

Reasons to Repeal the PATRIOT Act

by Robert P. Abele

October 26, 2001 was a dark day for American democracy. That was the day the Congress passed the USA PATRIOT Act (the House vote was 356-66; the Senate vote was 98-1, the lone dissenting vote cast by Senator Feingold from Wisconsin, who was one of the very few to have read the Act before voting on it). The title itself is an amazing display of pandering to the emotions of the nation at that time: it is a twisted acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.” What is more important is that the legislation contained in this Act could not even get approved by committees prior to 9/11/01. Never a group known for not taking advantage of a political opportunity, the Bush administration and the Justice Department pieced this legislation together and shoved it through Congress even as the clouds of smoke from the rubble of the World Trade Center collapse hung over New York, and a pall of grief hung over Americans. The clouds darkened two days later when Mr. Bush signed the Act into law. Lest we follow the same mistake as our alleged leaders in Congress, we would do well to know some of the specifics about the PATRIOT Act as we challenge our leaders to repeal it. Listed below are some of the issues that make the PATRIOT Act so controversial and divisive among people, juxtaposed with the relevant parallel from the Bill of Rights as found in our Constitution.

The First Amendment right to free speech. The First Amendment states, in part, that “Congress shall make no law...prohibiting freedom of speech...or the right of the people to peacefully assemble.” The Supreme Court rulings have regularly and historically given wide range to an individual’s free speech, rightfully seeing it as essential to a democracy. How does PATRIOT measure up to this very important right?

Section 411 presents a new definition of “terrorism” (“acts dangerous to human life that...appear to be intended...to influence the policy of government by intimidation or coercion”), plus a new definition of “engaging in terrorist activity” (i.e. “soliciting funds or other things of value...for any group” that the Attorney General holds “undermines U.S. efforts to reduce or eliminate terrorist activities”). In so doing, it allows prosecution through “Guilt By Association,” in direct confrontation with the First Amendment. The Supreme Court has ruled that “Guilt by association is alien to the traditions of a free society and to the First Amendment itself.”

Sections 215 and 505 of the Act issue gag orders on persons visited by FBI investigators. This includes librarians, doctors, bookstore managers, banking persons, etc.

Section 411 allows detention and deportation of any immigrant who even verbally supports a terrorist organization.

Section 802 defines “domestic terrorism” very vaguely as “acts dangerous to human life that are a violation of criminal laws...[that] appear to be intended...to influence the policy of a government by intimidation or coercion.” This very vague

definition allows the government a far wider range of discretion regarding who to wiretap and collect information on, and who to arrest, than any federal law heretofore.

The Fourth Amendment requirement of probable cause. The Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The main issue with PATRIOT regarding the Fourth Amendment is probable cause, which means that the government must have “reasonable grounds” for conducting searches and surveillances on U.S. persons. The PATRIOT Act raises concerns about probable cause in the following ways.

Numerous federal laws created under this Amendment require the government to produce evidence for eavesdropping and search and seizure. In PATRIOT this standard is very much watered down in nearly every section of the Act into allowing the government to engage in such actions only on the basis of “suspicion” of a target of investigation. This collides squarely with the Fourth Amendment requirement for probable cause. If a person did extensive writing opposed to governmental actions, for example, that would allow that person to be a target of government spying.

Section 214 of PATRIOT allows the government to bypass the usual requirement of a warrant for the use of trap and trace devices, simply by asserting that their need to spy on a U.S. citizen is “relevant to an ongoing terrorist investigation.” (Trap and trace devices record the numbers of both incoming and outgoing phone calls from whatever phones are tapped.) Note the slippery words “relevant to” and “ongoing.” Such words allow the government great leeway in their actions. What does “relevant to” a terrorist investigation mean? Only the Attorney General is permitted to answer that, and he may do so at his own whim.

Section 215 states that the FBI does not need to suspect the person of wrongdoing in order to seize evidence from them. In addition, delayed notification of warrant to the person searched is permitted. This section also repeals restrictions on governmental seizure of information, placing no limit on which “tangible thing” may be gathered up by government agents. Thus, an individual’s medical records, banking records, educational records, book purchases, and library borrowings are all specifically mentioned in PATRIOT as “tangible things” the government is now permitted to look into for any “U.S. person” (i.e. citizen). More importantly, this provision is permanent.

Section 218 suspends probable cause altogether in favor of wiretapping of persons for a “significant purpose” involving *criminal* (i.e. not limited to terrorist) investigations, OR “an ongoing intelligence investigation.” The latter, of course, need only mean that the government wants information on a certain person.

Section 412 states that the government need not present evidence before jailing immigrants. Rather, all the Attorney General needs to do is to state that he has “reasonable grounds” to believe that an immigrant is a threat. This applies to *suspected*, not proved, terrorists.

The Fourth Amendment right to privacy. Since 1890, the right to privacy has been a right that the U.S. Supreme Court has declared to be “self-evident” and constitutionally

implied in the Fourth Amendment to the U.S. Constitution. The issues regarding privacy raised in PATRIOT include the following problems.

Section 203 allows government agencies that do investigation on any criminal matter to share that information with other agencies.

Section 206 allows “roving wiretaps” for intelligence gathering on persons. These taps target a person and therefore any technological device that such a person might use, in any location. Thus, if the FBI is investigating someone who uses a library computer, the FBI can monitor any person who also uses that computer or other public electronic device, without that person’s knowledge or consent.

Section 213 permits “sneak-and-peek” searches that challenge the Fourth Amendment and also violate Rule 41(d) of the Federal Rules of Criminal Procedure. “Sneak-and-peek” means simply that a designated government official may enter a person’s home or office, look around, and leave without notification they were even there, let alone what was looked at. They need not present a warrant at the time, or even after, they engage in such actions, “for [an unspecified] reasonable period.”

Section 214 allows the government to use pen registers and trap and trace devices, without warrant.

Section 215 allows the FBI to require any record of any person from anyone, and requires judges to approve of it (i.e. “to enter...[the] order as requested”). There is no requirement for the government to provide specific facts supporting the contention that a person is an agent of a foreign power.

Section 216 permits tracking devices for telephone and Internet dialing, routing addressing and signaling information “relevant to an ongoing criminal investigation.” Note the change from “terrorist” investigation to “criminal” investigation. This happens numerous times in PATRIOT. Thus, the Act is not really a “terrorist” act, but a far wider one, with far more extensive implications for governmental power over U.S. citizens. In some instances, the change is from “terrorist” to “criminal” investigations; in others, it is a shift from “terrorist” to “intelligence” investigations. The latter allows government intrusion on any citizen they choose to target. As we have seen, probable cause for such targeting is no longer necessary.

Section 218 allows the collection and sharing of intelligence information by law enforcement communities for intelligence gathering only (“an ongoing intelligence investigation”), not for criminal activity. This changes the legal tradition radically, in that criminal law enforcement, once separated from foreign intelligence gathering, is no more. This also breaks down any separation between law enforcement and intelligence gatherers by allowing cooperation between the two.

Finally and perhaps most significantly, the “primary purpose” of espionage intelligence gathering under former federal law now becomes a “significant purpose” for *criminal* (i.e. not terrorist) investigation in PATRIOT.

The Constitutional requirement of “checks and balances.” The phrase “checks and balances” refers to the relationship of equal power between the Judicial, Executive, and Legislative branches of government which provides a guarantee that governmental power will not be consolidated or abused by one branch. This is dealt with in Articles I-III of the U.S. Constitution. Article I specifies the legislative powers; Article II specifies the powers of the executive; Article III specifies the powers of the judicial. It is particularly

in regard to Article III that PATRIOT causes grave concern. Article III, Section I, stipulates that the Supreme Court and lower courts are the only branches of government to be invested with judicial power. Furthermore, Section II states that “the judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution.” PATRIOT has been accused of undermining these aspects of the Constitution in the following ways.

The use of “suspicion” as the sole requirement of a search or seizure of citizen homes or offices effectively bypasses the entire judicial system of warranted and supervised seizures, in favor of Justice Department interests.

Section 203 allows information sharing between the FBI, CIA, INS (Immigration and Naturalization Service), and other federal agencies without judicial oversight. It also permits disclosure of grand jury information without judicial supervision. This applies to all *criminal* (i.e. not just to terrorist) investigations, and includes all U.S. persons (i.e. citizens and non-citizens alike).

The following sections of PATRIOT eliminate the judicial branch from the decision-making process of the Justice Department: section 206 rules that no judicial review of roving wiretaps is permitted; section 214 allows the use of pen registers and trap and trace devices without warrant; section 215 requires a judge to court order seizures of “any tangible thing” the Justice Department requests, merely by claiming that it is “sought for” a terrorism investigation OR that it is for “clandestine intelligence activities;” section 216 requires the judge to issue a court order for pen registers and trap and trace devices. It also permits no judicial supervision of activities under this section. Finally, in section 505, no judicial review is permitted of the activities of forcing people to turn over information on other people.

In Section 412, no court hearings outside of habeas corpus are required before jailing aliens/immigrants.

The Fifth Amendment. This involves the requirement of due process, which requires the government to follow established rules (not specifically mentioned in the Bill of Rights), and not act arbitrarily. This includes the right to be presumed innocent until proven guilty, and the right to have the state prove its case beyond a reasonable doubt. The Fifth Amendment, in part, says: “No person shall be...deprived of life, liberty or property, without due process of law...” These issues become relevant to the PATRIOT Act in the following ways.

Section 412 allows the Attorney General to detain non-citizens for up to seven days, and “for additional periods of up to six months” without charging him/her with criminal or immigration violation charges. Also, immigration violations result in mandatory detention without release until the Attorney General determines they are not terrorists.

Furthermore, neither the Justice Department nor the INS is required to present evidence on the alien; all that is needed is the word of the Attorney General that he has “reasonable grounds” for his actions.

Other Issues Raised by PATRIOT

The Freedom of Information Act (FOIA). The PATRIOT Act puts limits on FOIA while at the same time dramatically increasing the ability of the government to collect

massive amounts of information on U.S. persons. The PATRIOT Act sections 213, 215, 216, 218, 505, 506, and 508 all involve this issue.

Information Sharing. Whether one supports or rejects the PATRIOT Act, the one thing that is agreed upon by all parties is that PATRIOT “breaks down the walls” between investigative agencies of the federal government such as the FBI, CIA, ATF, Secret Service, Defense Intelligence Agency, National Security Agency, and the Customs Service, all of whom now work together, and often now work under the same roof, with the same computer database, to do their intelligence and investigation work, as well as their prosecution work. These walls were originally erected due to illegal and unethical domestic spying in the 1970’s. The walls were designed to limit federal power.

By allowing the CIA, FBI, and other federal agencies to use the grand jury information-gathering content and process, it drops a cloak of secrecy over all federal government investigative functions, for any criminal act, not just terrorism. Second, and perhaps most importantly, the removal of the wall between federal grand juries and intelligence agencies also removes oversight of this process by a federal judge. This concentrates a tremendous amount of power into a few hands at the federal level, to say nothing of a tremendous amount of information that is now at their disposal. The legal matter involved here also concerns the CIA charter, which bars it from domestic information gathering.

Before one comes to the erroneous conclusion that the government needs such powers in order to prevent terrorism from occurring, one must remember that the Foreign Intelligence Surveillance Act of 1974 (FISA) gave these very powers to the government regarding their spying on foreign nationals and foreign agents. PATRIOT turns these powers loose on American citizens, so that we are under governmental suspicion and possible surveillance on an equal footing with foreign agents. Does this protect and preserve the rights guaranteed by our Constitution? I would suggest that one would be hard pressed to answer this question in the affirmative, given the information presented here. Nor does the argument I heard expressed several times work: “they can spy on me if they want, since I haven’t done anything wrong.” The Bill of Rights was meant to prevent exactly such an attitude on the part of our government. Furthermore, the Supreme Court has universally held that the Bill of Rights states that citizens are “assumed innocent until proven guilty.” Thus, the response that one has not done any wrong, so the government is free to spy on them, is both shortsighted and in opposition to the Constitution.

Finally, the objection has often been made that the PATRIOT Act is not a local issue. However, as one can see from the above information, any Act of Congress that allows governments to spy on U.S. citizens for “intelligence gathering,” or even for “criminal suspicion” and without warrant, is a direct threat to individual liberty. When the freedom of individuals is threatened by their federal government, that is always a “local” issue because individuals are always local, as are their rights. When the actions of the federal government can both involve and drastically affect individual persons, since when does that become an issue “not of local concern”?

So how are American citizens to view the PATRIOT Act, which gives such wide-ranging and extensive powers to the Justice Department regarding their conduct toward American citizens? If citizens find themselves alarmed by these federal government

actions, they must speak out in whatever way they can. Writing one's Congressperson is always a good idea. However, our government officials listen with a much more attuned ear if citizens express themselves as groups, and/or through official or semi-official channels. It is time to get organized! Join groups opposed to the policies of the Bush administration. Where possible, use local forms of government to send messages to Washington. When organized groups such as city councils or county and state governments send their collective voices to the federal government telling them that their actions are unacceptable, that message is a strong one. Such resolutions need not be representative of each and every member of a community. Democracy only requires a majority of concerned citizens speaking in unison; after all, is democracy not about the will of the people instead of the power of a few?

###