

## **Eagle Forum letter to Congress, Oct. 2, 2001**

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Dear Member of Congress,

On September 11, terrorists attacked the heart of America. The nation mourns the loss and still fears future attacks. We support the Bush Administration's effort to find and hold accountable the perpetrators of these heinous acts. Yet, Congress must act deliberately and carefully when considering legislation that could infringe on our freedoms and liberties.

### **LIBERTY AND SECURITY**

We can have security and civil liberties in a time of crisis. The Fourth Amendment is one of our most precious constitutional rights, and we will not hand it over to the terrorists. Proposals that give the federal government unprecedented police power to snoop and spy on law-abiding citizens must be rejected. We do not want an American society where everyone is treated as a terrorist, money launderer, drug trafficker, or criminal. Only totalitarian regimes monitor the private actions of law-abiding citizens.

All the criminals who participated in the terrible acts of terrorism on September 11 were aliens who should not have been allowed in the United States. We should enforce our immigration laws already on the law books instead of cracking down on the freedoms of law-abiding citizens. Terrorism is not a domestic problem if we have border security.

### **ANALYSIS OF ANTI-TERRORISM PROPOSAL**

Clearly, adjustments to the law are necessary to fight terrorism. The anti-terrorism proposal submitted by the Administration contains numerous provisions that bring the law into the 21st century, recognizing the existence of cellular phones, the Internet, and e-mail. However, recognizing that bad ideas before are still bad ideas now, several sections have appeared before and were shelved because they crossed the line of freedom. Therefore, several sections must be rejected outright, while others amended.

Based on the September 19th draft anti-terrorism proposal, we recommend that the following sections be rejected entirely:

- Section 105 (Use of wiretap information from foreign governments): Because foreign governments do not have to follow the Fourth Amendment and other U.S. laws when spying on U.S. citizens, such information would not be permissible currently because it was illegally obtained. This section drastically changes current law because it would permit the use of evidence obtained by a foreign government wiretap. Furthermore, the NSA cannot spy on American citizens, but that does not stop foreign governments from spying and then exchanging information with U.S. intelligence officials. (Note: Project Echelon)

- Section 156 (Business records): This section is too broad, lacks judicial review, and applies to U.S. citizens as well as aliens.
- Section 158 (Disclosure of educational records): This section amends the Family Educational Rights and Privacy Act (FERPA) by permitting Department of Justice broad access to educational records for students in kindergarten through college. We are particularly troubled by the low standard of access: “so doing can reasonably be expected to assist in investigating or preventing a Federal terrorism offense . . .” FERPA already permits disclosure to comply with a judicial order or lawfully issued subpoena. Fishing expeditions into student records, which may also contain personal medical information, are unacceptable. Furthermore, there is no distinction made between records of U.S. citizens and aliens.
- Section 352 (Notice): Because there are split decisions among Circuit courts regarding the delay of notice of search warrants, it would be inappropriate to include this section in the legislation.
- Section 406 (Restraint of property subject to criminal forfeiture)
- Section 505 (Assistance to countries cooperating against international terrorism): Cooperation with other countries around the world is necessary to track down terrorists. However, these countries should not receive our tax dollars as a reward just for cooperating. Rewarding countries such as Sudan would be inconsistent foreign policy based on their current record of slavery, religious cleansing, and persecution.

We recommend that the following sections be amended:

#### Title I ^ Intelligence Gathering

##### Subtitle A ^ Electronic Surveillance

- Section 101 (Modification of Authorities relating to use of pen registers and trap and trace devices): This provision extends the use of pen register and trap and trace orders to the Internet and gives a Federal Judge the jurisdiction to issue an order that is valid anywhere within the United States. Congress should expressly state that the information to be obtained cannot include any content of the communication, including subject lines.
- Section 103 (Authorized disclosure): The definition of “investigative and law enforcement officer” should not include every federal government employee in the Executive Branch. It should be narrowed to include only the President, Vice President, law enforcement officials, and national security and intelligence personnel in connection with performing official duties.
- Section 106 (Interception of computer trespassers communications): This section states that anyone accessing a computer “without authorization” has no privacy rights and can be tapped by the government without a court order, if the operator of the computer system approves. And Internet Service Provider (ISP) “terms of service” agreement could then be used as a license to intercept e-mail without court order. A better approach would be to allow ISPs to seek government assistance when systems have been commandeered by a hacker.
- Section 108 (Nationwide service of search warrants for electronic evidence): This provision would allow law enforcement to seek a search warrant for electronic communications before any judge in the country with arguable jurisdiction over an investigation. This section is not limited to terrorism but

applicable to any person or organization that has become an investigatory target. The current language must be narrowed to terrorism cases or at least tightened to prevent abuse.

#### Subtitle B ^ Foreign Intelligence Surveillance and Other Information

- Section 152 (Multi-point authority): This section would allow the government to compel a common carrier, landlord, custodian or other person not specified in a court order to provide information and assistance with electronic surveillance if a “court finds that the actions of the target of the application may have the effect of thwarting the identification of a specific person.” Thus, as a suspect moves from place to place, the government can expand its demands to every person or organization the suspect comes in contact with, without the nicety of judicial review or consent. Conservatives and civil libertarians fought a heated battle over a similar effort in the 1996 terrorism bill. The section has become no less offensive over time.
- Section 153 (Foreign intelligence information): This section allows the government to initiate wiretaps in criminal investigations under the weaker standards permitted for foreign intelligence taps, thereby circumventing the relatively stricter provisions of the wiretap law. The section is especially problematic because it applies to U.S. citizens as well as aliens, and is not limited to terrorism cases. The real issue in this section is to ensure consultation between intelligence agents and criminal investigators, which would not threaten the foundation of FISA. Therefore, a better approach would be to amend FISA to expressly state that consultation between the foreign intelligence/counterintelligence agents and criminal prosecutors does not deprive an intelligence tap of its primary purpose.
- Section 154 (Foreign intelligence information sharing): This section would allow grand jury and electronic information, obtained during a criminal investigation, to be shared freely with “ANY federal law enforcement-, intelligence-, protective-, or national-defense personnel, or [with] any federal personnel responsible for administering the immigration laws of the United States.” Because this list could include thousands of government employees, this section should be amended to require that “intelligence-sharers” receiving the information are conducting an active investigation which is relevant to the information.
- Section 155 (Pen register and trap and trace authority): Pen registers and trap and trace authority in regard to FISA was changed in 1998. Currently, the target must have or be engaged in international terrorism that may violate U.S. criminal law or must be an agent of a foreign power. Because this section lowers the standard for a FISA pen register and trap and trace, it should not apply to U.S. citizens.
- Section 157 (Miscellaneous national-security authorities): Consumer Credit Protection standards are lowered by this section. Currently, the target must be a foreign power, a person who is not a United States person, and an official of a foreign power; or an agent of a foreign power who has or is engaging in international terrorism that may violate U.S. criminal law. The language in the statute (15 U.S.C 1681(u)) should be maintained. Alternatively, any changes aiming to lower the standard for access to consumer credit records, in the name of counterintelligence, should not apply to U.S. citizens.

#### Title III ^ Criminal Justice

##### Subtitle A ^ Substantive Criminal Law

- Section 309 (Definition): This provision defines the term “Federal terrorism offense.” Other provisions of the bill provide for prosecution without time limitation and increased penalties for those

involved in illegal conduct that meets this definition. The proposal defines the term “Federal terrorism offense” as “the violation of, or an attempt or conspiracy to violate” and then lists approximately 27 existing crimes. The most troublesome aspect of this definition is that it includes crimes that common sense tells us are not terrorist acts. Some of the offenses listed relate to injury to buildings or property over and under \$1,000, violence against maritime navigation, conspiracy to injure property of a foreign government, arson, simple assault on a member of Congress and protection of computers. The prospect of prosecutors bringing terrorism charges against some one who defaces a government building or engages in common computer hacking should, at the very least, call this provision into question.

Congress should consider either limiting the offenses that constitute the definition of a “federal terrorism offense” to only those crimes which common sense dictates is a terrorist act or if all the crimes are to remain include a terrorist mens rea as an element of the crime.

Unfortunately, the inclusion of Section 351, Title 18, in the list of terrorism predicates might make PETA a terrorist organization because one of its members hit the Secretary of Agriculture with a pie. Similarly, an organization defending the Second Amendment might become a terrorist organization under predicates like sections 956 and 1361 because one of its members, in connection with a sports shooting event, shot at a stop sign owned by our government or the government of a foreign country.

Suggested improvements for this language:

- Incorporate the “intent test” contained in the definition of “international terrorism” in section 2331 of Title 18, or
- Require a showing of over \$10,000 in intended damages or an intent to cause death or serious bodily injury.

Regardless, the definition of federal terrorism is too broad and must be tightened.

Subtitle B ^ Criminal Procedure

- Section 354 (Grand jury matters): Grand Jury information is currently protected. This section aims to permit the information to be shared with a broad range of U.S. officials. The list should be shortened to U.S. law enforcement and intelligence personnel. Furthermore, it should only apply to terrorism cases and court approval should be required before the release of any grand jury information.

Title IV ^ Financial Infrastructure

- Section 403 (Assets of terrorist organizations): The section is too broad, and its impact largely depends upon the definition of federal terrorism (Section 309).
- Section 405 (Disclosure of tax information in terrorism and national-security investigations): Disclosure of tax records is already granted on an emergency basis, and it is unclear why that is insufficient. This section should be tightened so that the requested records are relevant to the investigation being conducted by the requesting party.

America has never experienced such unbelievable terrorist acts on U.S. soil, and we have assurance under the President’s leadership that justice will be brought to all perpetrators involved in these heinous acts. However even in this time of a national crisis, our Constitutional rights must not be sacrificed. We look forward working with you and the Administration legislation drafted in response to September 11.

Faithfully,

Phyllis Schlafly  
President