



Department of Justice

STATEMENT

OF

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DEPARTMENT OF JUSTICE**

BEFORE THE

**SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

CONCERNING

**USA PATRIOT ACT REAUTHORIZATION
(SECTION 505 AND SECTION 804)**

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Chairman Coble, Ranking Member Scott, and Members of the Subcommittee, it is a pleasure to appear before you today to discuss two important provisions of the USA PATRIOT Act: Sections 505 and 804. The Subcommittee's work in conducting oversight of the Department's use of authorities contained in the USA PATRIOT Act has been exemplary. The Subcommittee's series of hearings has provided the Department with the opportunity to explain to both the Members of the Subcommittee and the American people how we have utilized the Act to protect the safety and security of American people in a manner consistent with the preservation of civil rights and civil liberties. The Department strongly believes that the record established in these hearings demonstrates the need for Congress to reauthorize those provisions of the Act that are currently scheduled to sunset at the end of this year, and we look forward to working with the Members of this Subcommittee on legislation to accomplish this goal. Today, however, I will be discussing sections 505 and 804, two provisions of the Act that are not scheduled to sunset.

Section 505

National Security Letters (NSLs) are similar to administrative subpoenas and are used by the FBI to obtain specified information from specified entities in international terrorism and espionage investigations. As is the case with other types of subpoenas, an NSL merely constitutes a request for the production of information and is not self-executing. The FBI therefore cannot enforce NSLs either through administrative

procedures or self-help. Rather, if the recipient of an NSL declines to produce the requested information, the FBI's only recourse is to turn to a federal court for an enforcement order.

The FBI's authority to issue NSLs preceded the USA PATRIOT Act by many years; section 505 of the Act simply revised the standards governing the issuance of NSLs. Section 505, in particular, amended three statutes authorizing the use of NSLs: (1) 18 U.S.C. § 2709, which allows the FBI to obtain subscriber and toll billing records information and electronic communication transactional records from a wire or electronic communications service provider, such as a telephone company or an Internet Service Provider (ISP); (2) 12 U.S.C. § 3414(a)(5)(A), which allows the FBI to obtain financial records from financial institutions, such as a bank or credit union; and (3) 15 U.S.C. § 1681u, which allows the FBI to obtain from consumer reporting agencies information regarding the financial institutions at which a consumer maintains accounts as well as the consumer's name, address, former addresses, places of employment, and former places of employment.

The information acquired through NSLs is extremely valuable to the Department's terrorism and espionage investigations. Electronic communications, for example, often play a vital role in advancing the operation of terrorist organizations. As a result, pursuing and disrupting terrorist plots often requires the FBI to seek information relating to the electronic communications of particular individuals. Likewise, money is critical to terrorist organizations, and the ability to track the movement of funds through financial institutions is often essential to identifying and locating those supporting or engaging in terrorist operations.

Unfortunately, however, NSLs were of limited utility prior to the passage of the USA PATRIOT Act. While records held by third parties may generally be subpoenaed by a grand jury in a criminal investigation so long as those records are relevant to the investigation, the standard for obtaining such records through an NSL was much higher before October of 2001; not only did the requested records have to be relevant to an investigation, the FBI also had to have specific and articulable facts giving reason to believe that the information requested pertained to a foreign power or an agent of a foreign power, such as a terrorist or spy.¹

This requirement often prohibited the FBI from using NSLs to develop evidence at the early stages of an investigation, which is precisely when they are the most useful, and often prevented investigators from acquiring records that were relevant to an ongoing international terrorism or espionage investigation. The prior standard, in essence, put the cart before the horse. Agents trying to determine whether or not there were specific and articulable facts that a certain individual was a terrorist or spy were precluded from using an NSL in this inquiry because, in order to use an NSL, they first had to be in possession of such facts.

Suppose, for example, investigators were tracking a known al Qaeda operative and saw him having lunch with three individuals. Investigators knew little about the

¹ However, one exception to this general requirement allowed the FBI to use an NSL to request the name, address, and length of service of a person or entity from a wire or electronic communication service provider if: (1) the information sought was relevant to an authorized foreign counterintelligence investigation; and (2) there were specific and articulable facts giving reason to believe that communication facilities registered in the name of the person or entity had been used, through the services of such provider, in communication with either: (a) an individual who was engaging or had engaged in international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act (FISA) or clandestine intelligence activities that involved or may have involved a violation of the criminal statutes of the United States; (b) or a foreign power or an agent of a foreign power under circumstances giving reason to believe that the communication concerned international terrorism as defined in section 101(c) of FISA or clandestine intelligence activities that involved or may have involved a violation of the criminal statutes of the United States. See 18 U.S.C. § 2709(b)(2) (2000).

other individuals except that they had eaten lunch with an al Qaeda operative, which would not constitute specific and articulable facts giving reason to believe that each and every one of them was a terrorist. As an investigative matter, however, a responsible agent would want to conduct a preliminary investigation of those individuals and find out, among other things, with whom they had recently been in communication. Before the passage of the USA PATRIOT Act, however, the FBI could not have issued an NSL to obtain the telephone or electronic communications transactional records of those individuals. While investigators could have demonstrated that this information was relevant to an ongoing terrorism investigation, they could not have demonstrated sufficient specific and articulable facts that the individuals in question were agents of a foreign power, as the law required.

Section 505 of the USA PATRIOT Act corrected this problem. Now, just as criminal investigators can use grand jury subpoenas to obtain records so long as they are relevant to their investigation, the FBI can now use NSLs to obtain specified records so long as they are “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment of the Constitution of the United States.” In explaining the need for this change, the House Judiciary Committee in its report on the USA PATRIOT Act stated: “The additional requirement of documentation of specific and articulable facts showing the person or entity is a foreign power or an agent of a foreign power cause substantial delays in counterintelligence and counterterrorism investigations. Such delays are unacceptable as our law enforcement and intelligence community works to thwart

additional terrorist attacks that threaten the national security of the United States and her citizens' lives and livelihoods." House Report 107-236, at 61-2 (2001).

In the last three-and-a-half years, section 505 of the USA PATRIOT Act has proven to be of enormous benefit to the Department in international terrorism and espionage investigations. While the details regarding the Department's use of NSLs necessarily remain classified, information obtained through NSLs has significantly advanced numerous sensitive terrorism and espionage investigations and has assisted the FBI in discovering links to previously unknown terrorist operatives.

I am aware that some on this Subcommittee have expressed concerns about NSLs and have suggested modifying the statutes authorizing their use. H.R. 1526, for example, would forbid the Department from using NSLs to obtain information from libraries and would sunset section 505 of the USA PATRIOT Act at the end of this year. The Department believes that both of these ideas are seriously flawed and should be rejected.

To the extent that libraries function as wire or electronic communications service providers, they should be treated the same as all such providers and should not be allowed to become a safe haven for terrorists or spies. The record before this Subcommittee clearly demonstrates that terrorists use libraries to access the Internet. As recently as the winter and spring of 2004, a member of a terrorist group closely affiliated with al Qaeda used Internet service provided by a public library to communicate with his confederates. Moreover, information provided to this Subcommittee last month strongly suggests that 9/11 hijackers used two public libraries in the United States prior to their attacks. Given this evidence, it simply does not make sense to say that NSLs should be able to be used to obtain information from any wire or electronic communications service

provider except a library. Indeed, were this proposal to be adopted, we could expect our public libraries to become the Internet communications avenue of choice for terrorists and their associates.

Returning to the pre-USA PATRIOT Act standard for NSLs by sunseting section 505 would also be a serious mistake. As explained earlier, the previous standard denied the FBI relevant information in terrorism and espionage investigations and made it harder for the FBI to use NSLs to obtain records from third parties than for criminal investigators to obtain third-party records through the use of grand jury subpoenas. Allowing section 505 to expire would impede the FBI's ability to conduct effective terrorism and espionage investigations and risk harm to the safety and security of the American people.

Before concluding my discussion of section 505 of the USA PATRIOT Act, I would like to briefly address ongoing litigation over the constitutionality of 18 U.S.C. § 2709, the statute authorizing the use of national security letters to obtain information from wire or electronic communications service providers. In a recent decision, the United States District Court for the Southern District of New York held this statutory provision to be unconstitutional. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2005). Some have therefore argued that the court concluded that the changes made to 18 U.S.C. § 2709 in section 505 of the USA PATRIOT Act were unconstitutional. This, however, is completely false.

The court concluded that the statute was unconstitutional for two reasons: (1) as applied, it effectively barred a recipient from challenging an NSL in court; and (2) the

provision permanently barred the recipient of an NSL from disclosing its existence.

Neither of these rationales, however, is related to section 505 of the USA PATRIOT Act.

Section 505 had no effect whatsoever on the availability of judicial review of NSLs. In any event, the Department has argued that current law allows for a recipient to obtain pre-enforcement judicial review of an NSL. Indeed, Department witnesses testified last year before this Subcommittee in favor of H.R. 3179, a bill that, among other things, would have explicitly authorized the Department to enforce NSLs in court and NSL recipients would have been free in such enforcement proceedings (as they are now) to challenge the validity of an NSL.

In addition, section 505 did not in any way change the nondisclosure requirement accompanying NSLs. This nondisclosure requirement has been in place since enactment of the Electronic Communications Privacy Act of 1986. While the court concluded that a permanent nondisclosure requirement violates the First Amendment rights of NSL recipients, the Department has argued that such a requirement is necessary because a recipient's disclosure of an NSL directly threatens the ability of the government to investigate and disrupt foreign intelligence and terrorist operations. A suspected terrorist or foreign intelligence operative who learns he is under investigation through the disclosure of an NSL may destroy evidence, create false leads, tip off others, or take other steps to avoid detection. Moreover, such disclosures can reveal the Department's intelligence-gathering methods, from which spies or terrorists could learn better how to avoid detection.

For the aforementioned reasons, the Department respectfully disagrees with the district court's decision and is appealing to the United States Court of Appeals for the

Second Circuit. Our appellate brief, in fact, was just filed on Tuesday, May 24. It is important to recognize, however, that the district court's decision in this case does not call into question either the wisdom or the constitutionality of the changes made in section 505 the USA PATRIOT Act to those statutes authorizing the use of NSLs.

Section 804

Turning to section 804 of the USA PATRIOT Act, in this provision Congress added a new paragraph to the statute defining the "special maritime and territorial jurisdiction of the United States" ("SMTJ"), 18 U.S.C. § 7. This new paragraph states, in relevant part, that, with respect to offenses committed by or against a United States national, "premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States" are included in the SMTJ. 18 U.S.C. § 7(9). This new paragraph, however, does not apply with respect to offenses committed by persons described in 18 U.S.C. § 3261(a), which codifies a provision of the Military Extraterritorial Jurisdiction Act; such persons are those who, while employed by or accompanying the Armed Forces, or while members of the Armed Forces subject to the Uniform Code of Military Justice, engage in conduct outside the United States that would constitute a felony if engaged in within the SMTJ. Such persons are instead subject to federal law pursuant to the Military Extraterritorial Jurisdiction Act or the Uniform Code of Military Justice.

Section 804 of the USA PATRIOT Act was intended to ensure jurisdiction over crimes committed by or against United States nationals on the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign states. Prior to the passage of the Act, the courts of appeals were divided over the

extraterritorial application of section 7(3) of the statute defining the SMTJ, which has long provided that the SMTJ includes “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof,” 18 U.S.C. § 7(3). Compare *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (holding that section 7(3) does not apply extraterritorially), with *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (holding that it does), and *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) (same). Section 804 was intended to address this conflict, see H.R. Rep. No. 107-236, pt. 1, at 74 (2001), and to codify the longstanding position of the United States that the SMTJ did extend to overseas bases.

Section 804 was simply intended to ensure that Americans who engage in wrongful conduct on United States Government premises overseas are subject to federal law. The Department is committed to investigating and prosecuting crimes taking place within the SMTJ, including those facilities covered by section 804, and will continue to investigate and prosecute such offenses in the future.

Conclusion

In closing, I would like to thank the Subcommittee for inviting me to appear before you today. The Department appreciates the leadership that this Subcommittee has demonstrated in giving us the tools we need to protect the safety and security of the American people and in conducting appropriate oversight of our use of the USA PATRIOT Act. I look forward to answering your questions.