Chapter Four: Pending Legislation Involving Civil Rights

Flushed with power and discontented with the first congressional PATRIOT victory, the Attorney General has proposed a follow-up piece of legislation to the PATRIOT Act, entitled the "Domestic Security Enhancement Act of 2003," nicknamed "PATRIOT II." If that were not enough, congressional leaders from both sides of the aisle have also proposed additional legislation to give the government even more power to enter into the lives of U.S. persons. In this chapter we will examine the main legislative proposals forthcoming, beginning with the so-called "PATRIOT II" Act.

I. The Domestic Security Enhancement Act of 2003 (DSEA; a.k.a. "PATRIOT II")

In February, 2003, the Attorney General publicly released a new proposal that he would like to see made into law. Then on September 13, 2003, President Bush weighed in by publicly proposing and endorsing the "Domestic Security Enhancement Act of 2003."[1] What follows is not an actual bill, then, but a proposal that is now in the public forum. As of November, 2003, it has not been presented to Congress. It is important, however, to bring this proposal to public attention due to some of the stark measures it takes concerning the open exercise of civil rights in the United States.

PATRIOT II is divided into five "Titles," each of which is intended to expand federal governmental power, specifically the power of the Attorney General, in his attempts to gather information on U.S. citizens and aliens, as well as the ability of his Justice Department to punish any perpetrators found by such spying.

Title I, called "Enhancing National Security Authorities," is arguably the most power-expanding section of the proposed Act. In this Title, there are many noteworthy proposals concerning wide-ranging new governmental powers in comparison with the rights of citizens protected by the Constitution.

Sections 101 of this Title includes an overturning of the FISA provision for probable cause. FISA does not require probable cause that the target of surveillance be engaged in criminal activity; all that is required is probable cause that the target be an agent of the foreign government. With that requirement lifted in PATRIOT II, there is a carte blanche the Justice Department seeks for wiretapping U.S. citizens and permanent residents.[2]

Section 102 expands who may be prosecuted as an "agent of a foreign power." Current law requires that anyone who engages in "intelligence gathering" that "involve[s] or may involve a violation" of federal criminal law, is classified as an "agent of a foreign power." This section expands that to classify as "an agent of a foreign power," any person who gathers intelligence, "regardless of whether those activities are federal crimes." Thus, anyone who the Attorney General determines is gathering information on the federal government may be labeled as an "agent of a foreign power" and be electronically monitored. Accordingly, this applies to any U.S. person, since the requirements of FISA

that the person to be wiretapped by an agent of a foreign power is lifted in this section of the Act. Finally, Section 102 takes the standards of information-gathering directed at agents of foreign governments and turns them on U.S. citizens, by allowing the government simply to "gather information" on a citizen without some evidence that their activities violate the law.

Section 103 of this Title is the first one of DSEA to eliminate the use of the U.S. court system for the purposes of increased governmental spying. The court through which the government usually obtains warrants for the use of electronic surveillance is called the Federal Intelligence Surveillance Court (FISC), established in 1978 by the Federal Intelligence Surveillance Act (FISA), for the sole purpose of hearing government requests for warrants for the surveillance of citizens. This is a top secret court, consisting of eleven judges (up from seven, by virtue of the USA PATRIOT Act), which operates on the top floor of the Justice Department, under heavy guard. The judges of this court make their decisions in secret, and they are not accountable to other courts for their decisions. In their history, they have never rejected a government request for a warrant for surveillance activities. However, now, under Section 103 in PATRIOT II, the Attorney General eliminates the use of even the FISC for warrants for electronic surveillance and even for physical searches, either when Congress authorizes military action short of war, against another country, or the U.S. is attacked in such a way as to create "a national emergency." This unlimited power is good for fifteen days after such events occur. This section, then, significantly expands when the Attorney General may bypass Congress and engage in unsupervised wiretapping of U.S. citizens, by circumventing the authority of Congress to declare when such national war emergencies exist. Under Section 103, this determination will be made by the Attorney General, once the President has declared that an attack on the U.S. has been made.

Section 105 vastly expands the type of information the Attorney General may obtain on persons. Current law prohibits use of gathered information "for law enforcement purposes" unless the disclosure includes a statement from the Attorney General that such information cannot be used in a criminal proceeding. This section eliminates the requirement that the Attorney General personally declare that the disclosure of information gathered on someone is not usable in a criminal context. In other words, this section allows the disclosure of gathered information to any other government agency, whether of a criminal nature or not, and excuses the Attorney General from having to make this distinction.

Section 106 shields wiretappers from prosecution for what they do, provided they had authorization from a senior official to engage in electronic surveillance. This has at least two consequences. First, even in the event that a wiretap is illegal, the agent performing it would not be held legally accountable for it. Second, the target of such surveillance is given no legal recourse if s/he believes s/he has been unjustifiably targeted for surveillance. FISA had in place criminal penalties on any government agent who engages

in illegal or unapproved electronic surveillance by FISA.[3] These penalties would be removed under PATRIOT II.

Section 107 eliminates even more restrictions on government spying. Current U.S. law places strict standards on the use of pen registers to gather information on U.S. persons. For foreign nationals, the government is permitted to use pen registers simply "to obtain intelligence information." However, for U.S. citizens, the pen register must only be used "to protect against international terrorism or clandestine intelligence activities." This section would eliminate all restrictions on the use of pen registers against U.S. citizens, and allow the government to use such registers simply for gathering "intelligence information." Section 216 of PATRIOT had already lowered the FISA standard to simply require a government official to certify that the information it would reveal is "relevant" to an investigation. Under PATRIOT II, this standard is lowered even further.

Section 109 expands the secret FISA Court's powers to those equal to a U.S. district court, including granting this court the ability "to enforce its orders, including the authority to impose contempt sanctions in case of disobedience." Thus, with this secret court, not only will there be no public information available about government surveillance, but added powers will be granted as well to the secret court.

Sections 120 and 121 expand the definition of terrorism beyond FISA, to include "criminal investigations" under "terrorist activities." This sweeping provision allows the federal government to arrest and prosecute U.S. citizens under a wider net, such that if their actions violate federal or state law, are potentially dangerous, and are intended to affect a government policy (the definition of "terrorism" under both PATRIOT Acts), one can be prosecuted as a "terrorist" instead of simply using the criminal codes already in place. This presents a great deal of power to the Justice Department.

Section 122 highlights more expanded governmental powers, for purposes of spying on citizens. This section allows the government to authorize "electronic surveillance without a court order in emergency situations," AND allows the use of "pen registers and trap and trace devices without a court order in emergency situations." How such an "emergency situation" is to be defined and determined is left unstated. Perhaps more importantly, this section expands who may be wiretapped. Under FISA, only "agents of a foreign power" could be targeted for surveillance. Under PATRIOT II, the federal government would be permitted electronic surveillance of any U.S. person simply for domestic intelligence purposes. Furthermore, the normal time limits for any domestic surveillance under FISA would all be doubled: pen and trap and trace devices could be used on U.S. persons for 120 days instead of 60 days. Finally, this section forbids judicial overview of governmental actions to no more than one report from the Justice Department every thirty days.

Section 123 expands governmental power in at least four ways. First, this section extends the number of statutory time limits relating to periods of electronic surveillance or monitoring and searches in investigations of terrorist activities, "from 30 days to 90 days."

Second, current U.S. law allows discretion by judges who issue such surveillance orders as to when a report is due to the court from the government on such surveillance. This section amends that judicial leeway and "would not allow reports to be required at shorter intervals than 30 days in investigations of terrorist activities." Thus the judicial oversight of electronic surveillance currently imbedded in the law would become very limited under PATRIOT II.

Third, current U.S. law allows delaying notification to the courts of the government "accessing a person's stored electronic communications where specified 'adverse results' would result from the notification." This section changes that to allow "endangerment of national security as a specified adverse result that permits delaying notification." Again, this Section intends to severely curtail, if not eliminate, judicial oversight of Justice Department activities regarding U.S. persons.

Fourth, this section "extends the normal authorization periods for pen registers and trap and trace devices in investigations of terrorist activities from 60 days to 120 days."

Section 124 refers to the use of "Multi-function Devices," and seeks to expand federal governmental power by allowing eavesdropping on *any* of the functions an electronic device produces. It also permits search warrants for all information retrievable from any electronic device. Thus, under DSEA, no matter what you do, if you are a target of government surveillance, and if what you do is done electronically, the government will be permitted to monitor its contents not by probable cause that you are using such technology for criminal purposes, but by probable cause that you are engaged in criminal activity. Thus, for example, if you advocate insurrection in an email, this section allows the government to monitor all other electronic devices you own that could be used to send email messages, such as your telephone line or cell phone. Such information has already been used for purposes outside of terrorist investigations (e.g. drug violations, credit card fraud, etc.). The stated purpose of this section of the act is that it allows multiple function devices to have their multiple functions tapped by surveillance. However, it amounts to a carte blanche for electronic surveillance by the Justice Department, by making automatic their ability to eavesdrop on any device: "communications transmitted or received through any function performed by the device may be intercepted and accessed unless the order specifies otherwise…"

Second, this section permits courts which authorize such eavesdropping to operate outside their geographical district for the purpose of government information gathering.

Section 126 would enable the government to obtain credit reports on individuals, on virtually the same terms that private entities may obtain them. In addition," this provision would prohibit disclosing to a consumer the fact that law enforcement has sought his credit report." It would allow the government to obtain credit reports of any American citizen without their knowledge or consent, and without any judicial oversight in so doing.

Section 128 allows the Justice Department to write its own subpoenas. Current law requires the Justice Department to obtain subpoenas of individuals from a grand jury. This section allows what are called "administrative subpoenas" to be issued outside of the grand jury for "investigations involving domestic or international terrorism…It also would prohibit a subpoena recipient from disclosing to any other person…the fact that he has received a subpoena." Thus complete secrecy of Justice Department activities is maintained and guaranteed. An "administrative subpoena," also called "a national security letter," is one which expands governmental power in at least two ways. First, it allows any local field office of the FBI to write its own subpoena, with no judge or court needed to do so. Second, the recipient of such a subpoena would be forced by law to cooperate with a federal investigator. Under the Fifth Amendment to the Constitution, one may refuse to provide an FBI agent with materials requested. Under this section of PATRIOT II, a person would no longer be permitted to appeal to the Fifth Amendment as a reason not to cooperate.

Equally chilling is what information Section 128 allows the Justice Department to collect:

> "In any investigation…[of] an offense involved in or related to international or domestic terrorism…the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, electronic data, and other tangible things that constitute or contain evidence) that he finds relevant or material to the investigation…The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing…"

If this were not bad enough, Section 129 sets up stiff penalties for people who do not comply with the administrative subpoenas issued by FBI officials. Specifically, not complying with such letters would now be "a misdemeanor punishable by up to a year in prison, but would be punishable by up to five years of imprisonment if the unlawful disclosure was committed with the intent to obstruct the terrorism or espionage investigation."

This section also expands the purpose of the information-gathering on the part of the government. Whereas current law only allows such extensive information gathering for the purpose of "international terrorism" or "terrorist activities," this section makes the

argument that this is insufficient for intelligence, because it may not be clear that what is being hatched is a terrorist plot. Thus, it allows the Attorney General to create his own guidelines for what information should be collected and disseminated.

In a related vein, Attorney General Ashcroft announced that the Justice Department would begin to gather information on judges who give lighter sentences than those called for by legislative guidelines.[4]

Title II is intended to "Protect National Security Information." Like Title I, the main intent is to increase governmental power to collect information *while at the same time* becoming more secretive about their information-gathering processes and contents. We will highlight three such instances.

Section 201 suspends much of the application of the Freedom of Information Act (FOIA), by the following claims: "the government need not disclose information about individuals detained in investigations of terrorism until disclosure occurs routinely upon the initiation of criminal charges." The intent of this section appears to be that of enhancing the ability of the government to withhold information on suspected terrorists, whom the government has in their custody, by rejecting all applicability of the Freedom of Information Act to their activities in this regard.

Section 202 will come as a shock to environmentalists. This section puts new restrictions on the FOIA with regard to disclosure of information related to pollution. Current law requires companies that use potentially dangerous chemicals to release a "worst case scenario" report that specifies the consequences of releasing such chemicals into the surrounding community. This section refers to such laws as "a roadmap for terrorists, who could use the information to plan attacks…" Thus, this section restricts access to such information under FOIA. Specifically, any member of the public who reads any such information must maintain it in a "read only" method (i.e. not to be repeated to anyone), and only those who live or work in a geographical area likely to be affected by a chemical release will be permitted to read the "worst case scenario" report. These reports are currently available to any member of the public under FOIA.

Section 202 is very specific regarding the intent of the government not to release pollution information to the public: "Information that is developed by the Attorney General, or requested by the Attorney General…for the purpose of preparing the report or conducting a review under this clause, shall not be disclosed or released under the Freedom of Information Act." Under this section, any government official who communicates such information will be charged under this section with committing a criminal offense.

Section 204 is another section intended to take the courts out of the Justice Department loop. Under current law, the Classified Information Procedures Act gives courts

discretion about whether or not to approve a government request for authorization to submit sensitive evidence ex parte (i.e. from one point of view). This section strips the power of the courts to use discretion in granting the government such permission, and *requires* the court to grant the government such a request.

Section 206 "make[s] witnesses and persons to whom subpoenas are directed subject to grand jury secrecy rules…" In other words, this provision would strip the right of grand jury witnesses to make any comment outside of the court regarding information they have been subpoenaed to present.

Title III, "Enhancing Investigation of Terrorist Plots," is perhaps the most draconian part of DSEA. In this title, the Justice Department will be permitted to collect DNA samples from suspected terrorists, and place them in a DNA database. It also places limits on court involvement in governmental spying on citizens, and also vastly expands who may be said to relinquish their U.S. citizenship, and thus be subject to arrest and deportation by the Justice Department. We will examine each of these categories of proposed legislation.

Section 302 and 303 both deal with DNA collection. Current law permits the FBI to collect DNA samples of persons *convicted* of certain crimes. This section amends that law to allow the government to collect DNA of persons "*suspected* of terrorism." This includes those associated with suspected terrorist groups, and noncitizens who have supported, in any way, any group designated by the government as "terrorist." Furthermore, it allows "the use of such means as are reasonably necessary to collect a DNA sample…"

Noncooperation with such government attempts will now be classified as a class A misdemeanor.

Section 303 allows the Attorney General to establish a DNA database of suspected terrorists, and requires ALL federal agencies "to give the Attorney General, for inclusion in the databases, any DNA records, fingerprints, or other identification information that can be collected under this subtitle." Furthermore, this section "allows the Attorney General to use the information to detect, investigate, prosecute, prevent, or respond to terrorist activities, or any other unlawful activities by suspected terrorists." It also allows the Attorney General to disseminate such information to any other governmental agency, federal, state, or local. It also allows the Attorney General to search information in numerous other databases to collect information on suspects.

Section 311 provides "authority for sharing of consumer credit information, visa-related information, and educational records of information with state and local law enforcement…" and places a gag order on anyone who is required by investigators to turn

over information on a target of an investigation. It does not limit the information shared to terrorism investigations.

Section 312 does a minimum of three things with regard to governmental surveillance activity. First, this section invalidates all agreements that were made between states and the federal government (called "consent decrees") that were designed to limit the government's power to gather information about individuals and organizations. This section claims that such agreements impede the efforts of the federal government to combat terrorism, and thus proposes to "immediately eliminate" them, in favor of the blanket ability of the government to collect information on citizens in any state, at any time.

Second, this section places limits on what a court can reward a plaintiff in any lawsuit against the federal government over surveillance issues. It also orders all courts not to make any ruling that would contradict the new surveillance powers mandated by PATRIOT I or requested by DSEA. PATRIOT II maintains that such laws, which were passed because of past police abuses, hamper the federal government's efforts to stop terrorism.

> "[Regarding] prospective relief in any civil action... The court shall not grant or approve any prospective unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on national security, public safety, or the operation of a criminal justice system caused by the relief…The court shall not order any prospective relief that requires a government official to refrain from exercising his authority under applicable law…"

Third, this section allows any court reward to a citizen to be terminated immediately "if the prospective relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct a current and ongoing violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." This means that, should the government determine that the court ruling was not in line with the "narrowly drawn" provisions for "relief" to an offended citizen, the court ruling could be invalidated.

Section 313 protects all businesses who report suspicious activities of their employees to the federal government, making them immune from prosecution for engaging in such activities. This protects businesses that voluntarily provide information to the federal government, even if that information is false, from being sued for defamation by the target of the government surveillance.

Section 321 authorizes the Justice Department to wiretap U.S. persons at the request of a foreign government, an activity not permitted by current law unless the U.S. Senate has approved a treaty with such a country in advance of such requests. Even without such a treaty, there is still ample provision for such requests from a foreign government.[5]

Section 322 is entitled "Extradition without Treaties and for Offenses Not Covered by an Existing Treaty." There are four issues pertinent to the new governmental power that would be given here.

First, this section expands the power of the federal government to extradite U.S. persons for various offenses, such as "distribution, manufacture, importation or exportation of a controlled substance, computer crimes, money laundering, or crimes against children." Extradition under DSEA would be for "probable cause," not conviction of a crime. Such offenses that permit extradition under PATRIOT II are to be permitted whether or not the U.S. has a treaty with another country regarding such extradition practices.

Second, critical to this section is a subsection which allows extradition for "political offenses." This term remains undefined in PATRIOT II.

Also critical to this section is a subsection which rules out "humanitarian concerns" as reasons for not extraditing a person. It also rules out court use of "the nature of the judicial system" or "whether the foreign government is seeking extradition of a person for the purpose of prosecuting or punishing the person because of the race, religion, nationality or political opinions of that person" in reaching a decision regarding extradition from the U.S.

The fourth critical aspect of this section is the following critical clause: "The authorities and responsibilities set forth in this subsection are not subject to judicial review." Again, the court system is taken out of the loop regarding Justice Department determinations of penalties. This denial of due process in court is also stated in Section 409, concerning the denial of certificates for civil aviation for national security reasons.

Title IV, "Enhancing Prosecution and Prevention of Terrorist Crimes," expands definitions of "terrorist activity" and the power of the Justice Department to pursue prosecution of people so designated under the proposed new rule. Section 402, for instance, under the title "Providing Material Support to Terrorism," explicitly criminalizes association with terrorist groups even if one had no intent to engage in specific terrorist criminal activities:

> "…this section amends the definition of 'international terrorism' to make it clear that it covers acts which by their nature *appear* to be intended for the stated purposes. Hence, there would be no requirement [on the part of

> the government] to show that the defendants actually had such an intent." (emphasis mine)

Thus, a person who gives money to an organization which is not officially labeled a "terrorist organization" by the federal government could still face prosecution by the Justice Department under this Section.

Section 404 mandates that any person who uses any electronic device with encryption technology to commit a crime is to "be imprisoned for an additional period of not fewer than 5 years." This type of technology is a standard part of many computer programs. This would apply to any federal crime, not just those of terrorism.
Section 405, "Presumption of Pretrial Detention in Cases Involving Terrorism" denies bail to persons charged with conduct which fits "a standard list of offenses that are likely to be committed by terrorists." There are none of the usual requirements that the government prove that the arrested person is a threat to public safety or that they might not show up at their trial. The "presumption," as stated in the title itself, is against the defendant.

Section 408, "Postrelease Supervision of Terrorists," changes two parts of the supervision law. Under USA PATRIOT, there is the potential for lifelong supervision of persons released from prison after serving time for terrorist activities, with the limitation that the offense committed was one which caused "a foreseeable risk of death or serious injury." Under this section of DSEA, this is wiped away, and any person who is convicted of terrorist activities, even nonviolent ones, is subject to lifelong supervision. This includes those who are convicted of "support" of terrorism. This provision does this by mandating that any act which does NOT "create a foreseeable risk of death or serious injury," and is "in the standard list of crimes likely to be committed by terrorists" is liable for prosecution and mandatory lifetime supervision. Second, DSEA would change the law to allow a maximum reimprisonment sentence for violations of supervision. Third, the DSEA (specifically, in section 410) explicitly eliminates the statute of limitations for such offenses.

Section 411 widely expands the use of the death penalty to any act that the government deems a "terrorist act" that results in death (intent is not mentioned in this section, so there are no judicial degrees for penalties where death results, such as in, for example, "second degree" murder), and any material support provided for such an act. As we saw in our examination of FISA and PATRIOT, these offenses include "acts dangerous to human life, that are in violation of state or federal law, and are committed in order to influence government by intimidation or coercion." This encompasses wide-ranging criteria and thus a wide-ranging application of the death penalty by explicitly referring to crimes "likely" to be committed by terrorists..

Subtitle B of Title IV is entitled "Incapacitating Terrorism Financing," and expands governmental authority over financial transactions that occur in business and/or those involving U.S. persons. Section 421 increases the current legal penalties for violating U.S. laws regarding economic exchanges with other countries to five times their current penalty (i.e. from $10,000 per offense to $50,000 per offense).
Section 422 focuses on "hawalas," an economic practice used in Arab cultures. The best way to define this practice, as well as the proposed law in response to it in PATRIOT II, we will quote the example presented in the Act itself, along with the Attorney General's proposed solution:

> [Person] A sends drug proceeds to [person] B, who deposits the money in Bank Account 1. Simultaneously or subsequently, B takes an equal amount of money from Bank Account 2 and sends it to A, or to a person designated by A. The first transaction from A to B clearly satisfies the proceeds element of the money laundering statute, but there is some question as to whether the second transaction—the one that involves only funds withdrawn from Bank Account 2—does so…This proposal is intended to remove all uncertainty on this point by providing that *all constitute parts of a set of parallel or dependent transactions involve criminal proceeds if one such transaction does so*." (emphasis mine)

Section 423 revokes the tax-exempt status of any organization that the government deems to be associated with terrorism, in addition to continuing the practice of freezing their assets and preventing the member of the organization from entry into the United States.

Section 427 allows the federal government to seize the property of "any person planning or perpetrating an act of terrorism against a foreign state or international organization while acting within the jurisdiction of the United States." The definition of "terrorism," as throughout PATRIOT II, is the one used in the USA PATRIOT Act.

Title V, "Enhancing Immigration and Border Security," Section 501, "Expatriation of Terrorists," is the section that has sent waves of shock and alarm across the spectrum of civil liberties advocates, because it deals with citizens allegedly surrendering their citizenship. This section expands the category of those who the federal government can take as having renounced their U.S. citizenship, and therefore are susceptible to deportation. Current U.S. law states that a U.S. citizen can renounce their citizenship voluntarily by: 1) obtaining nationality in a foreign state; 2) taking an oath of allegiance to a foreign state; 3) serving in the armed forces of a foreign state that are engaged in hostilities with the U.S.

PATRIOT II expands this category to allow the government to expatriate any U.S. citizen who, <u>by inference from their conduct</u>, the government believes has in fact renounced their citizenship. This includes such activities as "becoming a member of, or providing

material support to any organization" that the government claims is a "terrorist organization," and has "engaged in hostilities against the United States." Again, the determination of what defines a "terrorist organization" and what makes for "hostilities" remains unclear and not defined here. The serious rights issue here is that traditionally, one is said to expatriate oneself only if one has shown by his/her actions that s/he has made "a decision to accept [foreign] nationality." The Attorney General quotes this very case from a 1972 Supreme Court ruling, yet turns right around and asserts that this section of PATRIOT II "would make service in a hostile army or terrorist group prima facie evidence of an intent to renounce citizenship."[6] This Supreme Court ruling makes no mention at all that someone who supports a terrorist organization demonstrates a renunciation of citizenship, as this section seeks to make into law. Even more, the renunciation clause contained in DSEA does not limit itself to support of foreign terrorist organizations; it allows for the Justice Department to designate support of a domestic organization, branded by them as "terrorist," to be a cause for citizenship renunciation from its domestic supporters.

Section 502 increases the penalties for crimes committed by illegal immigrants to the U.S. under the pretext of connecting them to terrorism. This part of the proposed legislation has nothing at all to do with terrorism; rather, it is a clandestine attempt by the Justice Department to change immigration laws.

Section 503, "Inadmissibility and Removability of National Security Aliens or Criminally Charged Aliens," continues what Section 502 started, by giving the Attorney General the authority to bar an immigrant from entering the U.S., **or** to remove said immigrant, if "the Attorney General has reason to believe would pose a danger to the national security of the United States." Also, "The Attorney General in his discretion may at any time execute any order" with respect to barring entry of a person into the U.S. Part of what this section allows is for the Attorney General to grab authority that is equal to that exercised by the Secretary of State. Mr. Ashcroft himself admits this in the proposal. All that is needed is a statement alone from the Attorney General that the immigrant he wishes to deport "poses a danger to national security."

Section 504, "Expedited Removal of Criminal Aliens," expands who may be deported from the U.S., "to include all aliens, not just nonpermanent residents." This means that permanent residents of the United States would be subject to deportation if they committed a crime. It also expands the categories under which someone may be deported by the Attorney General, to include "possession of controlled substances, firearms offenses, espionage, sabotage, treason, threats against the President, violations of the Trading with the Enemy Act, draft evasion, and certain alien smuggling crimes."

Most importantly, this section *removes the possibility for an immigrant to appeal* an order to leave the U.S. by the Attorney General. Thus, all cases the Attorney General places under this section have the right of habeas corpus stripped from the immigrant.

Section 505: "Clarification of Continuing Nature of Failure-to-Depart Offense, and Deletion of Provisions on Suspension of Sentence," does two things: it expressly states that any person given the order of deportation by the Attorney General must depart the U.S. within 90 days. Second, it "eliminates the authority of courts…to suspend for good cause the sentence of an alien convicted of failure to depart."

Section 506: "Additional Removal Authorities," gives all power to the Attorney General for determination of the place of deportation, "whether the country or region has a government, recognized by the United States or otherwise."

Section 506 permits the Attorney General to deport an immigrant to any country in the world, whether there is a current operative government there or not, and whether or not the United States diplomatically recognizes a government in a given country.

There are clear civil rights issues that PATRIOT II raises. When combined with the other legislative proposals forthcoming from some of our representatives, the effect is not only positively chilling, but is enough to make one wonder what is happening to our democracy. It is in the interest of preserving our rights-based democracy that the following proposals are highlighted.

II. Other Forthcoming Legislation and Governmental Programs That Concern Civil Liberties in Post-9/11 America

On September 9, 2003, Senator Orin Hatch of Utah proposed two pieces of legislation regarding the PATRIOT Act. The first was an attempt to repeal all the sunset provisions in PATRIOT I.[7] Failing that, he has proposed legislation that he is calling "The Victory Act." According to Dan Eggen of The Washington Post, this proposal would

> "dramatically expand the government's power to seize records and conduct wiretaps in connection with 'narcoterrorism' investigations… [expand] prosecutorial power in traditional drug cases…give the government more latitude to freeze assets of alleged drug traffickers or terrorists; make it easier to charge drug defendants with aiding terrorists, and loosen the standards used to convict defendants of laundering money."[8]

If this weren't bad enough, Senators Jon Kyl, Republican of Arizona, and Charles E. Schumer, Democrat of New York, have proposed legislation that would "eliminate the need for federal agents who seek secret surveillance warrants to show that a suspect is affiliated with a foreign power or agent, or a terrorist group."[9] Called the "Kyl-Schumer Bill," it was revealed on Sept. 9, 2003, and was passed unanimously by the Senate Judiciary Committee.

The third thing we must be aware of in our post-9/11 country are two particular programs instituted by the government to collect information on U.S. citizens. The first of these programs is called "Total Information Awareness," and is designed to pull together as much information as possible about as many people as possible into an "ultra-large-scale" database, making that information available to government officials, who may sort through it at anytime to try to identify terrorists. According to the ACLU, this program would gather information on every person, including "medical records, financial records, political beliefs, travel history, prescriptions, buying habits, communications (i.e. phone calls, emails, and web surfing), school records, personal and family associations, credit card bills, etc."[10] There is even an attempt being made to develop a computer program called "LifeLog," which will capture the name of every TV show you watch and every magazine you buy.[11] In addition, already in testing mode, is a program entitled CTS ("Combat Zones that See"), blimps used to record movement of people, including license plates, facial features, and gait, keeping them in a central data bank. The goal, as a Pentagon spokesman said in a presentation to defense contractors, is to "track everything that moves."[12]

Finally, it is important to be aware of the program called CAPPS II. Proposed by the Transportation Security Administration (TSA), its real name is "Computer Assisted Passenger Pre-Screening System," and its purpose is related to TIA. It is a program that would collect every bit of information available on those who purchase airline tickets, create profiles on those who fly, and keep them in a central government database. This database would be available to local, state, federal, and international law enforcement officials.[13]

There are some serious problems with both TIA and CAPPS II. Perhaps most importantly, it replaces the longstanding jurisprudential tradition in the United States of the presumption of innocence with suspicion. Governmental data collecting is usually only justified, legally or ethically, where there is evidence of involvement in wrongdoing. Aside from that, such a program would effectively end privacy as we know it by allowing the government to maintain extensive information bases on its citizens. If the right to privacy is to remain a constitutionally protected right, such programs as TIA and CAPPS II cannot co-exist with such a right, as they are contradictory ideas.

Furthermore, possible abuses are legion. For example, the Detroit Free Press reported that police officers with access to a database for Michigan law enforcement used it "to help their friends or themselves stalk women, threaten motorists, track estranged spouses, and intimidate political enemies."[14]

Most puzzling to this writer, such a program assumes that there are tell-tale patterns of terrorist behavior. From these "patterns," a profile is created, and every person is then judged according to the pattern. But if such patterns turn out to be wrong or woefully

incomplete or inadequate, then the program itself is not only a waste of time and resources, but a dangerous intrusion on citizen privacy. In conjunction with this, such programs as TIA and CAPPS II record only electronic transactions. We already have learned that al Qaeda has revamped its communication procedures to exclude such lines of communication, so how effective could such a violation of privacy be?[15]

We have not seen an end to such legislative proposals and governmental programs. It is important, now more than ever, to be aware of the activities of our government. They are certainly becoming aware of ours! The next chapter will summarize some of the latest news on governmental actions and citizen responses to them.

Endnotes

[1] Lichtblau, Eric, "Bush Seeks to Expand Access to Private Data," The New York Times, September 14, 2003.

[2] Edgar, Timothy H. "Interested Persons Memo: Section-by-Section Analysis of Justice Department Draft 'Domestic Security Enhancement Act of 2003, also know as 'Patriot Act II," February 14, 2003, www.aclu.org/news.

[3] Ibid.

[4] Cronkite, Walter, "The New Inquisition," The Denver Post, September 21, 2003.

[5] Edgar, op. cit.

[6] The Supreme Court case in question is King v. Rogers, in which the Court ruled that "[S]pecific subjective intent to renounce United States citizenship…may [be] proved…by evidence of an explicit renunciation, acts inconsistent with United States citizenship, or by affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality."

[7] Lichtblau, Eric, "Republicans Want Terror Law Made Permanent," The New York Times, April 9, 2003.

[8] Eggen, Dan, "GOP Bill Would Add Anti-Terror Powers," The Washington Post, August 21, 2003.

[9] Lichtblau, ibid.

[10] ACLU, "Total Information Compliance: The TIA's Burden Under the Wyden Amendment," May 19, 2003, page 1.

[11] Schachtman, Noah, "The Pentagon's Plan for Tracking Everything That Moves," The Village Voice, July 9, 2003. See also The Chicago Tribune editorial, "Security and Liberty in the Balance," June 9, 2003.

[12] Ibid.

[13] ACLU, "Questions and Answers on the Pentagon's 'Total Information Awareness,'" at aclu.org

[14] Detroit Free Press, December 2001, as reported in ibid.

[15] For these and more criticisms on these programs, see ibid.