

Taking Liberties in the War on Terror: The Justice Department's "Patriot Act II"

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In the days following September 11th, the Bush Administration made a calculated decision to view the attacks on the World Trade Center and the Pentagon as acts of war by foreign aggressors, rather than criminal acts that required redress by the justice system. "We are at war," the nation's chief law enforcement officer, Attorney General John Ashcroft, told the United States Senate on September 25th. The resources of all federal law enforcement agencies were being marshaled for one "first and overriding priority," Ashcroft said, "defending our nation and its citizens against terrorist attacks." In response to Ashcroft's plea for "the tools to fight terrorism," Congress quickly ushered through the USA Patriot Act of 2001, which gave broad and virtually unprecedented powers to the Justice Department, FBI, CIA and other federal law enforcement agencies to conduct searches of homes and offices without prior notice, use roving wiretaps to listen in on telephone conversations, and monitor private computer Internet site visits and e-mail messages. (For an extensive constitutional analysis of the USA Patriot Act, see The Rutherford Institute's "Forfeiting 'Enduring Freedom' for 'Homeland Security'".)

Despite heavy fire from members of the public and civil rights watchdog organizations such as The Rutherford Institute, the ACLU and the Center for Democracy and Technology, the ink was hardly dry on the Patriot Act when the Justice Department began to chafe again under the "restrictions" imposed on law enforcement by decades-old privacy laws such as the Wiretap Act and the Privacy Act. Rumors had already been circulating on Capitol Hill of a "Patriot Act II" when in early January of this year a top-secret Justice Department memo and accompanying draft of the "Domestic Security Enhancement Act of 2003" was leaked to the Washington-based Center for Public Integrity. The proposed legislation would go far beyond even the Patriot Act in granting broad powers to the Attorney General to conduct electronic surveillance of U.S. citizens, search and seize homes and businesses absent probable cause, and arrest and deport persons accused of supporting terrorism. Although a Justice Department spokesperson said the draft bill was only for in-house discussion and denied it had been sent for review by Congress, a routing slip [PDF] obtained by a PBS reporter appears to confirm that the Justice Department's Office of Legal Policy had sent the draft bill to House Majority Leader Dennis Hastert and Vice President Dick Cheney "for review and comment" on January 10th, the day after the memo was drafted. It thus appears that the bill is already in the preliminary stages of review in Congress and at the White House, and

absent strenuous opposition from congressional leadership and the American public, will be introduced shortly in substantially the same form and earmarked for the same "fast-track" treatment as its predecessor, the Patriot Act.

The Domestic Security Enhancement Act (DSEA) first seeks to redefine the very terms of engagement in the "War on Terror" in order to broaden the scope of the Bush Administration's "war-fighting powers." Sections 121 and 122 of the draft bill amend the Wiretap Act and the restrictions relating to surveillance via pen register (which records outgoing telephone numbers dialed) and trap and trace devices (which record incoming telephone numbers) to eliminate the last vestiges of a distinction between international terrorism and "domestic terrorism," thereby granting far broader surveillance powers to law enforcement for a wide range of crimes. Section 402 would expand the current definition of the crime of providing material support to terrorists to reach potentially any kind of financial or informational support, direct or indirect, of organizations designated as "terrorist" (domestic or foreign -- without requiring that the accused intended the support. Sections 303 and 304 of the bill add a new definition of "suspected terrorist" for the purpose of maintaining a DNA database of such individuals, and allow an individual to be included in the database at the Attorney General's sole direction and discretion. Collateral provision 302 provides a circular definition of a "suspected terrorist" -- a "person suspected of being a member of a terrorist organization."

The bill also amends the procedures of the secret Foreign Intelligence Surveillance Act (FISA) court, which is a secret court consisting of eleven federal judges appointed by the Chief Justice of the Supreme Court to grant surveillance requests on an expedited basis and on less than probable cause where the target is a "foreign power" or an "agent of a foreign power." Sections 101 and 102 redefine a "foreign power" and an "agent of a foreign power" to include not only groups that engage in international terrorism, but "unaffiliated individuals who do so." Thus, the reach of the FISA's secret warrant powers would extend to investigations of any person deemed a "lone wolf" terrorist sympathizer within the United States.

The draft DSEA would also arrogate new powers to the Attorney General to disregard fundamental liberties. Under Section 103, the Attorney General's authority to authorize warrantless electronic surveillance or physical searches following a declaration of war under certain existing provisions of Title 50 of the United States Code could be invoked at virtually any time. As the Justice Department's secret memo explains:

This wartime exception is unnecessarily narrow; it may be invoked only when Congress formally has declared war, a rare event in the nation's history and something that has not occurred in more than sixty years. This provision would expand FISA's wartime exception by allowing the wartime exception to be invoked after Congress authorizes the use of military force, or after the United States has suffered an attack creating an [sic] national emergency.

Insofar as Congress has already authorized military action by the President in the "War on Terrorism," and the nation certainly suffered "an attack creating [a] national emergency" on September 11th, this provision appears to allow the Justice Department to now enter a new regime of warrantless and unaccountable searches, seizures and surveillance. Similarly, Section 128 expands the Attorney General's power to issue administrative subpoenas -- subpoenas issued without a court-ordered warrant -- whenever the Justice Department is

engaged in investigations of "domestic or international terrorism."

Other provisions of the DSEA, including Section 501, amend the "expatriation statute" -- the law defining when and under what circumstances an American citizen can be stripped of citizenship -- to provide that "an American could be expatriated if, with the intent to relinquish nationality, he becomes a member of, or provides material support to, a group that the United States has designated as a 'terrorist organization.'" Importantly, "[t]his provision would also make explicit that the intent to relinquish nationality need not be manifested in words, but can be inferred from conduct." Thus, whenever a U.S. citizen is accused of "providing material support" to a terrorist organization, he or she could be subjected to losing citizenship status and removed from the country. Similarly, Section 503 grants the Attorney General the power to deny admission to the U.S. or remove from the country any individual that he determines he has "reason to believe would pose a danger to the national security of the United States."

The DSEA bill brings the newly granted powers of the Attorney General to bear on U.S. citizens and lawful residents in many ways. Sections 107 and 109 of the bill would allow the secret FISA court to order pen register and trap and trace surveillance not only on "non-U.S. persons," as it historically has, but now on U.S. citizens as well -- as long as (per the Patriot Act) the Justice Department can claim that obtaining foreign intelligence information is "a purpose" (among others) of the investigation. The amendments also provide an enforcement mechanism whereby any person reluctant to facilitate such spying on Americans can be subjected to sanctions such as contempt of court proceedings. Section 123 extends the time limits for certain types of warrants ordered under the Wiretap Act when a "domestic security investigation" is the subject of the search. Other provisions grant the Attorney General greatly expanded powers to probe computer systems and financial records and even to conduct autopsies outside the United States on victims of violent offenses without the family members' knowledge or consent. Finally, Section 409 authorizes the Federal Aviation Administration to suspend or revoke a pilot's civil aviation certificate where the FAA determines that the pilot is "suspected" of posing a risk to aviation or national security.

The DSEA imposes more egregious restrictions on free speech than even its predecessor, the Patriot Act. Under "Patriot Act II," individuals who receive "administrative subpoenas" from the Justice Department are prohibited from disclosing that fact to any third party except a lawyer. Receipt of administrative subpoenas that may be issued by FBI personnel in national security investigations -- so-called "national security letters" -- also cannot be disclosed to the public under existing law, but disclosures would now carry a potential prison term of up to five years. Information relating to Environmental Protection Agency "worst case scenarios" of environmental disasters would be made largely unavailable, and schematic diagrams of certain government buildings would be sealed. Grand jury witnesses and persons to whom grand jury subpoenas are directed could be gagged "in cases where serious adverse consequences may otherwise result, including danger to the national security." The Justice Department would be removed from the burden of complying with all existing court orders forbidding surveillance of religious organizations (e.g., mosques) that had been conducted in possible violation of the First Amendment. And in response to numerous requests under the Freedom of Information Act (FOIA) for information relating to the status of "detainees" after the 9/11 attacks, the Justice Department seeks to close that "loophole" by amending FOIA to deny information "about individuals detained in investigations of

terrorism until disclosure occurs routinely upon the initiation of criminal charges."

It is no overstatement to charge that the Justice Department is exhibiting a wholesale institutional disdain for fundamental constitutional freedoms. As Georgetown law professor David Cole observes, "The Bush Administration's draft Domestic Security Enhancement Act of 2003 would radically expand law enforcement and intelligence gathering authorities, reduce or eliminate judicial oversight over surveillance, authorize secret arrests, create a DNA database based on unchecked executive 'suspicion,' create new death penalties, and even seek to take American citizenship away from persons who belong to or support disfavored political groups." (David Cole, "What Patriot Act II Proposes to Do" [PDF] February 10, 2003.)

There is still room to hope that if the public loudly voices its disapproval of the Justice Department's latest attack on civil liberties, as happened with the now defunct "Total Information Awareness" program, Ashcroft may be persuaded to abandon attempts to pass a "Patriot Act II." A Justice Department official [PDF] who was recently confronted with the leaked draft bill and accompanying analysis left room for the Department to back away, saying, "Department staff have not presented any final proposals to either the Attorney General or the White House. It would be premature to speculate on any future decisions, particularly ideas or proposals that are still being discussed at staff levels." Please do your part to oppose any further legislative erosion of civil liberties by clicking on this link to make your voice heard by the Justice Department. It is up to the American people to make sure that the precious liberties enshrined in the Bill of Rights are not the Bush Administration's first casualties on the homeland front of the "War on Terrorism."

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