



CRS Issue Statement on Civil Liberties and National Security

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Balancing the need to detect and thwart activities that pose a threat to U.S. national security with the need to safeguard the civil liberties of U.S. persons continues to be an important policy challenge facing the 111th Congress. As the final report issued by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission Report) noted,

We must find ways of reconciling security with liberty, since the success of one helps protect the other. The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.

Tactics employed to detect national security threats continue to implicate individuals' civil liberties. Electronic surveillance of communications to and from foreign intelligence targets can also capture innocent conversations and chill the exercise of First Amendment rights. New technologies may more effectively screen for explosives or other weapons, but simultaneously produce more revealing images of passengers' bodies. The broadened use of national security letters can provide investigators with a fuller picture to better allocate resources toward more serious threats, but also subject a larger universe of private financial or personal documents to disclosure. As Congress attempts to strike an appropriate balance between the need to detect and thwart activities that pose a threat to U.S. national security and the need to safeguard the civil liberties of U.S. persons, the following issues are likely to remain of interest.

Foreign Intelligence Surveillance Act and National Security Letters (NSL)

Three recent amendments to FISA (often referred to as "PATRIOT Act provisions") have a sunset date of February 28, 2010. These provisions concern "lone wolf" terrorists, "roving" wiretaps, and government access to business records and other tangible items. Several bills introduced in the 111th Congress would extend some or all of the expiring provisions. Additionally, some of these bills may also revive scrutiny of the five federal statutes that permit the federal agents to request financial, credit, or communications records through the issuance of a NSL. The proposed legislation includes potential sunsets and repeals of NSL authorities; amendment of nondisclosure requirements; the promulgation of standards to minimize capturing, using, and holding (long term) NSL generated information; continued periodic IG audits and reports; and limitations on statutory provisions thought by some to permit circumvention of NSL statutory requirements.

Transportation Screenings and Border Security

Particularly after the enhanced screening procedures used in response to the attempted Christmas Day attack on Northwest Airlines Flight 253, anti-terrorist screening programs operated by the Department of Homeland Security (DHS) have raised civil liberties-related issues, including the long-term retention of personal data by the federal government; charges of profiling based upon race, religion, nationality and ethnicity; and an inordinate level of persons misidentified as known or suspected terrorists. Such programs include the U.S. Customs and Border Protection's (CBP's) Automated Targeting System (ATS) and the Transportation Security Administration's (TSA's) "No Fly" and "Automatic Selectee" watchlists.

The ATS builds a risk assessment for cargo, conveyances, and travelers, and assigns "risk assessment scores" to travelers who seek to enter or exit the United States, for terrorist screening and other purposes (e.g., drug interdiction). Some critics suspect that CBP's use of the ATS is a form of passenger profiling. Critics also contend that terrorist screening programs have not been

developed and implemented with a sufficient degree of government openness, that they constitute an invasion of privacy and infringe upon other civil liberties, and often involve a denial of due process. Congress may be interested in continuing to scrutinize and evaluate the effectiveness of terrorist screening programs to ensure that adequate civil liberty and privacy safeguards and remedies are in place. At the same time Congress may also desire to provide screening agencies with sufficient authority to be able to reasonably and efficiently detect known and suspected terrorists.

Posse Comitatus and Satellite Surveillance

A recurring theme associated with the U.S. response to international terrorism is the effective blurring of the lines between civilian law enforcement and war-fighting. In general, the involvement of military personnel in direct law enforcement activities is prohibited by 18 U.S.C. §1385, unless otherwise specifically authorized under the Constitution or Act of Congress. While the USA PATRIOT Act (P.L. 107-56) broadened the permissible circumstances for the use of the military to assist law enforcement agencies in countering terrorism, Congress also reaffirmed its determination to maintain the principle of the posse comitatus law, 6 U.S.C. § 466. The use of DoD assets to collect intelligence on domestic targets as well as the increased sharing of information between military and civilian agencies has led to concerns that the military's role in domestic law enforcement poses a risk to civil liberties.

Similar legal issues may be involved in the use of satellite-derived information for law enforcement purposes. Commentators have questioned whether the proposed surveillance would violate the Posse Comitatus Act or other restrictions on military involvement in civilian law enforcement, or would otherwise exceed the statutory mandates of the agencies involved. Additionally, the proposed expansion of the use of satellite intelligence for domestic law enforcement purposes has been called into question on the basis of possible civil liberties implications, including concerns about the infringement of Fourth Amendment and privacy rights of U.S. persons.

Terrorism Support Prohibitions and Other Sanctions

Federal criminal law currently contains prohibitions against the provision of material support for terrorist organizations. Some civil liberties advocates have criticized the law defining "material support" as effectively curtailing First Amendment rights to free expression and association. The 9th Circuit recently found part of the definition of material support to be unconstitutionally vague, although Congress had amended the language describing "training" in an effort to clarify what the statute prohibits. The ruling has created a split among judicial circuits, which may lead to an eventual Supreme Court decision on the matter or calls for Congress to amend the provision.

Executive Order 13438, issued July 17, 2007, imposed sanctions on financial transactions and property of persons determined to be threatening the stabilization efforts in Iraq. The broad language of this Executive Order has been criticized as potentially reaching beyond insurgents in Iraq to others, including U.S. citizens for conduct that may unintentionally or indirectly provide some form of support for the insurgency. Congress may continue to monitor enforcement of this order by the Treasury Department to ensure civil liberties and property rights are respected.

Privacy and Civil Liberties Oversight Board

Intelligence reform legislation from the 109th Congress established within the Executive Office of the President a Privacy and Civil Liberties Oversight Board, charged with overseeing federal government adherence to guidelines on, and the commitment to defend, civil liberties and privacy. Congress later reconstituted the board as an independent agency with modified analysis, review, and advisory responsibilities; set qualifications and terms for nominees to be board members and required their Senate confirmation; and authorized the Attorney General to exercise subpoena power on behalf of the board (P.L. 110-53). The board currently awaits nomination and confirmation of the full membership, which is to set its agenda and pursue resources to enable fulfillment of the board's mission.

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For detailed information select from the following topical links.

Civil Liberties and National Security

USA PATRIOT Act: Expiring Provisions

[Government Collection of Private Information: Background and Issues Related to the USA PATRIOT Act Reauthorization](#)

[Amendments to the Foreign Intelligence Surveillance Act \(FISA\) Set to Expire February 28, 2010](#)

Use of Electronic Surveillance to Intercept and Monitor Communications

[The U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review: An Overview](#)

[Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping](#)

Government Access to Private Records and Other Information

[National Security Letters: Proposed Amendments in the 111th Congress](#)

[National Security Letters in Foreign Intelligence Investigations: A Glimpse of the Legal Background and Recent Amendments](#)

[National Security Letters in Foreign Intelligence Investigations: Legal Background and Recent Amendments](#)

[Government Access to Phone Calling Activity and Related Records: Legal Authorities](#)

[Journalists' Privilege: Overview of the Law and Legislation in the 110th and 111th Congresses](#)

[Border Searches of Laptop Computers and Other Electronic Storage Devices](#)

Government Programs or Tools Used for Counterterrorism Purposes

[Executive Order 13438: Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq](#)

[The REAL ID Act of 2005: Legal, Regulatory, and Implementation Issues](#)

[Satellite Surveillance: Domestic Issues](#)

[The State Secrets Privilege and Other Limits on Litigation Involving Classified Information](#)

Posse Comitatus, Oversight, and Other Matters

[The Use of Federal Troops for Disaster-Assistance: Legal Issues](#)

[Closing the Guantanamo Detention Center: Legal Issues](#)