



Bill of Rights Defense Committee

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A Guide to Provisions of the USA PATRIOT Act and Federal Executive Orders that threaten civil liberties

by Nancy Talanian

On October 26, 2001, President Bush signed into law the USA PATRIOT Act (acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism"). Passed hurriedly (many Congressmen stated later they had not even had time to read the law) it creates a new crime, "domestic terrorism," so broadly defined that it could conceivably apply to acts of civil disobedience.

The USA PATRIOT Act gives the FBI and the CIA greater rights to wiretap phones, monitor e-mail, survey medical, financial and student records, and break into homes and offices without prior notification. It creates a new crime of domestic terrorism that is so broadly defined that it may be applied to citizens acting legally to express their dissent. Under this Act and other legislation, noncitizens are being deported or detained indefinitely without judicial appeal.

The dangers of the USA PATRIOT Act are augmented by a Bureau of Prisons order allowing federal agents to abridge the attorney-client privilege by eavesdropping on conversations between lawyers and their clients held in federal custody. The Justice Department has also dismantled regulations against COINTELPRO operations that were enacted following abuses of the civil rights and peace movements of the 50's, 60's and 70's. The Administration has ordered secret military tribunals for suspected terrorists. In addition to being unfair and unnecessary, the U.S. threat of using military tribunals increases the likelihood that U.S. citizens will be treated accordingly overseas, and decreases the likelihood that other governments will be willing to extradite suspected terrorists or other parties wanted by the U.S.

The web sites of the following organizations contain excellent analyses of the provisions of the USA PATRIOT Act and various Federal Executive Orders passed since September 11, 2001, that threaten civil liberties:

- American Civil Liberties Union
- Electronic Frontier Foundation
- National Lawyers Guild
- People for the American Way

For ease of reference, this article summarizes how the USA PATRIOT Act and certain Federal Executive Orders threaten and diminish the civil liberties of U.S. citizens and noncitizens guaranteed by the Bill of Rights. The Bill of Rights Defense Committee advocates the repeal of several sections of the Act and Orders. For example, Congress showed its concern about certain sections of the Act relating to enhanced surveillance by including in the Act Section 224, a "sunset" provision. We are also concerned about the powers for enhanced surveillance, and so we call upon Congress to accelerate the sunset provision so that the sections expire immediately rather than on December 31, 2005.

We are concerned not only that the government is using its new powers but is refusing to provide unclassified information on how it is using them under the Freedom of Information Act, such as who is being detained. The refusal prevents anyone, including citizens, the media, federal judges and members of Congress, from knowing whether the powers have been or are being abused. We believe the enhanced secrecy imposed by the administration makes it all the more imperative that Congress repeal unwarranted and unnecessary powers that provide little or no security but that clearly threaten our civil liberties.

What follows is a brief summary of some of the provisions of the USA PATRIOT Act (USAPA) and Federal Executive orders that threaten our rights as guaranteed by the Bill of Rights. We recommend that these sections be repealed.

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Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

| Title or Provision | What It Says/What It Changes | How it can be misused |
|---|---|---|
| USAPA §802: Definition of domestic terrorism. | Creates a new crime, "domestic terrorism," which it defines as "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" and that "appear to be intended ... to influence the policy of a government by intimidation or coercion." | Broad definition may be used against activists exercising their rights to assemble and to dissent. |
| USAPA §215: Access to records and other items under the Foreign Intelligence Surveillance Act | It permits the FBI director to seek records from bookstores and libraries of books that a person suspected of terrorism has purchased or read, or of his or her activities on a library's computer. It also places a gag order to prevent anyone from disclosing that they have been ordered to produce such documents. | Puts people at risk for exercising their free speech rights to read, recommend, or discuss a book or to write an email. It also denies booksellers and library personnel the free speech right to inform anyone, including an attorney, that the FBI has asked for someone's reading list. |
| Attorney General's Edict for Increased Surveillance of Religious and Political Organizations | Rescinds anti-COINTELPRO regulations and authorizes the FBI to monitor and surveil religious groups and political groups without evidence of wrongdoing. | Opens the door to COINTELPRO operations, which were used in the past to harass and to intimidate people who disagreed with the government on issues such as civil rights and the Vietnam War. |

Amendment I continued

| Title or Provision | What It Says/What It Changes | How it can be misused |
|---|---|---|
| Attorney General's edict subverting Freedom of Information Act requests | Replaced Attorney General Janet Reno's previous guidelines to agencies for fulfilling FOIA requests, which were to make allowable discretionary disclosures except where there was "demonstrable harm." Ashcroft assures agencies that "decide to withhold records, in whole or in part," that they "can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." | Enables federal agencies to ignore many FOIA requests for unclassified information. For example, the administration has used this edict to keep secret the names of detainees detained for long periods, and to close their hearings. |
| Attorney General's approval of a Bureau of Prisons emergency surveillance order | Removes requirement to obtain judicial permission before listening in on conversations between prisoners (both prior to trial and convicted) and their attorneys. | Abridges freedom of speech. |

Amendment IV

This amendment forms a substantial basis of the constitutional right to privacy.

"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."

| Title or Provision | What It Says/What It Changes | How it can be misused |
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| USAPA §203: Authority to share criminal investigative information. | Permits law enforcement to give CIA sensitive information gathered in criminal investigations, including wiretaps and internet trapping. | No court order is required. CIA may share the information with other agencies and with foreign governments. |

Amendment IV continued

| Title or Provision | What It Says/What It Changes | How it can be misused |
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| USAPA §218: Foreign intelligence information | Amends Foreign Intelligence Surveillance Act (FISA) by eliminating the need for the FBI to show "probable cause" before conducting secret searches or surveillance to obtain evidence of a crime. | Eliminates judicial supervision by giving the FBI the ability to gather "foreign intelligence information" without a warrant, unless the evidence sought is to be used in a criminal proceeding. Former standard of "foreign intelligence information" is weakened. ¹ Agent may now say that foreign intelligence is relevant or plays a part in the investigation. "Probable cause" of a crime is no longer needed. |
| USAPA §206: Roving surveillance authority under the Foreign Intelligence Surveillance Act of 1978. (AKA "roving wiretaps") | Extends roving wiretap authority to "intelligence" wiretaps authorized by the Foreign Intelligence Surveillance Court. | These wiretaps may be authorized secretly. Expands the power broadly by tapping any device used by a terrorist suspect, regardless of who is using the device at the time. |
| USAPA §213: Authority for delaying notice of the execution of a warrant (AKA "sneak and peek") | Permits the government to search your home with no one present and to delay notification indefinitely. Court may authorize delayed notification "if the court finds reasonable cause to believe that providing immediate notification ... may have an adverse result." | Unlike the former "knock and announce" policy, a person whose home is to be searched cannot view the warrant to make sure the address is correct or to make sure that the agent adheres to the warrant's description of what is to be searched. |

¹ The Foreign Intelligence Surveillance Administration (FISA) issued an opinion in May 2002, which rejected the Justice Department's request for information sharing between counterintelligence and prosecutors because it would not effectively protect rights to privacy.

Amendment IV continued

| Title or Provision | What It Says/What It Changes | How it can be misused |
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| <p>USAPA §215: Access to records and other items under the Foreign Intelligence Surveillance Act</p> | <p>Relaxes requirements and extends capabilities of FISA by enabling anyone within the FBI down to rank of Assistant Special Agent in Charge to request a court order for tangible items sought for an investigation "to protect against international terrorism or clandestine intelligence activities." The judge must give permission if an agent has so certified.</p> <p>For example, it permits the FBI director to seek records from bookstores and libraries of books that a person has purchased or read, or of his or her activities on a library's computer. It also places a gag order to prevent anyone from disclosing that they have been ordered to produce such documents.</p> <p>Eliminates the former test, that "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power."</p> | <p>No legitimate checks and balances; rather, the judge becomes a 'rubber stamp'. No privacy protection for U.S. citizens or legal residents acting legally. Transfers power from the judiciary to the executive branch.</p> |
| <p>USAPA §411: Definitions relating to terrorism</p> | <p>Allows Secretary of State to designate any foreign or domestic group that has engaged in a violent activity a "terrorist organization."</p> | <p>Lowers standard for terrorist designation; possibility of groups that dissent peacefully being so designated as the result of an action by an agent provocateur.</p> |
| <p>USAPA §412: Mandatory detention of suspected terrorists; habeas corpus; judicial review</p> | <p>Gives Attorney General broad powers to certify immigrants as risks.</p> | <p>Reduces previous standard from "probable cause."</p> |

Amendment IV continued

| Title or Provision | What It Says/What It Changes | How it can be misused |
|--|---|--|
| Attorney General's Edict for Increased Surveillance of Religious and Political Organizations | Rescinds anti-COINTELPRO regulations and authorizes the FBI to monitor and surveil religious groups and political groups without evidence of wrongdoing | Reduces standard for surveillance from "probable cause." |
| Attorney General's approval of a Bureau of Prisons emergency surveillance order | Removes requirement to obtain judicial permission before listening in on conversations between prisoners (both prior to trial and convicted) and their attorneys. | Constitutes "unreasonable searches" without the necessity to meet the standard of "probable cause." |
| Attorney General's TIPS program | Sets up a system for up to 2 million Americans, more than were involved in the heyday of East Germany's Stasi, to secretly provide information to the government about any persons whom they consider suspicious, and for the government to set up a file on these persons. | May potentially damage someone's record due to innocent activities that are misunderstood or are invented or enhanced by the caller because of a personal vendetta. How the "tips" would be used has been neither reported nor approved, nor have there been assurances that anyone who is reported as "suspicious" will be confronted with the evidence against him/her and given an opportunity to correct it. |

Amendment V

"No person shall be held to answer for a ... crime, unless on a presentment or indictment of a Grand Jury..., nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

| Title or Provision | What It Says/What It Changes | How it can be misused |
|--|--|---|
| Attorney General's approval of a Bureau of Prisons emergency surveillance order | Removes requirement to obtain judicial permission before listening in on conversations between prisoners (both prior to trial and convicted) and their attorneys. | A prisoner may be made to be a witness against himself or herself. |
| President Bush's Military Order | Establishes trials by military tribunal, at president's discretion, for noncitizens. | Denies "due process of law," which applies not only to citizens but to all "persons" in the United States. Allows secret evidence and hearsay to be used against the accused. |
| President Bush's order designating "Enemy combatant" | Allows committee of attorney general, defense secretary, and CIA director to label citizens and noncitizens as "enemy combatants," placing them in military custody, holding them in detention indefinitely, interrogating them, and denying them communication with outsiders or judicial review. | No opportunity to prove innocence. Denial of "liberty without due process of law." |
| Attorney General's Edict for Increased Surveillance of Religious and Political Organizations | Rescinds anti-COINTELPRO regulations and authorizes the FBI to monitor and surveil religious groups and political groups without evidence of wrongdoing | An unsuspecting participant in a religious or political meeting may be "compelled to be a witness against himself." |
| USAPA §412: Mandatory detention of suspected terrorists; habeas corpus; judicial review | Gives Attorney General broad powers to certify immigrants as risks. | Deprives immigrants of "liberty ... without due process of law." |

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

| Title or Provision | What It Says/What It Changes | How it can be misused |
|---|--|--|
| USAPA §412: Mandatory detention of suspected terrorists; habeas corpus; judicial review | Gives Attorney General broad powers to certify immigrants as risks. | Infringes upon the rights "to a speedy and public trial, by an impartial jury of the State and district . . . , to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him," and "to have the Assistance of Counsel for his defence." |
| President Bush's order designating "Enemy combatant" | Any U.S. citizen or noncitizen designated as an enemy combatant may be placed in military custody, held in detention indefinitely, interrogated, and denied communication with outsiders or judicial review. | Infringes upon the rights "to a speedy and public trial, by an impartial jury of the State and district . . . , to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him," and "to have the Assistance of Counsel for his defence." |
| Attorney General's approval of a Bureau of Prisons emergency surveillance order | Removes requirement to obtain judicial permission before listening in on conversations between prisoners (both prior to trial and convicted) and their attorneys. | A prisoner who knows that law enforcement may listen in on conversations with an attorney may forego the right to ask for Counsel to aid in his or her defense. |

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

| Title or Provision | What It Says/What It Changes | How it can be misused |
|---|---|--|
| USAPA §412: Mandatory detention of suspected terrorists; habeas corpus; judicial review | Gives Attorney General broad powers to certify immigrants as risks. | May result in "cruel and unusual punishments" (deportation). |