

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association opposes efforts to repeal Section 224 of the
2 USA PATRIOT Act, Pub. L. No. 107-56 (“the Act”), which provides that certain of the
3 surveillance authorities granted under Title II of the Act will expire on December 31, 2005;
- 4 FURTHER RESOLVED, That the American Bar Association urges Congress to conduct a
5 thorough review of the implementation of the powers granted to the Executive Branch under the
6 Act before considering legislation that would extend or further expand such powers; and
- 7 FURTHER RESOLVED, That the American Bar Association urges the Executive Branch to
8 cooperate with the congressional committees of jurisdiction to ensure that they have timely
9 access to all information they require to fulfill their oversight responsibilities with respect to the
10 Act.

REPORT

Introduction

The terrorist attacks on our nation have prompted Congress and the Executive Branch to take unprecedented steps to enhance the safety and well-being of the American people. On October 26, 2001, within weeks of the attacks on the World Trade Center and the Pentagon, President Bush signed the USA PATRIOT Act (“the Act”)¹, granting the Executive Branch broad new law enforcement, immigration, and intelligence-gathering powers.

Lawmakers of both parties recognized that such substantial new powers offered significant potential for abuse and negotiated a number of safeguards that were incorporated into the Act. Chief among these was Section 224, the so-called “sunset” provision, which provided that many of the new surveillance authorities would expire on December 31, 2005, unless renewed or re-enacted by Congress.

The purpose of the sunset provision was to emphasize that the new authorities were temporary, enacted quickly in response to a national emergency, and by their nature highly prone to potential abuse. By placing a time limit on these powers, Congress sought to induce the government to use them with restraint and to assure the American people that lawmakers would conduct a thorough and searching review, in what they hoped would be a calmer and more reflective climate, to determine whether the new powers were being used properly and effectively and whether their further extension was warranted.

Such a review necessarily requires cooperation between congressional oversight committees and the agencies that they oversee to ensure that the committees have timely access to the information they require. To date, however, such cooperation has not been forthcoming.

Even so, some Executive Branch officials and members of Congress sought to repeal the sunset provision barely 18 months after its enactment and to make permanent the enhanced surveillance powers to which it applies. Although such efforts have encountered strong bipartisan opposition, they are expected to continue. Repeal of the sunset provision would abrogate the express understandings under which Congress agreed to grant these powers. Attempts at repeal also would shake the confidence of a public that has become increasingly concerned about their nature and extent and troubled at the prospect that emergency provisions would become a permanent part of our law with as little debate as they originally received.

The proposed resolution does not address the substance of either the USA PATRIOT Act or any proposals for the statute’s amendment. Rather, it seeks to reaffirm the principle that effective legislative oversight of executive agencies is critical to maintaining the constitutionally established balance of powers among our branches of government.

Specifically, the resolution opposes efforts to repeal the sunset provision, urges Congress to conduct a thorough review of the implementation of the powers granted to the Executive Branch

¹ Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001); its full title is the “United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act).”

under the Act before considering any extension or expansion of surveillance authority under the Act, and urges the Executive branch to cooperate with the congressional committees that have jurisdiction over the Act to ensure that they have timely access to all information they require to meet their responsibilities.

Since the tragedies of September 11, the ABA has adopted several policies seeking to ensure that the government, in fighting the war against terrorism, strikes the proper balance between national security needs and the preservation of civil liberties. Most recently, in February 2003 the ABA adopted a policy urging Congress to conduct regular and timely oversight, and to provide for periodic reports to the public, to ensure that government actions undertaken pursuant to the Foreign Intelligence Surveillance Act (FISA) comport with constitutional guarantees.

This resolution would carry that principle one step further, urging Congress and the Executive Branch to fulfill their constitutional responsibilities to ensure that the expansive powers put into place to combat terrorism do not compromise our fundamental freedoms.

Enactment of the USA PATRIOT Act

The USA PATRIOT Act includes 10 titles that amend 15 separate criminal statutes, create dozens of new federal crimes directed against terrorism, and greatly expand the authority of the government to conduct electronic surveillance and physical searches.² For example, the Act expands the definition of “terrorist activity” (Section 411). It vastly broadens the government’s search and surveillance powers, including its power to carry out electronic and computer surveillance (Sections 209-212), “sneak and peak” searches (Section 213), and roving wiretaps (Section 206); to use pen registers and “trap and trace” devices (Section 216); and to obtain nationwide search warrants (Sections 219 and 220).

Critics of these provisions recalled the abuses that had resulted from the largely unregulated use of such powers in the decades following World War II: the misuse of wiretap authority to harass anti-war dissenters, eavesdrop on conversations of government officials, journalists, and civil rights leaders, and conduct other improper surveillance. In 1975, the U. S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (“the Church Committee”) concluded that the government’s use of covert surveillance had been excessive, had circumvented the democratic process, and had violated the Constitution.³

Yet in the fear and confusion of the days following September 11, Congress spent little time examining the fundamental changes that the Act would bring about in the conduct of law enforcement and foreign intelligence investigations, approving the Act within a five-week period.⁴ The House Judiciary and Senate Intelligence Committees held only single-day hearings

² CRS Report for Congress, *The USA Patriot Act: Legal Analysis*, RL 31377, April 15, 2002, Charles Doyle, Senior Specialist, American Law Division (“CRS Report for Congress”).

³ Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Final Report, S. Rep. No. 755, 94th Cong., 2d Sess., BK. 1, Foreign and Military Intelligence 614-96 (1976) (“The Church Committee Report”).

⁴ For a complete reference to the statute’s legislative history, see CRS Report for Congress, *supra* note 2 at 1-2.

on the bill; U. S. Attorney General Ashcroft testified for only an hour in the House.⁵ In the House, the Judiciary Committee bill was rewritten by the House leadership; in the Senate, there was no Committee vote at all. Differences between the two versions of the bill were negotiated among a small group of legislators and Administration officials meeting informally rather than in a conference committee.⁶ Few members ever saw the final draft of the legislation before voting on its final passage.⁷

The Sunset Provision

Even as the legislation made its way through both chambers, however, many lawmakers recognized that the enhancements of Executive Branch powers contained in the bill raised important constitutional questions that could not be answered before the statute was enacted.⁸ Members of both parties sought to include at least minimal safeguards against the misuse of the new authorities.⁹ The sunset provision, originally included in the bill reported by the House Judiciary Committee, was seen as a particularly potent means of pressing the Administration to exercise the new authorities responsibly. Although it applies specifically only to selected surveillance provisions in the bill,¹⁰ its intended effect was to encourage responsible implementation of the Act as a whole.¹¹

⁵ See, e.g., *Administration's Draft Anti-Terrorism Act of 2001: Hearing before the Committee on the Judiciary, House of Representatives*, 107th Cong. (2001).

⁶ Remarks by Sen. Leahy, 147 CONG. REC. S 10991 (Oct. 25, 2001).

⁷ Ronald L. Plessner, James J. Halpert & Emilio W. Civitanes, *The USA Patriot Act for Internet and Communications Companies*, COMPUTER and INTERNET LAWYER, Mar. 2002 at 1; Rachel King & Lamar Smith, *Symposium: Q: Is Congress Giving Too Much Surveillance Power to Federal Law Enforcement?*, INSIGHT ON THE NEWS, Jan. 14, 2002 at 4043.

⁸ See, e.g., Remarks by Rep. Barr (R-Ga.), *Administration's Draft Anti-Terrorism Act of 2001: Hearing before the Committee on the Judiciary, House of Representatives*, 107th Cong. (2001); Remarks by Rep. Slaughter (D-N.Y.), 147 Cong. Rec. H6713-6714 (Oct. 12, 2001); Remarks by Rep. Frank (D-Ma.), 147 CONG. REC. H6761 (Oct. 12, 2001); Remarks by Sen. Leahy (D-Vt.), 147 Cong. Rec. S10991-S10992 (Oct. 25, 2001).

⁹ See, e.g., Remarks by Sen. Leahy (D-Vt.), 147 CONG. REC. S10990-S10991 (Oct. 25, 2001); Remarks by Rep. Slaughter (D-N.Y.), 147 CONG. REC. 6713 (Oct. 12, 2001); Sens. Patrick Leahy (D-Vt.), Charles Grassley (R-Ia.) & Arlen Specter (R-Pa.), *FBI Oversight in the 107th Congress: FISA Implementation Failures, an Interim Report* 10 at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> ("Interim Oversight Report"), (Feb. 2003).

¹⁰ Section 224 of the Act requires the December 31, 2005, termination of Sections 201 (authority to intercept wire, oral, and electronic communications); 202 (authority to intercept communications relating to computer fraud and abuse offenses); 203 (b), (c) (authority to share criminal investigative information with intelligence agencies); 204 (clarification of intelligence exceptions from limitations on interception and disclosure of wire, oral, and electronic communications); 206 (roving wiretaps under FISA surveillance); 207 (durations of FISA surveillance of non-United States persons who are agents of foreign powers); 209 (seizure of voice mail messages pursuant to warrants); 212 (emergency disclosure of electronic communications); 214 (pen register and trap and trace authority under FISA); 215 (access to records and other items under FISA); 217 (interception of computer trespasser communications); 218 (foreign intelligence information); 220 (nationwide service of search warrants for electronic evidence); 223 (civil liability for certain unauthorized disclosures); and 225 (immunity from compliance with FISA wiretap).

¹¹ Then-Senate Judiciary Chairman Patrick Leahy called the sunset provision "an enforcement mechanism for adequate oversight . . . that would serve notice that agencies . . . are going to have to use these powers carefully and in the best way . . ." He added that the sunset provision would "help ensure that law enforcement is fully responsive to Congressional oversight and inquiries on use of these new authorities and that a full record is developed on their efficacy and necessity. . . ." Remarks by Sen. Leahy, 147 CONG. REC. S11015, S10992 (Oct. 25, 2001).

The inclusion of the sunset provision has done little enough to reassure those who regard the steps taken to date under the authority of the Act as an excessive and disproportionate response to the terrorist threat. A wide range of interest groups¹² and editorials from a cross-section of the nation's leading newspapers¹³ have criticized major elements of the Act itself and its implementation. As of the end of May 2003, at least 115 cities, towns, and counties (and at least three states) across the nation had passed resolutions opposing implementation of the Act in their jurisdictions.¹⁴

Congressional Oversight and Legislative Proposals

A year and a half after the Act's approval, it is clear that the government is making full use of the new powers that it has been granted.¹⁵ Congressional supporters of the legislation also are asking whether the provisions have been effective and whether the sunset provision has resulted in any greater accountability on the part of government enforcement and surveillance agencies. Congressional committees with oversight jurisdiction of the Act have had little success to date in obtaining answers from the U. S. Department of Justice and the Department of Homeland Security or the agencies under them. In a February 2003 interim report on oversight efforts, Sens. Patrick J. Leahy (D-VT), Arlen Specter (R-PA), and Charles E. Grassley (R-IA) state that "legitimate [congressional oversight] requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of the [Senate Judiciary] committee. . . . The DOJ and the FBI have made exercise of our oversight responsibilities difficult."¹⁶

Cooperation with the House of Representatives has been no better. In June 2002, House Judiciary Chairman F. James Sensenbrenner, Jr. (R-WI) and Ranking Member John Conyers, Jr. (D-MI) asked Attorney General Ashcroft to respond to 50 questions regarding the use and effectiveness of the new law enforcement and surveillance provisions in the Act.¹⁷ Although some responses eventually were provided to the committee, answers to a number of questions were submitted only to the House Intelligence Committee, which conducts its proceedings in

¹² E.g., Charlotte Twight, *Watching You: Systematic Federal Surveillance of Ordinary Americans*, CATO INST. BRIEFING PAPER 69 (2001).; *What Did Congress Do in the 107th Congress, First Session?* EAGLE FORUM CAPITOL NEWS at <http://www.eagleforum.org/alert/2002/107th-congress-summary.shtml> (Jan. 23, 2002).

¹³ E.g., Christopher Smith, *Hatch Leading Charge to "1984," Critics Warn*, SALT LAKE TRIB., Apr. 13, 2003 at A2; Amitai Etzioni, *Patriot Act is Needed, but so are Revisions*, CHRIST. SCI. MONITOR, May 2, 2003, at 11; Jill Nelson, *America Creates Its Own Terrors*, USA TODAY, July 5, 2002 at A9; Judy Mann, *Speeches and Symbolism Do Little to Solve Our Problems*, WASH. POST, Oct. 31, 2001 at C12; Bruce Fein, *Trust . . . but Verify*, WASH. TIMES, Oct. 30, 2001 at A16.

¹⁴ See Bill of Rights Defense Committee, *Local Efforts*, at <http://www.bordc.org/OtherLocalEfforts.htm> (last modified June 4, 2003); see also Evelyn Nieves, *Local Officials Rise Up to Defy The Patriot Act*, WASH. POST, Apr. 21, 2003 at A1 (listing 85 municipalities as of that date); Thomas Ginsburg, *Phila. Council Condemns U. S. Antiterror Law*, PHIL. INQ, May 30, 2003 (noting 120 cities and states as of that date).

¹⁵ E.g., according to a one-page report issued by Att'y Gen. Ashcroft to Congress, the FISA Court has granted 1,228 surveillance and search warrants in 2002. The court modified only two and approved the remaining, unchanged. The number of warrants granted represents an increase of 31 percent over 2001. Letter from John Ashcroft, Att'y Gen. to Leonidas Ralph Mecham, Dir., Administrative Office of the United States Courts (April 29, 2003). See also, e.g., Shannon McCaffrey, *Government Sought a Record Number of Warrants*, KNIGHT RIDDER NEWSPAPERS, May 2, 2003.

¹⁶ Interim Oversight Report, *supra* note 9 at 13-14.

¹⁷ *Id.* at 13.

secret.¹⁸ On April 1, 2003, Sensenbrenner and Conyers again forwarded questions to the Justice Department,¹⁹ to which partial answers were submitted to the committee on May 13.²⁰

Despite the lack of information about the use and effectiveness of the Act, in April 2003 Senate Judiciary Committee Chairman Orrin Hatch (R-UT) proposed amending it to repeal the sunset provision.²¹ Although the Administration favors the repeal, the proposal drew immediate criticism from both Republicans and Democrats in Congress.²² The proposal was dropped in exchange for Senate approval of a bill that further expands the government's powers under FISA, but repeal efforts could be renewed at any time.²³

In February 2003, it was reported that the Justice Department has been considering a new legislative proposal that would dramatically enhance powers already granted to the government in the USA PATRIOT Act. The draft bill, entitled, "The Domestic Security Enhancement Act of 2003,"²⁴ "would radically expand law enforcement and intelligence gathering authorities, reduce or eliminate judicial oversight over surveillance, authorize secret arrests, create a DNA database based on unchecked executive 'suspicion,' create new death penalties, and even seek to take American citizenship away from persons who belong to or support disfavored political groups."²⁵ Although the Administration has disclaimed any intention to file the bill in its present form, the appearance of the draft has stiffened the resolve of some congressional leaders to resist consideration of proposals to expand or extend the USA PATRIOT Act until Congress has had adequate time and has received sufficient information to determine that the Act has been implemented effectively and responsibly.²⁶

The Proposed Resolution

The resolution takes no position regarding the substance of the USA PATRIOT Act or proposals for its amendment. Rather, it seeks to reaffirm the principle that effective legislative oversight of

¹⁸ *Id.*

¹⁹ Letter from Rep. Sensenbrenner, Chairman, House of Representatives Committee on the Judiciary, to the Attorney General (April 1, 2003).

²⁰ The response included answers to 26 of the 38 questions. Eight questions were referred to the Department of Homeland Security, and the Department indicated that it would submit classified answers to the remaining questions under separate cover. The Department declined to provide answers to one question, and a portion of another, which it said would be provided to the House Permanent Select Committee on Intelligence. Letter from the Office of Legislative Affairs, U. S. Department of Justice, to Rep. Sensenbrenner, Chairman, House of Representatives Committee on the Judiciary (May 13, 2003).

²¹ Smith, *supra* n. 13.

²² *Id.*

²³ Eric Lichtblau, *G.O.P. Makes Deal in Senate to Widen Antiterror Power*, N.Y. TIMES, May 9, 2003 at A1.

²⁴ The document, dated January 9, 2003, and labeled "confidential—not for distribution," was posted on the Internet by the Center for Public Integrity, a Washington-based nonprofit organization. Center for Public Integrity, *Special Report: Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act*, at <http://www.publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0>; Charles Lane, *U.S. May Seek Wider Anti-Terror Powers*, WASH. POST, Feb. 8, 2003 at A1.

²⁵ David Cole, quoted in *Editorial: Patriot II – Second Act Even Worse*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 13, 2003 at 4A.

²⁶ Craig Gilbert, *Sensenbrenner Says He'll Enforce Sunset of Police Powers*, MILWAUKEE J. SENTINEL, April 17, 2003; see also Remarks by Sen. Leahy, *Senate Judiciary Committee Hearing on the War Against Terrorism: Working Together to Protect America*, 2003 WL 734442 (F.D.C.H. Mar. 4, 2003).

executive agencies is critical to maintaining the constitutionally established balance of powers among our branches of government.

Specifically, the resolution

- 1) opposes efforts to repeal section 224 of the USA PATRIOT Act, Pub. L. No. 107-56 (the 'Act'), which provides that certain of the surveillance authorities granted under title II of the Act will expire on December 31, 2005;
- 2) urges Congress to conduct a thorough review of the implementation of the powers granted to the Executive Branch under the Act before considering legislation that would extend or further expand such powers; and
- 3) urges the Executive Branch to cooperate with the congressional committees of jurisdiction to ensure that they have timely access to all information they require to fulfill their oversight responsibilities with respect to the Act.

Conclusion

Congress moved rapidly to enact the USA PATRIOT Act in the wake of the worst terrorist event in the nation's history. To ensure that it would have the opportunity to revisit that decision at a later date and to discourage the government from misusing its substantial new powers in the meantime, Congress included a sunset provision in the Act that provides for the automatic expiration of key surveillance powers on December 31, 2005.

Congress should resist attempts to repeal that provision and should decline to extend or expand any other provisions of the Act unless and until it has conducted sufficient oversight to determine that the measures currently in effect have been implemented effectively and responsibly and that their extension is warranted.

Effective oversight requires the sustained attention of members of Congress and the full cooperation of the Executive Branch. Only when both are present can the public have confidence that the government's national security initiatives are being carried out within constitutional bounds.

Respectfully submitted,

Mark D. Agrast, Chair
Section of Individual Rights and Responsibilities

August 2003

GENERAL INFORMATION FORM

Submitting Entity: Section of Individual Rights and Responsibilities

Submitted by: Mark D. Agrast, Chair
Section of Individual Rights and Responsibilities

1. Summary of Recommendation

The resolution opposes efforts to repeal Section 224 of the USA PATRIOT Act, which provides that certain sections of the surveillance authorities granted under title II of the Act will expire on December 31, 2005; calls upon Congress to conduct a thorough review of the implementation of the powers granted to the Executive Branch under the Act before considering legislation that would further extend such powers; and urges the Executive Branch to cooperate with the congressional committees of jurisdiction to ensure that those committees have timely access to all information they require in order to fulfill their oversight obligations under the Act.

2. Approval by Submitting Entity

The Council of the Section of Individual Rights and Responsibilities approved the submission of this Report with Recommendation during its spring meeting on Saturday, April 26, 2003.

3. Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?

No.

4. What Existing Association Policies Are Relevant to This Recommendation and Would They Be Affected by Its Adoption?

On Feb. 10, 2003, the ABA House of Delegates adopted a resolution urging Congress to conduct regular and timely oversight of government law enforcement and surveillance agency activity to ensure that government investigations undertaken pursuant to the USA PATRIOT Act's amendments to the Foreign Intelligence Surveillance Act do not violate the First, Fourth, and Fifth Amendments to the Constitution.

5. What Urgency Exists That Requires Action at This Meeting of the House?

A year and a half after enactment of the USA PATRIOT Act, legislation is under discussion that would further expand the powers granted to the government under that legislation and make permanent the surveillance authorities that currently are scheduled to expire. The ABA should act now to help ensure that the Congress conducts a thorough

review of the implementation of the Act to determine whether the existing authorities are being used effectively and responsibly before considering extending or expanding them.

6. Status of Legislation

The Section is not aware of any relevant legislation pending at this time. Legislation addressing the subject matter reportedly is being considered.

7. Cost to the Association (both direct and indirect costs)

Adoption of this recommendation would result only in minor indirect costs associated with Governmental Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest

There are no known conflicts of interest..

9. Referrals

By copy of this form, this Report with Recommendation is being circulated to other ABA entities that may have an interest in the subject matter, including the Standing Committee on Law and National Security and the ABA Task Force on Terrorism, and all ABA Sections and Divisions.

10. Contact Persons (prior to meeting)

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11. Contact Person (who will present the report to the House)

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12. Contact Person Regarding Amendments to this Recommendation

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