



## **International PEN and PEN American Center**

### **Contribution to the 9th session of the Working Group of the Universal Periodic Review**

#### **Submission on the United States of America**

16 April 2010

International PEN and PEN American Center welcome the opportunity provided by the Office of the High Commissioner on Human Rights to comment on the climate for free expression and human rights in the United States. This document concentrates on encroachments and violations of the right to freedom of expression and other fundamental rights in connection with antiterrorism practices and policies of the United States and highlights particular areas of ongoing concern despite the election of a new administration in 2008.

#### **Introduction**

Immediately following the September 11, 2001 terrorist attacks, the United States embarked on policies and implemented programs that violated domestic and international free expression and due process protections. Under anti-terror legislation and under secret orders enacted without oversight or review, the executive branch gained new power to monitor the daily activities of U.S. citizens and residents and collect information on personal associations, reading habits, and opinions; weakened the power of the American people to monitor government activities and built barriers that restrict the flow of information and ideas; and created a shadow legal system that undercut basic due-process protections and facilitated gross human rights violations including arbitrary detention, enforced disappearance, and torture.

These policies were implemented in a political climate that discouraged dissent and capitalized on a climate of fear, extreme secrecy, patriotic fervor, and public confusion about the parameters of the U.S. Constitution and international law. In a 2004 poll, 41% of Americans said newspapers should not be allowed to freely criticize the U.S. military; 47% said the media should not cover anti-war protests in a time of war; and one-third of Americans said the media should not report the comments of anyone who criticized the government. This erosion of public understanding of and support for core First Amendment principles continued through 2006, when an employee of a U.S. military veteran's hospital in New Mexico was threatened with prosecution for sedition for publishing an opinion piece critical of the Bush administration's handling of Hurricane Katrina, and when Bush administration officials and some members of Congress threatened to prosecute leading journalists under the Espionage Act for breaking stories on torture, secret CIA prisons, and illegal surveillance programs.

The climate for freedom of expression has improved markedly since then. No journalists are currently under threat of prosecution for their reporting or for protecting confidential sources, and this year Secretary of State Hillary Rodham Clinton lifted the ban on two prominent international scholars who had been barred from the United States for several years because of their criticism of U.S. policy, raising hopes that the current administration is reversing a post-9/11 policy of barring international writers and intellectuals from visiting the U.S. because of their political views. Moreover, the Obama administration has reaffirmed the United States' commitment to abide by international prohibitions on torture and cruel, inhuman, and degrading treatment and pledged to close the detention facility at Guantánamo Bay, Cuba, and resolve the cases of those detained there.

However, the United States continues to assert and use surveillance powers that threaten intellectual freedom and violate constitutional protections against illegal searches. In addition, the current administration has continued to claim the state secrets privilege and otherwise suppress information and documents that are necessary for citizens to inform themselves about the nature and scope of human rights abuses in the United States' post-9/11 detention and interrogation programs, thwarting efforts to promote accountability for those violations.

### **Surveillance and freedom of expression**

The Patriot Act and other post-9/11 legislation expanded the power of U.S. law enforcement and intelligence agencies to gather information on, and monitor the activities of, U.S. citizens and residents. Some of these powers posed clear threats to intellectual privacy and to the rights of Americans under the First Amendment of the U.S. Constitution and Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights.

For instance, under Section 215 of the Patriot Act, the “business records” provision, the FBI can seek an order from the Foreign Intelligence Surveillance (FISA) Court requiring a bookseller or librarian to turn over any patron records that are “relevant to” an investigation of international terrorism or foreign espionage, including the records of people who are not suspected of criminal conduct. Section 215 orders prohibit a bookseller or librarian from revealing that they have received a demand for records. Under the Patriot Act, bookstores and libraries that provide the public with access to the Internet are also subject to National Security Letters (NSLs). NSLs are orders that the FBI issues itself, without prior judicial review. Like Section 215 orders, they can be used to obtain records about innocent people so long as the records are merely “relevant” to a terrorism or espionage investigation, and the FBI can impose a gag order on the NSL recipient.

These provisions have made it possible for the government to engage in fishing expeditions that violate the First Amendment right of Americans to seek information freely without fear of government scrutiny. Two reports by the Inspector General of the Justice Department have shown that the FBI issued more than 200,000 NSLs between 2003 and 2006, and that in 2006 more than 60% of these letters were used to gather information on American citizens. Moreover, in at least one instance, the FBI issued an NSL after the Foreign Intelligence Surveillance Court had twice rejected the FBI's request for a Section 215 order on the grounds that “the facts were too ‘thin’ and that this request implicated the target's First Amendment rights.” According to the

Inspector General's report, "The FBI General Counsel told the Office of the Inspector General that she believed that it was appropriate to issue NSLs because she disagreed with the FISA Court...She stated that the FBI would have to close numerous investigations if it was not permitted to investigate individuals based on their contact with other subjects of FBI investigations."

There has been some progress in the effort to restore privacy protections for such important First Amendment-protected materials as people's reading records. Federal courts have repeatedly ruled that aspects of the gag and record demand provisions are unconstitutional, and Congress has amended these provisions to allow limited court challenges. However, both Section 215 and the NSL statute continue to allow searches of bookstore and library records without a showing that the person whose records are being sought is suspected of any wrongdoing, a power which threatens constitutional and international due process and privacy protections.

Behind these Congressionally-authorized surveillance powers is another level of secret and illegal surveillance programs that the executive branch launched or expanded in the wake of 9/11 with no oversight whatsoever. While its full scope remains unknown, between 2001 and 2007 President Bush authorized a program that allowed the NSA to wiretap Americans without a warrant in blatant disregard of a federal statute that prohibited the practice. Concerns about the legality of this practice surfaced repeatedly. Indeed, in 2004, the Department of Justice refused to provide the legal certification necessary for reauthorization of the original program because top department officials—all Bush appointees—were not convinced of its legality. When elements of the program were finally exposed in 2005, however, Congress failed to hold accountable the officials who had authorized it or to put new legislative protections in place. Instead, in 2008 it passed a new law, the FISA Amendments Act, which not only granted immunity to telecommunications companies for their participation in the NSA program, but also provided the executive branch with even broader authority to conduct warrantless, suspicionless, dragnet surveillance of Americans' international emails and telephone calls.

Last year, the Inspectors General of the NSA, CIA, Defense Department, Justice Department, and the Office of the Director of National Intelligence released a report describing a surveillance program that was far larger than previously acknowledged; that report, too, questioned the legal basis for the program the Bush administration launched in 2001 and revealed that most of the intelligence leads generated by the program had questionable relevance to terrorism investigations. Meanwhile, ongoing Congressional investigations have uncovered new information suggesting that the NSA continues to scrutinize emails on a scale that may even violate the terms of the FISA Amendments Act.

### **Secrecy as a means of thwarting accountability**

Efforts by citizens and organizations to learn more about potentially unlawful post-9/11 policies and programs have repeatedly run up against a wall of secrecy that increasingly appears constructed specifically to conceal government wrongdoing.

In the case of the clandestine National Security Agency surveillance program, the Bush administration turned back legal challenges aimed at ascertaining the scope and lawfulness of

program by asserting “state secrets privilege” and arguing that the fact that plaintiffs in the lawsuits could not show they were the targets of surveillance (which of course they could not do because of the intense secrecy surrounding the program) meant they lacked standing to sue. Human rights groups including PEN American Center filed a new lawsuit last year challenging the FISA Amendments Act on the grounds that they believe their international communications are being monitored, but the Obama administration is again arguing that because the groups cannot prove they have been monitored, the suit should be dismissed.

Last month, a federal court rejected that position in a lawsuit brought by a Muslim charity and its lawyers, ruling that the NSA program’s surveillance without a court order is illegal. However, that suit was unique: it was allowed to proceed because the U.S. government had inadvertently disclosed a classified document that made clear the plaintiffs had been a target of the warrantless surveillance program; the FBI subsequently admitted surveillance had taken place. Meanwhile, the U.S. government continues to argue that other suits, including the one brought by human rights groups, should be dismissed because the groups have no evidence that they have been targeted.

Secrecy is likewise being used to suppress information about post-9/11 U.S. detention practices and policies and to undermine efforts to bring evidence of torture and other human rights abuses against detainees in U.S. custody to light.

In May 2007, five detainees brought a civil lawsuit under the Alien Tort Claims Act against Jeppesen Dataplan, Inc., a subsidiary of Boeing that handled the logistics of the CIA’s rendition flights, for complicity in their forced disappearance and torture. Jeppesen has never responded to the complaint; instead, the Bush administration intervened and moved to have the case dismissed on the grounds that the “very subject matter” of the lawsuit—that the U.S. had flown captives to be detained and interrogated in both foreign and secret CIA prisons—is a state secret. In February 2008, a U.S. federal judge granted the government’s motion to dismiss, ruling that the administration’s invocation of the state secrets privilege meant the court lacked jurisdiction to hear the lawsuit. When their lawyers appealed, the Obama administration again asserted the state secrets privilege. In April 2009 an appeals court ruled that the case must be allowed to proceed and the government can invoke state secrets only with respect to specific pieces of evidence, but the administration has appealed that decision, and if it prevails, the suit will again be dismissed without a hearing on facts of the case.

The U.S. government has similarly persisted in preventing the release of documents that would illuminate post-9/11 human rights abuses and help build the kind of public record that is necessary to guard against impunity.

For example, in November 2005, the Bush administration destroyed 92 videotapes of the interrogations of Abu Zubaydah and Al Nashiri in a secret prison in Thailand. Those tapes were among the documents and materials that were the subject of a 2004 Freedom of Information Act lawsuit seeking information about the torture and abuse of detainees in U.S. custody, and subsequent legal proceedings for contempt of court have centered on securing the release of documents relating to the contents of the tapes, including CIA cables describing the interrogations the tapes depicted and communications about their destruction. First the Bush and

then the Obama administrations have successfully fought the release of these critical materials on the grounds that releasing them would reveal classified intelligence-gathering methods, even though the interrogation methods depicted—which the International Committee on the Red Cross has concluded were tantamount to torture—are potentially illegal and outside of the CIA’s operational mandate. Under U.S. law, no government agency is allowed to claim an exemption to the Freedom of Information Act in order to conceal wrongdoing. Nevertheless, the current administration is continuing a course that began with the Bush administration’s destruction of the tapes and appears to be calculated to do just that.

In another striking and extremely discouraging example, successive U.S. administrations have even sought to suppress the release of information about the torture or cruel, inhuman, and degrading treatment of detainees in U.S. custody in courts outside the United States. Binyam Mohamed, a British citizen who was subjected to abusive interrogations and torture in Pakistan, Morocco, and a secret CIA prison in Afghanistan, brought a case in the United Kingdom seeking to compel the British government to release documents in its possession that corroborated his account of abuse so that he could defend himself in proceedings before a military commission in Guantánamo Bay, Cuba. In the course of the case, the U.K. court concluded that 42 documents the CIA had sent to British intelligence services confirmed his account of mistreatment. The United States government not only fought the release of those documents, but for more than a year succeeded in suppressing a seven-paragraph summary of the contents of the documents from published court opinions by threatening that the release of the paragraphs would cause the United States to reevaluate its intelligence-sharing relationship with Great Britain.

## **Conclusion and Recommendations**

The free flow of information and ideas is vital to democratic self-governance. Intrusive government surveillance and excessive government secrecy both constrict the flow of information, violating First Amendment and international guarantees protecting the right of citizens to seek, receive, and impart information freely and without interference. Surveillance chills intellectual and creative freedom. Secrecy, especially secrecy that abridges the right of citizens to access information about government conduct that might include grave violations of U.S. and international law, undermines the shared sense of responsibility and accountability on which democracy depends. In order to more fully realize its stated commitments to freedom of expression and the full range of internationally recognized human rights, **International PEN and PEN American Center call on the government of the United States of America to:**

- Restore full privacy protections for bookstore and library records, including a requirement that searches of such First-Amendment-protected materials be limited to the records of those suspected of involvement in terrorism or other criminal activity;
- End dragnet, warrantless surveillance of telephone and Internet communications and all surveillance programs operating without judicial oversight or review;
- Lift the veil of secrecy surrounding the arbitrary detention, enforced disappearance, and torture of detainees in U.S. custody and promote full accountability for violations of American and international human rights norms.