole, is deserving of support.

Given the impending deadline for reauthorization of the expiring provisions, the working group did not discuss in detail the many other provisions of the Patriot Act that have no statutory sunset provision, let alone other laws related to terrorism which the Congress may see fit to examine now or in the future. We recognize, however, that many of the most controversial and important provisions of the Patriot Act are not those set to expire at the end of 2005, and we urge the Congress to review those provisions with care as well, and, if feasible, to do so in the context of the impending authorization.

We offer these recommendations in the hope that they will make a useful and constructive contribution to your deliberations. A complete list of the members of the working group is appended to the letter. We hope you will feel free to contact any of us if we may be of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Podesta".

John D. Podesta

A handwritten signature in black ink, appearing to read "Richard A. Falkenrath".

Richard A. Falkenrath

Attachment



June 17, 2005

The Honorable Arlen Specter, Chairman
Senate Committee on the Judiciary
224 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On December 31, 2005, 16 provisions of the USA PATRIOT Act of 2001 (Public Law 107-56) (the "Patriot Act") will expire unless the Congress passes and the President signs legislation to continue them. One additional and related provision of U.S. law – the so-called "lone wolf" provision (section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004) – not contained within the original Patriot Act, will also expire on this date. In general, these provisions of law augment the U.S. government's authority to collect, share, and act upon information on potential terrorist threats to the U.S. homeland.

The Patriot Act has been the subject of intense, often passionate public debate, which has often generated more heat than light. In an effort to assist policymakers and the public in moving forward, a small working group of former executive and legislative branch officials from both political parties, with expertise in counterterrorism law and practice, came together to discuss the expiring provisions of the Patriot Act and assess the advisability of their reauthorization and/or modification. (A list of the members of the working group is appended to this memorandum.)

To the surprise of many within the working group, the participants were able to achieve consensus on a compromise involving the 17 provisions under consideration, as detailed below. Each member of the group had strong views on at least some of the expiring provisions. Some would support reauthorizing all of the provisions without amendment. Others believe that certain of the provisions should be reauthorized if and only if amendments are made. But however we may differ on these questions, based on the facts as we know them and the law as it stands today, all of us believe that reauthorization with the recommended amendments represents a reasonable compromise which, taken as a whole, is deserving of our support.

It should be emphasized that we have agreed to endorse the package as a whole as a reasonable and desirable overall compromise; this should not be construed as an accurate guide to the views of any individual member of our working group on any particular issue or provision taken in isolation. Subject to this understanding, the working group recommends:

- (a) indefinite reauthorization without modification of 10 of the expiring provisions;
- (b) indefinite reauthorization of six provisions with amendments along the lines outlined below; and
- (c) reauthorization until December 31, 2008 of section 6001 of the Intelligence Reform and Terrorism Prevention Act (the "lone wolf" provision).

We believe that the bipartisan consensus we have reached is a significant development, and wish to share our conclusions with the Congress, the Administration, and the public.

In addition, the working group agreed that seven key issues related to the expiring provisions of the Patriot Act deserve further consideration by the Congress and the Administration. (The provisions to which these further considerations pertain are marked with an asterisk (*) below.) The working group did not achieve consensus as to how these issues should be resolved. However, provided that consideration of these issues does not prevent the Congress from completing action on reauthorization prior to December 31, 2005, the working group believes that the Congress and the Administration should consider these issues in the context of the pending reauthorization.

All of us take seriously the need to defend our nation from terrorist attack and to do so in a manner that is fully consistent with the values of a free society. As is true of any law that empowers the government to collect security-related information domestically, evaluating the Patriot Act requires one to weigh a wide range of competing interests – the most obvious of which are: (a) the ability of our government to detect and thwart attacks against our nation; and (b) the constitutional rights of those who live within it. While individual members of the working group would strike this balance in different ways, we agreed on the following general principles, which formed the basis for the deliberations and conclusions that follow:

- The provisions in question – many of which were longstanding proposals by the executive branch under both political parties – should be evaluated on their merits without regard to political considerations.
- The provisions of the Patriot Act that are due to expire have, taken as a whole, enhanced the government's ability to protect the United States from potential terrorist attacks, other threats to our security, and ordinary crimes, and for that reason should not be permitted to expire.
- While a number of provisions may present risks to civil liberties if improperly applied, those risks can be minimized through amendments or procedural

changes that would: (a) ensure that these measures are appropriately tailored to achieve their intended purpose; and (b) enhance the ability of the Congress and the courts to provide effective oversight.

- The President should request, and the Congress should provide, funding and personnel for the judicial and executive offices responsible for the handling of cases related to counterterrorism at levels that permit prompt and effective action as well as efficient compliance with statutory and administrative oversight requirements.

Given the impending deadline for reauthorization of the expiring provisions, the working group did not discuss in detail the many other provisions of the Patriot Act that have no statutory sunset provision, let alone other laws related to terrorism which the Congress may see fit to examine now or in the future. We recognize, however, that many of the most controversial and important provisions of the Patriot Act are not those set to expire at the end of 2005, and we urge the Congress to review those provisions with care as well, and, if feasible, to do so in the context of the impending authorization.

The specific recommendations of the working group are as follows:

Recommendations on expiring provisions¹

Section 201 (criminal predicates for wiretaps): Renew indefinitely.

Section 202 (criminal predicates for wiretaps): Renew indefinitely.

Section 203 (b) & (d) (criminal investigative information sharing). Renew indefinitely, but amend 203(b), relating to the sharing of wiretap information, to provide for after-the-fact notification to the court that approved the wiretap, consistent with the standard for notification in 203(a), relating to the sharing of grand jury information.*

Section 204 (clarification of intelligence exceptions from prohibitions on interception and disclosure): Renew indefinitely.

Section 206 (roving wiretaps under the Foreign Intelligence Surveillance Act (FISA)): Renew indefinitely, but amend, consistent with the provisions governing roving wiretaps under Title III, to require that a roving wiretap order under FISA (a) identify or describe with particularity the person to be wiretapped and (b) limit interception to such periods of time as it is reasonable to presume that the target is or was reasonably proximate to the instrument through which the communication will be or was transmitted.

¹ An asterisk (*) indicates an issue for further consideration by the Congress, as detailed in the succeeding section.

Section 207 (duration of surveillance): Renew indefinitely.*

Section 209 (seizure of voicemail messages pursuant to warrants): Renew indefinitely.*

Section 212 (emergency disclosure by Internet service providers): Renew indefinitely.*

Section 214 (FISA pen registers/trap and trace): Renew indefinitely, but amend to require that an application for pen register or trap and trace authority under FISA include a certification which describes the factual basis for believing that the information likely to be obtained is (a) foreign intelligence information not concerning a United States person, or (b) relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment.*

Section 215 (access to records): Renew indefinitely, but (a) amend Section 215(b) to require the government to state specific and articulable facts as to why the records sought (i) contain foreign intelligence information not concerning a United States person, or (ii) are relevant to an investigation of international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment; and (b) permit the recipient of an order under this section to consult an attorney and to apply to the FISA court to challenge the order, seek to limit the scope of the order, or permit disclosure of the order.

Section 217 (authorization to Internet service providers to intercept trespassers): Renew indefinitely.*

Section 218 ("significant purpose" test): Renew indefinitely.*

Section 220 (nationwide service of warrants): Renew indefinitely, but amend to entitle challengers to recoup the marginal cost of presenting challenges to a remote issuing court upon a showing of financial need.

Section 223 (civil liability for unauthorized disclosures): Renew indefinitely.

Section 225 (immunity for compliance with FISA wiretap): Renew indefinitely.

Section 6001 of the Intelligence Reform and Terrorism Prevention Act (the "lone wolf" provision): Renew, subject to a three-year sunset (expiring December 31, 2008).

Issues for further consideration by the Congress

Section 203 (FISA information sharing). Section 203 allows law enforcement officers and prosecutors to share foreign intelligence or counterintelligence information collected in the course of a criminal investigation with intelligence, protective, immigration, national defense or national security officials. The Congress should consider (a) the scope of covered information under section 203; (b) whether it is desirable to reinforce provisions currently in law to provide access to covered information to all officials with a legitimate national or homeland security, or intelligence, need for such information, while strengthening measures to ensure that those without such need do not receive the information; and (c) whether it is desirable to enhance oversight of the use of shared information.

Section 207 (duration of surveillance). This provision extended the duration of certain FISA wiretap orders from an initial period of 90 days with 90-day extensions to an initial period of 120 days with one-year extensions. The Congress should consider whether the FISA court should have discretion to grant renewals for a shorter period when appropriate.

Section 209 (seizure of voicemail messages pursuant to warrants). Under this provision, voicemail and other stored voice communications may be seized pursuant to either a warrant or a subpoena, depending on the nature of the stored communication. As such, the provision perpetuates a number of anomalies in the treatment of stored communications under current law. For example, the law provides different rules for the seizure of opened and unopened stored records, and different rules for stored records that are 180 days old or less and those that are more than 180 days old. The Congress should consider whether these distinctions should be eliminated, and whether the seizure of stored communications should be rationalized with the warrant requirements and relevancy criteria that apply to the seizure of voice communications and email seized in transit.

Section 212 (emergency disclosure by Internet service providers). This provision permits service providers to disclose customer communications or records to the government without a warrant if they “reasonably believe” that there is “an emergency involving immediate danger of death or physical injury to any person.” The Congress should consider whether this provision should be amended to incorporate checks and balances provided under similar emergency provisions in Title III and FISA, including subsequent review by a judge to determine whether the emergency exception was properly invoked.

Section 214 (FISA pen registers/trap and trace). The expansion of pen register and trap and trace authority from traditional telephone service to electronic communications such as email and Internet browsing has led to a blurring of the formerly clear line between the “content” of a communication, which may not be acquired through a pen register or trap and trace device, and “transactional” information about that communication, which may be acquired. For example, the

URL of a website visited by a customer, or the subject line of an email, may reveal more information about a communication than a dialed telephone number. The Congress should consider whether there are practical means to ensure that the “transactional” information obtained pursuant to this section (and section 216, which does not sunset) includes only information analogous to that obtained through traditional pen registers or trap-and-trace devices, but does not reveal the contents of communications or, if not, whether additional safeguards may be desirable for the more content-related information captured through pen registers or trap and trace devices as applied to electronic communications.

Section 217 (authorization to Internet service providers to intercept trespassers). This provision permits service providers who are attacked by computer trespassers to consent to law enforcement monitoring of the trespasser’s communications. The Congress should consider whether it is desirable to place a time limit on the period of authorized interception so that monitoring does not continue beyond the amount of time necessary to identify the trespasser.

Section 218 (FISA in criminal investigations). FISA has always permitted the use in federal criminal proceedings of evidence obtained by FISA surveillance and searches. The pre-Patriot Act interpretation of FISA, which called for foreign intelligence to be the “primary purpose” of the investigation, has been expanded under Section 218 of the Patriot Act, which permits the acquisition of evidence under FISA so long as the collection of foreign intelligence is a “significant purpose” of the investigation, and under the decision of the Foreign Intelligence Court of Review, which permitted criminal prosecutors to initiate and control FISA surveillances and searches. Under current law, criminal defendants are permitted to challenge the admissibility of such FISA-derived evidence. Unlike ordinary defendants, however, they do not have access to the underlying affidavits which formed the basis for FISA authority because the affidavits often contain sensitive intelligence. Moreover, criminal defendants facing evidence derived from FISA surveillances do not have access to the transcripts of those surveillances on as broad a basis as accorded to defendants facing evidence derived from ordinary wiretaps. Given the increased use of FISA evidence in criminal cases, the Congress should consider whether broader access to FISA applications or FISA transcripts, under appropriate guidelines, is warranted, raising due process standards without compromising national security.

Sincerely,

John D. Podesta
Richard A. Falkenrath
Mark D. Agrast
Bradford A. Berenson
Bryan Cunningham
James X. Dempsey
John A. Gordon
Eric H. Holder, Jr.

Robert S. Litt
Andrew C. McCarthy
Joseph N. Onek
Paul Rosenzweig
Stephen A. Saltzburg
Suzanne E. Spaulding
James B. Steinberg
Ryan P. Stiles

cc: The Honorable Alberto R. Gonzales,
Attorney General of the United States
The Honorable Patrick J. Leahy, Ranking Member,
Senate Committee on the Judiciary
The Honorable F. James Sensenbrenner, Jr., Chairman,
House Committee on the Judiciary
The Honorable John Conyers, Jr., Ranking Member,
House Committee on the Judiciary
The Honorable Pat Roberts, Chairman,
Senate Select Committee on Intelligence
The Honorable John D. Rockefeller IV, Ranking Member,
Senate Select Committee on Intelligence
The Honorable Peter Hoekstra, Chairman,
House Permanent Select Committee on Intelligence
The Honorable Jane Harman, Ranking Member,
House Permanent Select Committee on Intelligence



Members of the Bipartisan Working Group¹

John D. Podesta (*co-convener*) is President and CEO of the Center for American Progress and a Visiting Professor in Law at Georgetown University Law Center. He was Chief of Staff to President William J. Clinton from October 1998 to January 2001. Prior to his White House service, he held a series of senior positions with the Senate Judiciary Committee. He can be reached at 202.682.1611 or jpodesta@americanprogress.org.

Richard A. Falkenrath (*co-convener*) is a Senior Fellow at the Brookings Institution. Until May 2004, he was Deputy Assistant to the President and Deputy Homeland Security Advisor to President George W. Bush. He served as Deputy Assistant to the President and Deputy Homeland Security Advisor from January 2003 until May 2004. Previously, he served as Special Assistant to the President and Senior Director for Policy and Plans within the Office of Homeland Security, as Director for Proliferation Strategy on the National Security Council staff, and a member of the Bush-Cheney Transition Team for the National Security Council. He can be reached at rfalkenrath@brookings.edu.

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Bryan Cunningham is a homeland security consultant and a Principal in the Denver-based law firm Morgan & Cunningham LLC. Bryan served as Deputy Legal Adviser to the National Security Council from 2002-2004, Assistant General Counsel at the Central Intelligence Agency 1994-1998, and Trial Attorney and Special Assistant United States Attorney at the U.S. Department of Justice from 1998-2000. He can be reached at 303.743.0003 (office), 720.234.7229 (cell), or bc@morgancunningham.net.

James X. Dempsey is the Executive Director of the Center for Democracy and Technology. He served as Staff counsel to the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights, from 1985-1995. He can be reached at 202.365.8026 or jdempsey@cdt.org.

¹ Affiliations listed for identification purposes only.

John A. Gordon is a retired four-star Air Force general who served as Assistant to the President and Homeland Security Adviser, Deputy National Security Adviser for Combating Terrorism, Undersecretary of Energy and Administrator of the National Nuclear Security Administration, and Deputy Director of Central Intelligence. He can be reached at j.gordon1@comcast.net.

Eric H. Holder, Jr. is a Partner at Covington & Burling. He was Deputy Attorney General at the U.S. Department of Justice from 1997-2001. He was United States Attorney for the District of Columbia from 1993-1997 and an Associate Judge of the Superior Court of the District of Columbia from 1988-1993. He can be reached at eholder@cov.com.

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Andrew C. McCarthy is a Senior Fellow at the Foundation for the Defense of Democracies. From 1986-2003 he was Assistant United States Attorney (Criminal Division) in the Southern District of New York. He led the 1995 terrorism prosecution of Sheik Omar Abdel Rahman and eleven others. He can be reached at 203.254.3768 or acmccarthy@optonline.net.

Joseph N. Onek is Senior Policy Analyst at the Open Society Institute and Senior Counsel and Director of the Liberty and Security Initiative at The Constitution Project. He served as Principal Deputy Associate Attorney General at the U.S. Department of Justice from 1997-1999 and as Senior Coordinator for Rule of Law at the U.S. Department of State from 1999-2001. He was Deputy Counsel to the President from 1979-1981. He can be reached at 202.721.5621 or jonek@osi-dc.org.

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Suzanne E. Spaulding is Managing Director of The Harbour Group, LLC. She was Assistant General Counsel of the Central Intelligence Agency from 1989-1995, Executive Director of the National Commission on Terrorism (the Bremer Commission) from 1999-2000, and Minority Staff Director of the House Permanent Select Committee on Intelligence from 2003-2004. She can be reached at 202.295.8787 or suzanne.spaulding@harbourgrp.

James B. Steinberg is Vice President and Director of Foreign Policy Studies at the Brookings Institution. He was Deputy National Security Advisor to President Clinton and held various senior positions at the U.S. Department of State. He can be reached at 202.797.6400 or jsteinberg@brookings.edu.

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