United States Senate

WASHINGTON, DC 20510

December 14, 2005

Dear Colleague,

Prior to the Thanksgiving recess, several Senators expressed strong opposition to the draft Patriot Act reauthorization conference report that was circulated by the conferees. We were gratified that Congress did not attempt to rush through a flawed conference report at that time, and we hoped the conferees would make significant improvements to the conference report before we returned to session this month.

We write to express our grave disappointment that the conference committee has made so few changes to the conference report since then. And now, in the last week of the session, the Senate is being asked to reauthorize the Patriot Act without adequate opportunity for debate. If the conference report comes to the Senate in the same form that it was filed in the House last week, we will oppose cloture on the conference report. We urge you to do the same.

As you know, the Senate version of the bill, passed by unanimous consent in July, was itself a compromise that resulted from intense negotiations by Senators from all sides of the partisan and ideological divides. That bill did not contain many Patriot Act reforms that we support, but it took important steps to protect the freedoms of innocent Americans while also ensuring that the government has the power it needs to investigate potential terrorists and terrorist activity. Although the conference report contains some positive provisions, it unfortunately still retreats too far from the bipartisan consensus reached in the Senate. It fails to make some vitally important reforms and in some areas actually makes the law worse.

Last week, Chairman Specter circulated a Dear Colleague suggesting the conference report as drafted addresses the concerns raised about potential civil liberties abuses. We credit Chairman Specter for improving the conference report. However, the most important substantive reforms from the Senate bill were excluded from the conference report. The original cosponors of the SAFE Act (Senators Craig, Durbin, Sununu, Feingold, Murkowski, Salazar) identified several items before Thanksgiving as problematic and indicated they would not support the conference report unless additional changes were made in those areas. Those issues were not adequately addressed. They include the following:

- The conference report would allow the government to obtain library, medical and gun records and other sensitive personal information under Section 215 of the Patriot Act on a mere showing that those records are relevant to an authorized intelligence investigation. As business groups like the U.S. Chamber of

Commerce have argued, this would allow government fishing expeditions targeting innocent Americans. We believe the government should be required to convince a judge that the records they are seeking have some connection to a suspected terrorist or spy, as the three-part standard in the Senate bill would mandate.

Some conferees argue that the language in the conference report would permit the government to use the "relevance" standard only in limited, extraordinary circumstances, and that the Senate bill's three-part standard would continue to apply in most circumstances. To the contrary, the conference report never *requires* the government to demonstrate that the individual whose records are sought is connected to a terrorist or spy; rather, it permits the "relevance" standard to be used in every case.

It has also been asserted that the government should not be required to abide by the three-part Senate standard because the Department of Justice demonstrated in a classified setting that "circumstances may exist in which an individual may not be known to a foreign power or be a recognized terrorist but may nevertheless be crucial to an authorized terrorism investigation." We are convinced, however, that the three-part standard provides the necessary flexibility in such circumstances. Indeed, the government need only show that the records they seek are relevant to the activities of a suspected terrorist or spy, a very low burden to meet, but one that will protect innocent Americans from unnecessary surveillance and ensure that government scrutiny is based on individualized suspicion, a fundamental principle of our legal system.

- Unlike the Senate bill, the conference report does not permit the recipient of a Section 215 order to challenge its automatic, permanent gag order. Courts have held that similar restrictions violate the First Amendment. While some have asserted that the FISA court's review of a government application for a Section 215 order is equivalent to judicial review of the accompanying gag order, the FISA court is not permitted to make an individualized decision about whether to impose a gag order when it issues a Section 215 order. It is required by statute to include a gag order in every Section 215 order; the gag order is automatic and permanent in every case. The recipient of a Section 215 order is entitled to, but does not receive, meaningful judicial review of the gag order.

- The conference report does not sunset the National Security Letter (NSL) authority. In light of recent revelations about possible abuses of NSLs, which were reported after the Senate passed its reauthorization bill, the NSL provision should sunset in no more than four years so that Congress will have an opportunity to review the use of this power.

- The conference report does not permit meaningful judicial review of an NSL's gag order. It requires the court to accept as conclusive the government's assertion that a gag order should not be lifted, unless the court determines the government is acting in bad faith. As a result, the judicial review provisions do not create a meaningful right to review that comports with due process.

- The conference report does not retain the Senate protections for "sneak and peek" search warrants, as Chairman Specter's letter suggests. The conference report requires the government to notify the target of a "sneak and peek" search within 30 days after the search, rather than within seven days, as the Senate bill provides and as pre-Patriot Act judicial decisions required. That seven-day period was the key safeguard included in the Senate sneak and peek provision. The conference report should include a presumption that notice will be provided within a significantly shorter period in order to better protect Fourth Amendment rights. The availability of additional 90-day extensions means that a shorter initial time frame will ensure timely judicial oversight of this highly intrusive technique but not create undue hardship on the government.

While the issues discussed above are the core concerns about the conference report that the original cosponsors of the SAFE Act asked to be modified, they are not the only problems that we see with the conference report. There are a number of other areas where we believe the conference report falls short.

"Library Records" Provision (Section 215)

- Unlike the Senate bill, the conference report requires a person who receives a Section 215 order to notify the FBI if he consults with an attorney and to identify the attorney to the FBI. This will have a significant chilling effect on the right to counsel. There is no such requirement in any other area of law.

- The conference report would give the government unilateral authority to keep all its evidence secret from a recipient who is challenging a 215 order, regardless of whether the evidence is classified. This will make it very difficult for the recipient of a Section 215 order to obtain meaningful judicial review that comports with due process.

- Under the conference report, the target of a Section 215 order never receives notice that the government has obtained his sensitive personal information and never has an opportunity to challenge the use of this information in a trial or other proceeding. All other FISA authorities (wiretaps, physical searches, pen registers, and trap and trace devices) require such notice and opportunity to challenge.

National Security Letters (Section 505)

- The conference report would allow the government to issue NSLs for certain types of sensitive personal information simply by certifying that the information is sought for a terrorism or espionage investigation. This would allow government fishing expeditions targeting innocent Americans. As business groups have argued, the government should be required to certify that the person whose records are sought has some connection to a suspected terrorist or spy.

- Unlike the Senate bill, the conference report requires a person who receives an NSL to notify the FBI if he consults with an attorney and to identify the attorney to the FBI. This will have a significant chilling effect on the right to counsel. There is no such requirement in any other area of law.

- Unlike the Senate bill, the conference report for the first time imposes criminal penalties on an NSL recipient who speaks out in violation of an NSL gag order, even if the NSL recipient believes his rights have been violated.

- The conference report for the first time gives the government the power to go to court to enforce an NSL, effectively converting an NSL into an administrative subpoena. An NSL recipient could now potentially be held in contempt of court and subjected to serious criminal penalties. The government has not demonstrated a need for NSLs to be court enforceable and has not given any examples of individuals failing to comply with NSLs.

- The conference report would give the government unilateral authority to keep all its evidence secret from a recipient who is challenging an NSL, regardless of whether the evidence is classified. This will make it very difficult for an NSL recipient to obtain meaningful judicial review that comports with due process.

- As with Section 215, the conference report fails to require notice to the target of an NSL if the government seeks to use the records obtained from the NSL in a subsequent proceeding, and fails to give the target an opportunity to challenge the use of those records.

"Sneak and Peek" Searches (Section 213)

- The conference report does not eliminate the catch-all provision that allows sneak and peek searches any time that notice to a subject would "seriously jeopardize" an investigation. This exception could arguably apply in almost every case.

Roving Wiretaps (Section 206)

- The conference report does not include meaningful checks on "John Doe" roving wiretaps, a sweeping power never authorized in any context by Congress before the Patriot Act. A John Doe roving wiretap does not identify the person or the phone to be wiretapped. Unlike the Senate bill, the conference report does not require that a roving wiretap include sufficient information to describe the specific person to be wiretapped with particularity.

- The conference report does not require the government to determine whether the target of a roving intelligence wiretap is present before beginning surveillance. An ascertainment requirement, as has long applied to roving criminal wiretaps, is needed to protect innocent Americans from unnecessary surveillance, especially when a public phone or computer is wiretapped.

Pen Registers and Trap and Trace Devices (Section 214 and 216)

- The conference report retains the Patriot Act's expansion of the pen/trap authority to electronic communications, including e-mail and Internet. In light of the vast amount of sensitive electronic information that the government can now access with pen/traps, modest safeguards should be added to the pen/trap power to protect innocent Americans, but the conference report does not do so.

Domestic Terrorism Definition (Section 802)

- The conference report retains the Patriot Act's overbroad definition of domestic terrorism, which could include acts of civil disobedience by political organizations. While civil disobedience is and should be illegal, it is not necessarily terrorism. This could have a significant chilling effect on legitimate political activity that is protected by the First Amendment.

It is not too late to remedy the problems with the conference report and pass a reauthorization package that we can all support. The House could take up and pass the bill the Senate adopted by unanimous consent in July, or, if the additional modest but critical improvements to the conference report that the original cosponsors of the SAFE Act laid out prior to Thanksgiving are made, we believe the conference report can easily and quickly pass both the House and the Senate this month.

We appreciate that since Thanksgiving, the conferees agreed to include four-year sunsets of three controversial provisions rather than seven-year sunsets. But we should not just make permanent or, in the case of three provisions, extend for another four years the most controversial provisions of the Patriot Act. The sunsets this year provide our best

opportunity to make the meaningful changes to the Patriot Act that the American public has demanded. Now is the time to fix these provisions.

We urge you to join us in opposing cloture on the conference report, and in supporting our call for the conferees to make additional improvements. We still have the opportunity to pass a good reauthorization bill this year. But to do so, we must stop this conference report, which falls short of the meaningful reforms that need to be made. We must ensure that when we do reauthorize the Patriot Act, we do it right. We still can – and must – make sure that our laws give law enforcement agents the tools they need while providing safeguards to protect the constitutional rights of all Americans.

Sincerely,

Larry E. Craig

Richard J. Durbin

John Sununu

Russell D. Feingold

Lisa Murkowski

Ken Salazar

Chuck Hagel

John F. Kerry

Barack Obama