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How “Patriot Act 2” Would Further Erode the Basic Checks on Government Power That Keep America Safe and Free

The USA PATRIOT Act, passed by Congress shortly after September 11, 2001, increases government surveillance, detention and other law enforcement powers while reducing basic checks and balances on such powers. The Department of Justice is currently drafting legislation designed as a sequel to the USA PATRIOT Act.¹ A draft copy of this legislation, dated January 2003, recently became available.²

The draft legislation, which has been dubbed “Patriot Act 2,” would grant sweeping powers to the government, eliminating or weakening many of the checks and balances that remained on government surveillance, wiretapping, detention and criminal prosecution even after passage of the USA PATRIOT Act.

Patriot Act 2, like its predecessor, is technical and complex. This statement tries to make sense of these issues, by

- (1) summarizing its key provisions,
- (2) explaining how those provisions undermine key checks and balances, including the federal courts, Congress and the press, and
- (3) explaining how these new powers could go beyond affecting the rights of suspected terrorists and impact ordinary people of diverse constituencies.

1. Summary of Key Provisions

The Domestic Security Enhancement Act (also called “Patriot Act 2”):

- Further dismantles court review of surveillance, such as by terminating court-approved limits on police spying on religious and political activity (sec. 312), allowing the government to obtain credit records and library records secretly and

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

² Copies of the draft bill can be obtained at <http://www.dailyrotten.com/source-docs/patriot2draft.html>

without judicial oversight (secs. 126, 128, 129), and by allowing wiretaps without a court order for up to 15 days following a terrorist attack (sec. 103);

- Allows government to operate in secret by authorizing secret arrests (sec. 201), and imposing severe restrictions on the release of information about the hazards to the community posed by chemical and other plants (sec. 202);
- Further expands the reach of an already overbroad definition of terrorism so that organizations engaged in civil disobedience are at risk of government wiretapping (secs. 120, 121) asset seizure (secs. 428, 428), and their supporters could even risk losing their citizenship (sec. 501);
- Gives foreign dictatorships the power to seek searches and seizures in the United States (sec. 321), and to extradite American citizens to face trial in foreign courts (sec. 322), even if the United States Senate has not approved a treaty with that government; and
- Unfairly targets immigrants under the pretext of fighting terrorism by stripping even lawful immigrants of the right to a fair deportation hearing and stripping the federal courts of their power to correct unlawful actions by the immigration authorities (secs. 503, 504).

These are only examples of the unfettered powers that the new bill would grant to the government; for a complete analysis, please see ACLU's detailed section-by-section summary, available on our website.³

2. Undermining Checks and Balances

Under our Constitution, government powers are subject to control by the courts, the Congress, and ultimately by the American people, informed by a free press. Checks and balances help ensure both safety and freedom. They ensure that government actions taken for very important purposes, such as to prevent terrorism or other crime, do not violate the rights of ordinary citizens, and that government is held accountable when they do. They also help the government, ensuring that its resources are concentrated on arrests of real criminals – not on ineffective, feel-good solutions advanced by political leaders anxious to reassure a frightened public.

This section explains why eroding checks and balances is a false solution to the real problem of terrorism, and then explains just how Patriot Act 2 would further erode three key checks and balances – the courts, Congress, and the free press.

³ <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206>

Eroding Checks and Balances Is a False Solution

Anti-terrorism policies that infringe on basic rights – such as ethnically-based roundups of innocent persons, or intrusive surveillance of peaceful political activists – not only make America less free, they make our nation more vulnerable to terrorism. Such policies waste scarce government resources that should be used to track down real criminals, and help sew the seeds of mistrust among communities that might otherwise be willing to assist the government in arresting terrorists.

As FBI special agent Coleen Rowley observed in a recent letter to Director Robert Mueller, questioning the FBI's priorities in investigating and fighting terrorism:

The vast majority of the one thousand plus persons "detained" in the wake of 9-11 did not turn out to be terrorists. . . . [A]fter 9-11, Headquarters encouraged more and more detentions for what seem to be essentially PR purposes. Field offices were required to report daily the number of detentions in order to supply grist for statements on our progress in fighting terrorism. The balance between individuals' civil liberties and the need for effective investigation is hard to maintain even during so-called normal times, let alone times of increased terrorist threat or war. It is, admittedly, a difficult balancing act. But from what I have observed, particular vigilance may be required to head off undue pressure (including subtle encouragement) to detain or "round up" suspects, particularly those of Arabic origin.⁴

In the same vein, in late 2001, a memorandum was circulated by senior intelligence specialists expressing serious concerns that a focus on racial profiling or other investigative techniques that intrude on civil liberties could undermine security by distracting security officials from less clumsy and more reliable individual suspicion.⁵ At the same time, no fewer than eight high ranking former FBI officials, many from the Reagan and Bush administrations, strongly criticized anti-terrorism proposals that violate civil liberties, saying such tactics were likely to be ineffective and to distract from proven investigative techniques.⁶

While granting new powers to federal agents, the draft bill systematically attacks precisely these basic checks and balances on government power, thus making it harder for professional law enforcement agents to resist pressure by political leaders to implement highly visible policies that violate civil liberties, rather than rely on proven techniques that are effective.

⁴ *Full Text of FBI Agent's Letter to Director Mueller*, N.Y. Times, March 5, 2003 (letter dated Feb. 26, 2003).

⁵ Bill Dedman, *Memo Warns Against Use of Profiling As Defense*, Boston Globe, Oct. 12, 2001.

⁶ Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism; Detention of Suspects Not Effective, They Say*, Washington Post, Nov. 28, 2001, at A1

How Patriot Act 2 Weakens Checks and Balances Provided by the Courts, Congress and the Press

The Federal Courts. Under the Constitution, government searches and wiretaps, orders for confidential records, and spying on religious and political activity are subject to important limits. In general, searches and other surveillance are lawful only if the government shows to a court that it has probable cause to believe evidence relevant to a crime or intelligence related to a threat from a foreign power may be found.⁷ Government spying on political, religious or other peaceful, expressive activity may not contravene the First Amendment, so federal courts are empowered to limit police spying to prevent these abuses. Obtaining sensitive records, such as credit records and library records, are also subject to Fourth Amendment standards and courts – not the Executive Branch acting alone – decide when those standards have been met. Finally, under the Constitution, the government may only detain persons under the supervision of a court.

Yet these basic rights, while embodied in the Constitution, do not enforce themselves. Rather, they are made meaningful only by the standards and procedures Congress has laid out for the federal courts to use in measuring the limits government authority. One such law, the Foreign Intelligence Surveillance Act of 1978,⁸ is designed to ensure that wiretaps for national security purposes will never again be subject to the discretion only of the Executive Branch. Unilateral executive power had resulted in an abuse of power -- in the wiretapping of civil rights leaders, including Martin Luther King, Jr. and in the secret political surveillance under Nixon that culminated in the crimes of Watergate.

Under the amendments to surveillance statutes the bill authorizes, the standards under which a court must approve searches and surveillance is lowered – in many cases, making such review no longer meaningful. The bill creates a new defense that could shield the future Nixon-era wiretappers from prosecution even if they act without a court order, so long as their activities were authorized by high government officials, as they were in Nixon's day (sec. 106). Likewise, limits on police spying approved by federal courts will be swept aside, freeing state and local police to spy on political and religious activity, thus violating citizens' First Amendment rights (sec. 312).

The draft bill also rescinds authority for immigrants to challenge the lawfulness of government action by habeas corpus (sec. 504). This section attempts to effectively reverse a Supreme Court decision holding that earlier restrictions on review of immigration decisions had left intact review under the Habeas Corpus Act, enacted in 1789 by the same Congress that ratified the Bill of Rights.⁹ As a result, immigrants, including lawful permanent residents, will be subject to arbitrary deportations at the whim of the government.

⁷ See *Katz v. United States*, 389 U.S. 347 (1967) (criminal surveillance); *United States v. United States District Court ("Keith")*, 407 U.S. 297 (1972) (intelligence surveillance).

⁸ 50 U.S.C. §§ 1801-63

⁹ See *INS v. St. Cyr*, 533 U.S. 289 (2001); 28 U.S.C. § 2241.

The United States Congress. The Constitution lays out a separation of powers that puts Congress in charge of making the laws, approving treaties, and declaring war. By splitting power in this way, the Framers ensured that even a popular President could not change the law, declare war, or commit the country to binding international commitments without obtaining the consent of Congress.

Under current law, the Executive Branch may only extradite Americans or others to face trial in foreign courts if an extradition treaty, ratified by the United States Senate, specifies that the crime is one for which extradition is allowed. Likewise, the Executive Branch may not conduct searches and wiretaps on behalf of a foreign government which is investigating a foreign crime unless the Senate has approved a “Mutual Legal Assistance Treaty.” Under the draft bill, however, extradition is allowed without a treaty or in excess of limits imposed by existing treaties, and so are foreign-directed searches and wiretaps (secs. 321, 322).

By writing the Senate out of the process of defining the limits of our legal relationships with other governments, the bill jettisons an important bulwark against subjecting American citizens to the control of possibly dictatorial governments. At the same time, the bill further strips away judicial power by preventing the courts from questioning an extradition request, even for an American citizen, even if the court were to find that the requesting country’s legal system fails to respect fundamental civil and human rights (sec. 322).

The Free Press. The public is the ultimate source of power under our democratic system of government. For its decisions to be informed, the press must be unfettered and must have access to the workings of government through the Freedom of Information Act and other open government laws.

Under the draft bill, however, basic operations of government, such as the arrests of terrorism suspects who have not been criminally charged, can be kept secret (sec. 201). These might include material witness detainees, immigration detainees, or American citizens or others labeled “enemy combatants” by the President and incarcerated by the military. Grand jury witnesses can also be gagged at the government’s request (sec. 206).

By casting a veil of secrecy over the basic workings of the judicial branch of our government, Patriot Act 2 violates an essential principle of American democracy and undermines public confidence in the fairness of the criminal justice system. As Alexander Hamilton made clear more than two centuries ago, a policy that allows “confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten” is a “*dangerous engine* of arbitrary government.”¹⁰

Likewise, information required by law to be reported by chemical companies and others whose activities pose a hazard, while theoretically public, will be subject to severe restrictions on access(sec. 202). This information will become virtually inaccessible to

¹⁰ THE FEDERALIST No. 84 (Hamilton) (emphasis in original) (quoting 1 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 335).

the press, the public and environmental organizations, undermining their ability to hold government and industry accountable for public safety.

By undermining these key institutions of our government – the courts, the Congress and the press – Patriot Act 2 takes the position that checks and balances must be jettisoned in the interests of national security. Whenever America has succumbed to this temptation in the past – by interning Japanese Americans without trial during World War II, or by denying basic due process to suspected Communists during the red scares of the 1920s and 1950s – our nation has come to regret it.

There is a better way. Our nation should embrace its system of checks and balances and look on judges, Congress and the American people as partners in the fight against terrorism, rather than inconvenient obstacles to the Executive Branch.

3. Targeting Ordinary People, Not Terrorists

Patriot Act 2's laundry list of new powers will not only erode certain fundamental rights of terrorism suspects or other criminal defendants, but also contains powers which could be directed at ordinary people, such as protestors with diverse political viewpoints, members of community, environmental and religious organizations, library users and ordinary immigrants, including legal permanent residents.

When Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), it intended those extraordinary powers to be used against the Mafia and organized crime. Over the years, however, RICO was used far more broadly, even against anti-abortion protesters and other dissidents.¹¹ The ACLU is deeply concerned that some of the powers the government may be seeking in Patriot Act 2, while ostensibly directed at terrorists, could likewise be used in unexpected ways.

Protestors – Right and Left. Under an existing, overbroad definition of international and domestic “terrorism,” any individual or group that breaks the law with the intent of influencing the government can be labeled a terrorist if their activities are “dangerous to human life.”¹² Under that definition, diverse “direct-action” organizations, including Operation Rescue, the World Trade Organization protestors, and others could conceivably be labeled “terrorist organizations.”

Patriot Act 2 not only fails to fix this definition, it exacerbates these problems by hinging even more anti-terrorism powers to this definition. These include new wiretapping authority (secs. 120, 121), civil asset forfeiture powers (sec. 427, 428), new death penalties (sec. 411), and a frightening and unprecedented power for the government to revoke American citizenship even of native-born Americans (sec. 501).

Under these new powers, an overzealous Attorney General in an Administration that favored abortion rights could label a pro-life organization that engaged in “direct action”

¹¹ *Scheidler v. National Organization for Women, Inc.*, __ U.S. __, 2003 WL 467549, (Feb. 26, 2003).

¹² 18 U.S.C. § 2331.

as a domestic terrorist group. As a consequence, the government could wiretap their meetings, seize their property, and strip their supporters of United States citizenship, rendering them in the same position as stateless undocumented immigrants who face potentially indefinite detention.¹³

Community and Environmental Organizations. Community and environmental organizations rely on open records laws to ensure that the risks to health and safety from power plants, chemical plants and other hazardous facilities are understood and that proper safety precautions are maintained. This public pressure is often more effective than government regulation.

One such record-keeping requirement is the responsibility to complete a “worst case scenario” under the Clean Air Act.¹⁴ Patriot Act 2 would impose extraordinary restrictions on access to these scenarios, effectively rendering them unavailable to the public in any useable form (sec. 202). As a result, companies whose activities pose a hazard to the community could keep those hazards secret.

Churches, Synagogues, Mosques and Other Religious and Community Groups. Religious and secular organizations that take controversial positions on issues like war and peace, abortion, or casino gambling could face infiltration and monitoring by local and state police departments acting in concert with unsympathetic government officials.

Patriot Act 2 would immediately terminate court-ordered limits on political spying by local and state police, freeing them to re-activate intelligence gathering squads that can investigate organizations without any evidence of a connection to terrorism or other criminal activity (sec. 312).

Library Users. Since September 11, American libraries, bookstores and Internet Service Providers (ISPs) have been faced with ever-increasing demands from federal and state law enforcement agencies for records, e-mail, and other information for “dragnet-style” fishing expeditions.¹⁵

Under current law, the government is required under some circumstances to back up its demands with a court order. While the standard for issuing such orders has been lowered by the USA PATRIOT Act, some judicial intervention is still required. Under Patriot Act 2, these demands are likely to escalate even further, as the government gains new powers to issue “administrative subpoenas” and what it calls “national security letters” that will enable it to force compliance without going to court at all (secs. 128, 129).

Ordinary Immigrants. The Constitution and laws protect the rights of immigrants to due process of law, requiring the government to provide a fair hearing to anyone the government wants to deport, and subjecting the immigration authorities to the rule of law

¹³ See, e.g., *Zadvydas v. Davis* 533 U.S. 678 (2001).

¹⁴ 47 U.S.C. § 7212(r).

¹⁵ Michael S. Gerber, *Anti-Terrorism Measures Create Privacy Dilemma for Corporations*, The Hill, March 12, 2003

by giving the federal courts power to correct unlawful actions by the government. The Supreme Court reaffirmed these basic principles only two years ago when it ruled against the government in *INS v. St. Cyr*, 533 U.S. 289 (2001), saying “Judicial intervention in deportation cases is unquestionably required by the Constitution.”

Patriot Act 2 seriously erodes the rights of immigrants – including lawful permanent residents – by providing for summary deportations without charges or evidence if the Attorney General merely suspects an immigrant may be a risk to national security (sec. 503). This proposal flies in the face of a consensus – supported by President Bush in the 2000 election campaign – that jailing immigrants on secret evidence is unreliable and un-American.

Finally, lawful permanent residents who are not suspected of posing any risk to national security – but have committed some minor criminal offense even in the distant past – will be stripped of their right to an immigration hearing and will be barred from petitioning a federal court to correct any unlawful actions by the government (sec. 504). Patriot Act 2 does this by rescinding the authority that the Supreme Court relied on to review the government’s actions – the Habeas Corpus Statute.

Conclusion

Patriot Act 2 is fundamentally flawed because it relies on a false premise – that America can be safer if we do away with basic checks and balances. By undermining the role of the courts, Congress and the press in providing a real check on Executive power, Patriot Act 2 directs its ire at the institutions of American democracy instead of at the terrorists that threaten it. In so doing, it threatens to undermine the rights of ordinary people, not terrorists.

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