

Statement of Electronic Privacy Information Center (EPIC)

Regarding Documents Obtained Under the Freedom of  
Information Act and  
Renewal of the Patriot Act

December 12, 2005  
Fund for Constitutional Government  
Capitol Hill  
Washington, DC

Good morning and welcome. My name is Marc Rotenberg and I am Executive Director and President of EPIC, the Electronic Privacy Information Center. With me this morning are David Sobel, EPIC's General Counsel, Marcia Hofmann, EPIC Staff Counsel and Director of the Open Government Project and Lillie Coney, Associate Director of EPIC.

I would like to thank Conrad Martin and the Fund for Constitutional Government for hosting this press conference on Capitol Hill. EPIC began as a project of the Fund for Constitutional Government. It is appropriate that we are here today.

Yesterday afternoon the Senate returned to Washington to consider renewal of the Patriot Act. Our press conference this morning will provide new information about the Patriot Act.

Since passage of the Patriot Act in the fall of 2001, EPIC has pursued a careful, but determined strategy to uncover documents that we believe would be of interest to the public and to lawmakers. We have done this by submitting a series of requests through the federal Freedom of Information Act or "FOIA".

The FOIA grants everyone the right to obtain records held by federal agencies. It is a vital means of ensuring transparency and oversight, particularly during a period when the government has sought increased police powers.

Among the various documents that EPIC has obtained over the last several years are:

- Internal FBI emails and memoranda on Patriot Act powers,
- Reports from FBI field offices on their use of Patriot Act authorities, and

- The form used by FBI agents to request an order from the Foreign Intelligence Surveillance Court for business records.

We recognize that agencies are reluctant to disclose information that may reveal mismanagement, program failures, or violation of law. But it is vital to ensure that when problems arise they are made known so that they can be corrected and the federal government can pursue its legal responsibilities with the full confidence of public support.

Today we are going to discuss documents that EPIC received from the FBI regarding the Patriot Act authorities that are due to expire this year. These are the so-called “Sunset” provisions that Senate and House lawmakers are debating this week.

But it is difficult to evaluate these key provisions. The Patriot Act not only gave the government dramatically expanded search authority, it also limited the ability of the public and Congress to assess the use of these new techniques.

For example, before the Patriot Act, federal agencies relied primarily on Title III of the federal wiretap Act to conduct electronic surveillance in the United States. Since passage of the Patriot Act, the government turned to the expanded powers of the Foreign Intelligence Surveillance Act.

A chart comparing the use of traditional Title III warrants and FISA orders shows that 2003 and 2004 are the first two years that FISA orders exceeded traditional wiretap warrants.

And whereas the public reporting requirements for the federal wiretap law are extensive, the reporting for FISA is minimal. The 2004 Wiretap Report, prepared by the Administrative Office of the United States Courts, was 247 pages long. The report detailed the legal basis for the searches, the types of surveillance undertaken, the judges and prosecutors involved, and the outcomes that resulted.

The 2004 FISA report, prepared by the Attorney General, was simply a page and a half. It provided none of the information that would be traditionally available to the public about the government’s use of search authority.

It is even more difficult to determine the use of national security letters, as there is no public reporting on their use. However, it appears that the use of NSLs escalated dramatically over the last several years. According to one report, as many as 30,000 NSLs were issued in 2004.

EPIC was aware of the risk of increased government secrecy when the Patriot Act was enacted four years ago. Our aim was to ensure adequate public information about the use of key Patriot Act provisions precisely because the law failed to provide the type of information that would otherwise be available to assess the government’s police powers.

On March 29, 2005, EPIC submitted an FOIA request to the Department of Justice seeking documents concerning the provisions of the Patriot Act that are set to expire at the end of this year. These provisions include roving wiretaps, trap and trace authority, and section 215, the so-called “library records” provision. Our goal was to determine how these legal authorities were used, whether difficulties were encountered, and also whether violations of law occurred.

We made this request on an expedited basis, as provided for in the FOIA, so that the documents we were seeking would be available in time for consideration by lawmakers who would vote on reauthorization this year.

However, the FBI failed to comply with the legal requirements for processing of a FOIA request on an expedited basis. EPIC then filed suit against the Department of Justice in federal court. The first documents released by the FBI in response to EPIC’s request were disclosed in October, only after Congress had concluded hearings and was considering draft legislation to renew sunset provisions of the Patriot Act.

This was clearly an attempt on the part of the Bureau to prevent the public disclosure of documents that would be relevant to the Congress’s decision whether to renew the Patriot Act.

At a court hearing on November 8, 2005, Judge Gladys Kessler expressed frustration at the delay in the Bureau’s processing of EPIC’s request. She said, “What is clear is that Plaintiff’s FOIA request, which should have been processed on an expedited basis, has been pending for nearly eight months. An incredibly small amount of pages has been released to Plaintiff. While the Court recognizes the difficulty the Government has had in processing Plaintiff’s request, the record shows that Defendant’s efforts have been unnecessarily slow and inefficient.”

Judge Kessler ordered the Bureau to immediately begin disclosing the documents EPIC had requested. She established a timetable under which the Bureau is required to process 1,500 pages every two weeks.

At this point, EPIC has received two sets of documents. We expect to receive several more.

The first set of documents disclosed to EPIC revealed many apparent violations of internal procedures and federal law. Under procedures established by Presidential order, the FBI is required to report to the Intelligence Oversight Board where actions of the Bureau may have violated the rights of US citizens. Among the violations reported included an unlawful search that violated a federal financial privacy law, investigations conducted for months without proper reporting or oversight, and an unidentified intelligence agency’s unlawful physical search.

In response to our document release, the FBI falsely claimed that the problems identified were simply technical or administrative problems. But under the procedures

established pursuant to the Executive order, it is clear that administrative problems need not be reported to the Intelligence Oversight Board.

Subsequent reporting determined that there were at least 113 such instances reported to the board since last year. And the numbering system associated with these reports suggests that several hundred such cases may have occurred since passage of the Patriot Act in 2001.

A second set of documents was released last week. Among the documents were internal emails and memoranda in which FBI officials expressed frustration that the Office of Intelligence Policy and Review, an internal check on FBI authority, had not approved applications for Section 215 orders to go forward to the Foreign Intelligence Surveillance Court.

But this is extraordinarily broad search authority that the FBI was seeking. Under Section 215, the FBI must show only “relevance” to a foreign intelligence or terrorism investigation to obtain personal information. This means that there is no requirement that there is suspicion about a particular individual about whom the records are sought. Almost certainly, information about the private activities of American citizens who are suspected of no wrongdoing are gathered by law enforcement agencies under section 215 authority.

It is unclear why the Office of Intelligence Policy and Review did not approve these applications. The FBI has not revealed this information, nor did it explain whether other search methods have failed.

However, a memo from an FBI field office to the Office of General Counsel dated March 24, 2004 refers to “recent changes” allowing the FBI to “bypass” the Office of Intelligence and Policy Review. It should be very troubling to lawmakers that the FBI sought to remove the primary internal check on one of the most controversial provisions of the Patriot Act.

We are expecting more information from the FBI. There is still a great deal of information about the use of the Patriot Act that has not yet been revealed.

Under Judge Kessler’s timetable, we could reasonably expect to receive these documents over the next few months.

### Conclusion

Four years ago the United States passed the Patriot Act. The law was enacted six weeks following the most serious terrorist attack on the United States.

Since that time, many facts have come to light that raise questions about the use of the law. The documents obtained by EPIC under the Freedom of Information Act raise new questions about the Patriot Act:

- What is the extent of the violations of internal procedures? Which laws were broken and which substantive rights were abridged? How were these violations dealt with?
- What are the internal checks and balances on the FBI's authority, particularly concerning the use of section 215?
- Has the personal information obtained on innocent American citizens suspected of no crime been expunged, or was that data simply dropped into massive government databases?
- What other information has not been provided that the Bureau was required to provide earlier that would shed further light on the use of the Patriot Act?

It is EPIC's view that the Patriot Act should not be renewed until these questions are answered.

Some members of the Senate have proposed a temporary extension, not a renewal, to ensure that a bill with better safeguards is adopted. We believe this is a sensible approach and we hope that it is followed.

EPIC's larger concern remains that the Patriot Act not only granted greater police authority to the federal government, but it also created new secret procedures. The so-called gag provision in section 215, the increasing reliance on FISA warrants, the dramatic expansion of national security letters are all techniques by which the government obtains information with little or no judicial review or public accountability.

This is a form of secrecy that is corrosive and will, over time, destroy the checks and balances on which a Constitutional democracy is based. Oversight and accountability must be established before Patriot Act renewal.

Thank you for your attendance this morning. We would be pleased to answer your questions.