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## ACLU Fact Sheet on PATRIOT Act II

March 28, 2003

### Justice Department Contemplates Seeking More Sweeping Powers *Bill Would Further Erode Limits on Antiterror Powers*

Less than two years after Congress passed the USA PATRIOT Act, giving new, sweeping powers to the federal government to conduct investigations and surveillance inside the United States, the Justice Department is contemplating another chilling grab of authority and further diminution of constitutional checks and balances on law enforcement.

With the Domestic Security Enhancement Act the Administration would seek "to take the Patriot Act's antiterror powers several steps further."<sup>[1]</sup> Dubbed "Patriot Act 2," the legislation would grant additional sweeping powers to the government, eliminating or weakening remaining limits on government surveillance, wiretapping, detention and prosecution.

#### I. Patriot Act 2: An Overview

- The government would no longer be required to disclose the identity of anyone, even an American citizen, detained in connection with a terror investigation – until criminal charges are filed, no matter how long that takes (sec 201).
- Current court limits on local police spying on religious and political activity would be repealed (sec. 312).
- The government would be allowed to obtain credit records and library records without a warrant (secs. 126, 128, 129).
- Wiretaps without any court order for up to 15 days after terror attack would be permissible. (sec. 103).
- Release of information about health/safety hazards posed by chemical and other plants would be restricted (sec. 202).
- The reach of an already overbroad definition of terrorism would be expanded – individuals engaged in civil disobedience could risk losing their citizenship (sec. 501); their organization could be subject to wiretapping (secs. 120, 121) and asset seizure (secs. 428, 428).
- Americans could be extradited, searched and wiretapped at the behest of foreign nations, whether or not treaties allow it (sec. 321, 322).
- Lawful immigrants would be stripped of the right to a fair deportation hearing and federal courts would not be allowed to review immigration rulings (secs. 503, 504).

"An American citizen suspected of being part of a terrorist conspiracy could be held by investigators without anyone being notified. He could simply disappear."

*New York Times Magazine*  
February 23, 2003

#### II. A Frighteningly Freer Hand Against ... Us

At the core of the American experiment is liberty, the freedom secured through Constitutional rights of individuals and limitations on government power. So under our Constitution, government powers are subject to limits by the courts, the Congress and the people.

### **Patriot Act 2 Offers A False Solution, a Less Safe Nation**

Our system's checks and balances not only ensure that the government does not violate the rights of law-abiding citizens, they also help maintain the legitimacy of law enforcement. Actions viewed as arbitrary, capricious or improper sow the seeds of mistrust among communities that might otherwise cooperate with authorities. Limits also force the government to use their limited resources more wisely – that is, pursuing real criminals using *proven* investigative techniques.

The bitter irony is that the Patriot Act 2 could make our nation more vulnerable to terrorism, a view held by many experts:

- As Coleen Rowley – the FBI special agent named by Time Magazine as a person of the year for blowing the whistle on pre 9/11 intelligence failures – observed in a letter to Director Robert Mueller:

The vast majority of the one thousand plus persons "detained" in the wake of 9-11 did not turn out to be terrorists. . . . [A]fter 9-11, headquarters *encouraged more and more detentions for what seem to be essentially PR purposes*. Field offices were required to report daily the number of detentions in order to supply grist for statements on our progress in fighting terrorism.[2]

- In late 2001 senior intelligence specialists wrote that the use of racial profiling and other investigative techniques that intrude on civil liberties could undermine security by distracting security officials from less clumsy and more reliable forms of individual suspicion.[3]
- At least eight former high-ranking FBI officials, many from the Reagan and Bush administrations, criticized anti-terrorism proposals that violate civil liberties, saying they were likely to be ineffective and to distract from proven investigative techniques.[4]

### **How Patriot Act 2 Weakens Checks and Balances**

**The Federal Courts.** The First and Fourth Amendments place important limits on the government's ability to conduct searches, wiretap, obtain records and spy on religious and political activity.[5] In general, the government must *first demonstrate to a court* that it has probable cause to believe evidence may be found that is relevant to a crime or related to a threat from a foreign power. Under the Constitution, the government may only detain persons *under the supervision of a court*.

In addition, an important post-Watergate era law requires the government to *get court approval* before conducting wiretapping, searches or surveillance for national security purposes. Before the Foreign Intelligence Surveillance Act (FISA) of 1978 was enacted,[6] lack of judicial oversight had led to famous abuses of power, including the wiretapping of Martin Luther King, Jr. and the secret political surveillance conducted by the Nixon White House.

The Patriot Act II would make major changes in FISA:

- Standards for court approval of searches and surveillance would be lowered – in many cases, making such review no longer meaningful;
- A new defense would be created, shielding wiretappers acting without a court order from prosecution, so long as they had authorization from senior officials (sec. 106).

**U.S. Congress.** Under current law, the government may extradite an individual to face trial in foreign courts only if an extradition treaty, *ratified by the Senate*, allows for extradition for the particular crime. Likewise, the government may not conduct searches and wiretaps on behalf of a foreign nation unless *the Senate has approved* a Mutual Legal Assistance Treaty.

Under the draft bill, Americans could be extradited without a treaty or in excess of limits imposed by a treaty, and could be subject to foreign-directed searches and wiretaps (secs. 321, 322). Courts would no longer have the authority to review extradition requests to see if the foreign nation's legal system provides basic fairness – even from dictatorial, brutal or corrupt regimes (sec. 322).

**A Free Press.** In a democracy, the people rely on a free press to be able to make wise decisions. The bill would deny the press, and the public, access to the following important information:

- Arrests of terrorism suspects who have not been charged with a crime (sec. 201) – which might include material witness detainees, immigration detainees, or Americans citizens or others labeled “enemy combatants” by the President;
- Grand jury proceedings in connection with terror investigation (sec. 206);
- Public information about health and safety hazards of chemical and other plants (sec. 202).

### III. Targeting Ordinary People, Not Terrorists

The draft bill would do more than erode certain fundamental rights of suspects and defendants. It would grant the government powers that could be directed at ordinary people.

**Protestors – On the Right and Left.** Under the Patriot Act, any individual or group that breaks the law with the intent of influencing the government can be labeled a terrorist if their activities are “dangerous to human life.”<sup>[7]</sup> Under that definition, diverse “direct-action” organizations, including Operation Rescue or the World Trade Organization protestors, could be labeled “terrorist organizations.”

The draft exacerbates the reach of the definition by using it to trigger new antiterror powers:

- Wiretapping authority (secs. 120, 121)
- Civil asset forfeiture powers (sec. 427, 428)
- New death penalties (sec. 411)
- Unprecedented power of the government to revoke American citizenship even of native-born Americans and detain them indefinitely (sec. 501)

Consider this: An overzealous attorney general in an administration that favored abortion rights could label a pro-life organization that engaged in “direct action” as a domestic terrorist group. The government could then wiretap calls, seize property, and strip supporters of U.S. citizenship.<sup>[8]</sup>

**Community and Environmental Groups.** Organizations rely on open records laws to protect their communities against risks to health and safety from power, chemical or other plants. These facilities currently are required to complete a “worst case scenario” under the Clean Air Act.<sup>[9]</sup> Patriot Act 2 would impose extraordinary restrictions on access to these scenarios (sec. 202).

**Churches, Synagogues, Mosques and Other Religious and Community Groups.** Patriot Act 2 would terminate court-ordered limits on political spying by local and state police. Religious and secular organizations that take controversial political positions could face infiltration and surveillance, whether or not they have any connection to terrorism or other crime (sec. 312).

**Library Users.** Patriot Act 2 would give the government new powers to issue “administrative subpoenas” and to enforce what it calls “national security letters” to obtain confidential library, Internet and bookstore records – without going to court at all (secs. 128, 129).

**Immigrants.** The Constitution and laws protect the rights of immigrants to due process of law, requiring the government to provide a fair hearing to anyone the government wants to deport, and giving federal courts the power to review immigration actions. The Supreme Court reaffirmed these basic principles two years ago, stating “Judicial intervention in deportation cases is unquestionably required by the Constitution.”<sup>[10]</sup>

Patriot Act 2 would provide for summary deportations without charges or evidence if the attorney general merely suspects an immigrant may be a risk to national security (sec. 503). Lawful permanent residents who happen to have committed some minor criminal offense in the distant past could be stripped of their right to an immigration hearing and court review, even by the Great Writ of habeas corpus (sec. 504).

### IV. Conclusion

Patriot Act 2 is fundamentally flawed because it relies on a false premise – that America can be safer if we do away with basic checks and balances. By undermining the role of the courts, Congress and the press in providing a real check on executive power, Patriot Act 2 directs its ire at the institutions of our democracy instead of at the terrorists that threaten it. In so doing, it threatens to undermine the rights of ordinary people and, ironically, the war against terrorism.

**For a detailed section-by-section summary of the entire bill, go to:**  
<http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206>

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#### ENDNOTES

- [1] Matthew Brzezinski, "Fortress America," *New York Times Magazine*, Feb. 23, 2003. For a copy the draft bill visit <http://www.dailyrotten.com/source-docs/patriot2draft.html>
- [2] *Full Text of FBI Agent's Letter to Director Mueller*, N.Y. Times, March 5, 2003 (letter dated Feb. 26, 2003) (Emphasis added).
- [3] Bill Dedman, *Memo Warns Against Use of Profiling As Defense*, Boston Globe, Oct. 12, 2001.
- [4] Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism; Detention of Suspects Not Effective, They Say*, Washington Post, Nov. 28, 2001, at A1
- [5] See *Katz v. United States*, 389 U.S. 347 (1967) (criminal surveillance); *United States v. United States District Court ("Keith")*, 407 U.S. 297 (1972) (intelligence surveillance).
- [6] 50 U.S.C. §§ 1801-63
- [7] 18 U.S.C. § 2331.
- [8] See, e.g., *Zadvydas v. Davis* 533 U.S. 678 (2001).
- [9] 47 U.S.C. § 7212(r).
- [10] *INS v. St. Cyr*, 533 U.S. 289 (2001)

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