

REAUTHORIZED USA PATRIOT ACT: A Civil Liberties Briefing

On March 9, 2006, a day before 16 provisions of the USA PATRIOT Act were due to expire, President Bush signed into law H.R. 3199 (the USA PATRIOT Improvement and Reauthorization Act) and legislation containing minor changes offered by Senator Sununu of New Hampshire (passed separately as S. 2271). At the signing ceremony he called the Act "a piece of legislation that's vital to win the war on terror and to protect the American people."

President Bush added a "signing statement" to the Act, asserting that its reporting requirement that he inform Congress about how his Administration was using its expanded police powers was not binding. He could withhold this information if he decided giving it would "impair foreign relations, national security, the deliberative process of the executive, or the performance of the executive's constitutional duties" (*Boston Globe*, March 24).

The legislation found its way to his desk after a 89-10 vote in the Senate on March 2 and a 280-138 vote in the House on March 7.

Inexplicably, Massachusetts senators Kerry and Kennedy both supported the bill that was opposed in the Senate on civil liberties grounds by Senators Akaka (D-HI), Bingaman (D-NM), Byrd (D-WV), Feingold (D-WI), Harkin (D-IA), Jeffords (I-VT), Leahy (D-VT), Levin (D-MI), Murray (D-WA), and Wyden (D-OR). *But all ten Massachusetts House members opposed it.*

Under special rules the bill needed a two-thirds majority to pass in the House, and only received two votes more than necessary. The opposition to the reauthorized Act was led by Senator Feingold, who stated that "Americans want to defeat terrorism, and they want the basic character of this country to survive and prosper. They want both security and liberty, and unless we give them both – and we can if we try – we have failed."

The reauthorized PATRIOT Act resoundingly fails to balance security and liberty and makes only a minimal effort to restore checks and balances.

The positive features are these:

- The original PATRIOT Act's overbroad definition of domestic terrorism remains but assets can only be forfeited if the organization or individual is involved in a serious federal crime.
- Any business or third party that receives a National Security Letter or Section 215 order requiring it to hand over the records of employees or customers has the right to consult with a lawyer and decide whether to challenge the demand.
- There are new hoops for the FBI to jump through to get a Section 215 order to obtain "tangible things" from libraries, bookstores and other businesses. These include the requirement that they provide "a statement of facts" demonstrating the relevance of their request and detailing the "tangible things" they are after to the FISA court. The Director of the FBI may delegate authority to request such an order either to the Deputy Director or the Executive Assistant Director for National Security but no further.
- "Minimization" procedures have been added to Section 215, limiting the government's retention of information about people with no connection to a suspected spy or terrorist.
- Libraries which are not Internet Service Providers cannot be issued with National Security Letters (that are written without any judicial oversight).
- The Justice Department must annually report on the number of times it has used Section 215 and the Inspector General of the Justice Department will report on any abuses -- *but the President has said he can block this reporting requirement.*

Several provisions that sound promising are in fact cosmetic. For instance:

- Although the new language provides for the right to counsel and the right to challenge the gag order accompanying Section 215, it does so under terms that are illusory. The gag remains in place for a year. Only then can it be challenged. All a high-level government official has to say is that the disclosure would harm national security or

diplomatic relations for the gag to be upheld by a court. The court must consider this assertion "conclusive" unless it can be somehow be demonstrated that it was made in bad faith.

- The same kind of language applies to gag provisions that accompany National Security Letters, despite a federal court ruling that NSLs were unconstitutional.
- The Act continues to allow records that are NOT connected to an international terrorist or spy to be obtained using Section 215 or a National Security letter, despite the additional requirements in the application process for a Section 215 court order.
- New time limits have been added to "sneak and peek" searches. But the initial 30-day period under which they can be kept secret can be indefinitely extended by the court, and secret search warrants can be issued by the court to search any home or office without any link to terrorism whatsoever. (Nearly 90 percent of the sneak and peek warrants that have been obtained by the Bush administration involve cases that have nothing to do with terrorism).
- There is some enhanced court oversight of government eavesdropping and secret search orders without a target being named. But law enforcement can still obtain what amounts to a blank or general warrant, allowing the government to eavesdrop on a telephone conversation or secretly search a home or business and fill in the names and locations later. There is still no requirement that the government ensure that a suspect is using the telephone it is monitoring.

Some amended provisions are entirely punitive:

- National Security Letters that are issued by the FBI for financial records and internet or phone logs without a court order are now termed National Security Subpoenas. Businesses that do not comply can be held in contempt by courts.
- Any employee who discloses a demand for such records can go to jail for five years.

Some worrying new provisions have been added to the Act:

- Under Title VI, the "Secret Service Authorization and Technical Modification Act," the Secret Service is expanded to include a new uniformed police division. The Secret Service can limit access

to "national special security events" and arrest demonstrators who enter a security perimeter or restricted building and charge them with felonies that can lead to fines and terms of up to ten years in prison. It is now a federal crime to produce, possess or transfer a false identification document that can be used to gain access to any restricted area. This section can have a dire impact on free speech, permitting the Secret Service to create wide "exclusion zones" even when "protected persons" such as the President are not expected to be present.

- The Act creates a new National Security Division in the Department of Justice.
- New death penalties have been added to federal crimes linked to terrorism without adequate consideration by Congress.
- Section 507 permits the US Attorney General to certify that a state's system of providing counsel to indigent criminal defendants is adequate in capital cases, a power that had been previously possessed by the federal courts.
- Section 402 forces more organizations and charities to check people against flawed watchlists (which run to more than 220 pages of small print) and dramatically boosts Treasury Department penalties for the failure to do so.
- A very broad "Combat Methamphetamine Epidemic Act" stiffens criminal penalties and requires strict reporting procedures on the part of retail vendors and internet sellers of substances (including those available in pharmacies) that are used in the manufacture of methamphetamine.

The Act has been made permanent except for three four-year sunsets attached to:

- Section 215 (the so-called library provision).
- Section 206 (roving wiretaps allowing multiple phones to be tapped without requiring law enforcement ascertain that a suspected foreign terrorist is using the phones).
- The "lone wolf provision" (which was added by the 2004 Intelligence Act and applies FISA secret surveillance powers to non US citizens without requiring a showing that they are acting for a foreign power or terrorist group).

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