

# THE IMPACT OF THE PATRIOT ACT UPON CIVIL RIGHTS

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## I. A BRIEF REVIEW OF TITLE II OF THE PATRIOT ACT AS MODIFIED BY THE USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT.

In response to the tragic events of September 11, 2001, the United States Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. On October 26, 2001, President George W. Bush signed the USA PATRIOT Act of 2001 into law.

Since its enactment, Americans have expressed concern over certain provisions in Title II of the Act (“Enhanced Surveillance Procedures”) which expanded the Government’s ability to conduct surveillance and searches in anti-terrorism and counterintelligence investigations. The Government’s expanded powers included:

- The authority under the Foreign Intelligence Surveillance Act of 1978 (FISA) to use pen registers and trap and trace devices<sup>1</sup> against U.S. persons (U.S. citizens and lawful permanent aliens), Patriot Act, 115 Stat. 272, §214, *codified* at 50 U.S.C. §1842(a)(1)(2005);
- The authority to allow the FBI to obtain under FISA an order requiring a third party to produce in perpetual secrecy any tangible things (including books, records, papers, documents, and other items) requested by the Government, Patriot Act, §215, *codified* at 50 U.S.C. §1861;<sup>2</sup>
- The authority under FISA to use a roving “John Doe” wiretap in order to intercept a suspect’s communications, Patriot Act, §206, *codified* at 50 U.S.C. §1805; and,

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<sup>1</sup> A pen register is a mechanical device that records outgoing telephone numbers and email addresses while a trap and trace device records incoming telephone numbers and email addresses. *American Civil Liberties Union v. U.S. Dep’t of Justice*, 265 F.Supp.2d 20, footnote 3 (D.D.C. 2003).

<sup>2</sup> In addition to §215, §§358 and 505 of the Patriot Act allow the Government to obtain consumer reports, telephone records, and financial records from third parties upon written certification that the information is necessary for an anti-terrorism or counterintelligence investigation. The disclosing party must keep the government’s request confidential.

- The ability to obtain a “sneak and peak” warrant from any federal court so as to search for and seize any property or materials that constitute evidence of a federal crime while delaying the provision of notice to the suspect for a reasonable period of time, Patriot Act, §213, *codified* at 50 U.S.C. §3103a.

These provisions were passed subject to a sunset clause in §224 of the Patriot Act which rendered them ineffective as of December 31, 2005. Due to the sunset clause, the USA PATRIOT Improvement and Reauthorization Act of 2005 (Patriot Act II) was enacted on March 9, 2006. Patriot Act II modified some of the controversial provisions in Title II. The modifications in part increased the public’s right to know about governmental activity under Title II. *See* Patriot Act II, §106A (Requiring the Department of Justice to perform a comprehensive audit of the FBI’s use of investigative authority under FISA and to submit reports to Congress in an unclassified form).

The modifications also increased judicial oversight as follows:

- Third parties who receive a §215 order to produce documents have the right to consult with an attorney and the right to challenge the order in the FISA court on the grounds that the order does not comply with the requirements in §215 or is otherwise unlawful, Patriot Act II, 120 Stat. 192, §106, *codified* at 50 U.S.C. §1861 (2006);
- The recipient of a request for records or information under 18 U.S.C. §2709(b) (telephone records), Sections 626(a), 626(b) or 627(a) of the Fair Credit Reporting Act (consumer reports), Section 1114(a)(5)(A) of the Right to Financial Privacy Act (financial records), or Section 802(a) of the National Security Act of 1947 (known as a “national security letter”) may file a petition in federal district court for an order modifying or setting aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful, Patriot Act II, §115, *codified* at 18 U.S.C. §3511(2006);<sup>3</sup>
- The recipient of a national security letter may also obtain judicial review of a permanent non-disclosure requirement; however, if the Government certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, the certification shall be treated as conclusive unless the court finds that the certification was made in bad faith, *Id.*; and,

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<sup>3</sup> In all judicial proceedings under 18 U.S.C. §3511, the court shall, upon request of the government, review *ex parte* and *in camera* any submission from the government which may include classified information. *Id.* Please note that the use and *ex parte* judicial review of classified information in national security cases has been held constitutional. *See, United States v. Ott*, 827 F.2d 473 (9<sup>th</sup> Cir. 1987), *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982).

- The Government must give notice to a suspect of a “sneak and peak” warrant within a reasonable period of time not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of time, subject to court-approved extensions (presumptively limited to 90 days) for good cause shown, Patriot Act II, §114, *codified* at 181 U.S.C. §3103a (2006).

In addition, Patriot Act II repealed the sunset clause in §224 of the Patriot Act. Thus, the provisions in Title II are now permanent, with the exception that §206 (roving “John Doe” wiretaps) and §215 (access to business records under FISA) are subject to a new sunset clause which takes effect on December 31, 2009. Patriot Act II, §102.

## **II. OTHER PROVISIONS IN THE PATRIOT ACT AND PATRIOT ACT II WHICH IMPEDE UPON OUR CIVIL LIBERTIES.**

The Government’s expanded powers in Title II of the Patriot Act raise significant First Amendment, Fourth Amendment, Due Process, and right to privacy issues. However, these are not the only provisions in the Patriot Act and Patriot Act II which raise significant civil liberty issues. The following paragraphs review the effect of other parts of the Patriot Act and Patriot Act II on our civil liberties.

### **A. FIRST AMENDMENT**

#### **1. Special Events of National Significance**

Patriot Act II has codified the Bush Administration’s efforts to minimize and segregate public protests at national events. Title VI of the Patriot Act II (Secret Service Authorization and Technical Modification Act of 2005) makes it a federal crime to:

(1) willfully and knowingly ... enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting;

(2) willfully and knowingly ... enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds so restricted in conjunction with an event designated as a special event of national significance....

Patriot Act II, §602, *codified* at 18 U.S.C. §1752 (2006). A non-violent violation of this section is punishable by a fine and/or imprisonment of less than one year. This provision will effectively allow the Government to remove all visible signs of protest at any event which involves the President or has been designated by the Government as a “special event of national significance.”

In addition, Title VI creates a permanent police force known as the “United States Secret Service Uniformed Division.” This police force is subject to the supervision of the Secretary of Homeland Security and has the authority to police special events of national significance. Please note that Title VI was apparently tacked on as an amendment to Patriot Act II and enacted into law without any debate in the House of Representatives or Senate.

## **2. Lawful expert advice or assistance to groups designed as “foreign terrorist organizations”**

Section 805 of the Patriot Act included “expert advice or assistance” within the definition of prohibited material support for foreign terrorist organizations under 18 U.S.C. §2339A. The term “expert advice or assistance” arguably prohibited lawful activities and advocacy subject to protection under the First Amendment. However, the United States District Court for the Central District of California rejected a First Amendment challenge to Section 805 on the grounds that it was overly broad in its prohibition. *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185 (C.D.CA 2004). Although the Court rejected the First Amendment challenge, it held that the phrase “expert advise or assistance” was unconstitutionally vague in violation of the Due Process Clause. The Government was then enjoined from enforcing the unconstitutionally vague provision against the named plaintiffs and its members. *Id.*

## **B. LIMITATIONS ON RIGHTS OF REDRESS**

The Bush Administration has repeatedly sought to eliminate or reduce the abilities of Americans to seek redress in the courts. In the Patriot Act, President Bush was successful in obtaining the passage of the following provisions:

- Any person who is aggrieved by any willful violation of Chapters 119 or 121 of Title 18 of the U.S. Code or of Sections 106(a), 305(a), or 405(a) of FISA may commence an action against the United States to recover actual damages (but not less than \$10,000, whichever amount is greater) and litigation costs, Patriot Act I, §223, *codified* at 18 U.S.C. §2712;
- Any financial institution that voluntarily discloses to the Government any possible violation of law or regulation shall not be liable to any person for the disclosure or to for failing to provide notice to any person identified in the disclosure, Patriot Act I, §351, *codified* at 31 U.S.C. §5318;<sup>4</sup>
- Any federal insured depository institution that voluntarily discloses (to another insured depository institution) in a written employment reference its suspicions that the employee was involved in potentially unlawful activity shall not be liable

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<sup>4</sup> A financial institution is prohibited from notifying any person involved in a transaction that the transaction was reported to the Government as suspicious. *Id.*

to any person identified in the disclosure unless the voluntary disclosure was made with malicious intent, Patriot Act I, §355, *codified* at 12 U.S.C. §1828;

- Any person who donates qualified fire control or rescue equipment to a volunteer fire company shall not be liable for civil damages for personal injuries, property damage or loss, or death caused by the equipment after the donation, unless (1) the act or omission constitutes gross negligence or intentional misconduct, (2) the person manufactured the equipment, or (3) the person modified or altered the equipment after it was re-certified as meeting manufacturer specifications, Patriot Act II, §125, *codified* at 15 U.S.C. §2233 (2006).

### **III. CONCLUSION**

This paper has provided a brief overview of the provisions in the Patriot Act and the Patriot Act II which raise civil rights concerns. As a general proposition, the Patriot Act represents our Country's willingness to relinquish some its rights in the name of national security. For some, the relinquishment of rights makes them feel more secure, and for others, it makes them feel less free and more closely watched by the Government. Notwithstanding one's perspective on the merits of the law, the Patriot Act certainly increases the Government's power. Its legacy and true impact upon civil rights will be determined by how the Government actually uses its power and whether Congress continues to expand the Executive's authority at the expense of our Judiciary.