

USAWC STRATEGY RESEARCH PROJECT

U.S.A. PATRIOT ACT: COMPATRIOT IN ARMS OR ENEMY OF AMERICAN CIVIL LIBERTY?

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The views expressed in this academic research paper are those of the author and do not necessarily reflect the official policy or position of the U.S. Government, the Department of Defense, or any of its agencies.

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ABSTRACT

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To help ensure the physical security of the Homeland, the President requested and the Congress passed the USA Patriot Act. The President in his National Strategy for Homeland Security states that this legislation is an important step in protecting America. This strategic means of combating terrorism and defending the homeland, however, has come under tremendous criticism. There is great concern this Act severely diminishes the civil rights of the American people and violates the Constitution. This paper will analyze the most controversial provisions of the Act, the obstacles they face in the courts of law and public opinion, propose alternative courses of action, and makes a recommendation that will meet the President's objective while maintaining public support and withstanding legal challenges.

TABLE OF CONTENTS

ABSTRACT	III
U.S.A. PATRIOT ACT: COMPATRIOT IN ARMS OR ENEMY OF AMERICAN CIVIL LIBERTY?.....	1
HISTORY OF THE USA PATRIOT ACT	2
GENERAL OVERVIEW OF THE USA PATRIOT ACT.....	4
NON-CONTROVERSIAL TITLES OF THE USA PATRIOT ACT.....	4
THE CONTROVERSIAL TITLES OF THE USA PATRIOT ACT.....	5
THE USA PATRIOT ACT VERSUS THE UNITED STATES CONSTITUTION.....	6
CONSTITUTIONAL PROTECTIONS DERIVED THROUGH THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 AND THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.....	7
FOURTH AMENDMENT OBSTACLES TO THE USA PATRIOT ACT.....	8
Section 213--Sneak & Peek Search and Seizures.....	9
Searches and Seizures under the FISA without Probable Cause	10
Section 206--Extension of Roving Wiretaps under The Omnibus Crime Control and Safe Streets Act of 1968 to FISA.....	12
Back to McCarthyism and Un-Americanism?	12
FIRST AMENDMENT OBSTACLES TO THE USA PATRIOT ACT.....	13
FIFTH AMENDMENT OBSTACLES TO THE USA PATRIOT ACT.....	15
WAYS TO FIX THE CONSTITUTIONAL OBJECTIONS TO THE USA PATRIOT ACT....	16
STATUS QUO.....	17
CONSTITUTIONAL AMENDMENT.....	17
EXECUTIVE ORDER.....	18
FULL DEBATE IN CONGRESS AND REVISION OF THE USA PATRIOT ACT.....	18
CONCLUSION.....	19
ENDNOTES.....	21
BIBLIOGRAPHY	29

U.S.A. PATRIOT ACT: COMPATRIOT IN ARMS OR ENEMY OF AMERICAN CIVIL LIBERTY?

THROUGHOUT THIS NATION'S HISTORY WE HAVE USED OUR LAWS TO PROMOTE AND SAFEGUARD OUR SECURITY AND OUR LIBERTY. THE LAW WILL BOTH PROVIDE MECHANISMS FOR THE GOVERNMENT TO ACT AND DEFINE THE APPROPRIATE LIMITS OF THAT ACTION.

—GEORGE W. BUSH

THEY THAT CAN GIVE UP ESSENTIAL LIBERTY TO OBTAIN A LITTLE TEMPORARY SAFETY DESERVE NEITHER LIBERTY NOR SAFETY.

—BENJAMIN FRANKLIN

The United States has historically had three core national interests: physical security of the United States; promotion of our values; and economic well-being.¹ All three of these interests were severely challenged on September 11, 2001 when the terrorist group al Qaeda attacked the United States. To help ensure the physical security of the homeland, the President requested and the Congress passed the Uniting and Strengthening America by Providing for Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act).² The President in his National Strategy for Homeland Security states that this legislation is a very important step in protecting America.³

This strategic means of combating terrorism and defending the homeland, however, has come under tremendous criticism, particularly the sections which grant the Government broad powers in conducting surveillances within the United States, expand surveillance authority to include United States citizens, and create a federal crime of “domestic terrorism.”⁴ Also the subject of much debate are the sections allowing “sneak and peek searches”, i.e., covert searches of a person’s home or office without notifying the person until after the search has been completed, and the provision authorizing the sharing without judicial supervision of certain criminal and foreign intelligence information among the Federal Bureau of Investigation, the Central Intelligence Agency, and the Immigration and Naturalization Service.⁵ There is great concern that these changes severely diminish the civil rights of the American people and violate the United States Constitution. This paper will give a general overview of the USA PATRIOT Act, discuss the most controversial provisions of the Act, and analyze the obstacles those provisions are most likely to face in the courts of law and public opinion. It will also propose alternative courses of action and make a recommendation that will meet the President’s strategic objectives while maintaining public support and withstanding legal challenges.

HISTORY OF THE USA PATRIOT ACT

On October 26, 2001, just a few short weeks after the terrorist attacks against the World Trade Center in New York City and the Pentagon in Washington, D.C., Congress, quarantined from its anthrax-contaminated offices, passed and the President signed into law the USA PATRIOT Act. The Act was passed without significant debate within the Congress and with little floor commentary, virtually no public hearings, and was accompanied by neither a conference nor committee report.⁶ Almost all of the negotiations and compromises were conducted behind closed doors away from both the public and the media.⁷

The genesis of the bill began within days of the terrorist attacks when Senator Frank Leahy, Chairman of the Senate Judicial Committee, and Mr. John Ashcroft, United States Attorney General, pledged to work together toward a shared goal of passing an act to detect, prevent, and investigate terrorism.⁸ Unfortunately, this bipartisan relationship lasted merely a few days. Amidst the disintegration of a working relationship between the Democratically-held Senate and the Republican Attorney General who was representing the President's position on the legislation, the Senate passed on October 11, 2001, a bill introduced by Senator Leahy known as the Uniting and Strengthening of America Act (USA Act) which lacked many of the provisions requested by the President through the Attorney General.⁹ The House then moved quickly and the next day passed its own version of the bill that contained most of the provisions requested by the Attorney General and the White House.¹⁰ The House, however, did not request a conference when it passed its version of the USA Act and the legislation became stalled. Pressure from the White House resulted in high-level discussions between Senate Democrats and House Republicans that lead to a compromise bill which became the USA PATRIOT Act passed by the House on October 24, 2001 and by the Senate on the next day.¹¹

Groups from both sides of the political spectrum vigorously objected to the USA PATRIOT Act, contending that it would unduly sacrifice our most treasured civil rights in the name of national security.¹² The solidly liberal American Civil Liberties Union (ACLU) vehemently expressed its view in a letter to the Senate, stating:

While it contains provisions that we support, the American Civil Liberties Union believes that the USA Patriot Act gives the Attorney General and federal law enforcement unnecessary and permanent new powers to violate civil liberties that go far beyond the stated goal of fighting international terrorism. These new and unchecked powers could be used against American citizens who are not under criminal investigation, immigrants who are here within our borders legally, and also against those whose First Amendment activities are deemed to be threats to the national security by the Attorney General.¹³

Similarly, the staunchly conservative Congressman Robert L. Barr Jr., Republican from Georgia characterized the Act in the following manner:

It seems their attitude is, 'Well, that wasn't enough so we're going to take more I'm not sure we can ever satisfy the federal government's insatiable appetite for more power. This massive suspension of civil liberties . . . will likely set precedents that will come back to haunt us terribly.'¹⁴

Others, especially within the Bush administration, defended the Act by arguing that the country will not be able to effectively defend itself from future terrorist attacks without it.¹⁵ In a letter sent to key senators while Congress was considering this legislation, Assistant Attorney General Daniel J. Bryant, of DOJ's Office of Legislative Affairs, openly advocated for a suspension of the Fourth Amendment's warrant requirement in the government's investigation of foreign national security threats. The Bryant letter brazenly declares:

As Commander-in-Chief, the President must be able to use whatever means necessary to prevent attacks upon the United States; this power, by implication, includes the authority to collect information necessary to its effective exercise. . . The government's interest has changed from merely conducting foreign intelligence surveillance to counterintelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself. The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. . . Here, for Fourth Amendment purposes, the right to self-defense is not that of an individual, but that of the nation and its citizens. . . If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.¹⁶

In the end, the vote in the Senate was 98-to-1 and in the House 357-to-66 in favor of the USA PATRIOT Act.¹⁷ The Act is essentially 342 pages of complicated laws contained in ten chapters known as titles. It makes changes, some major and some minor, to 15 different statutes. Many of the ten titles are not controversial and have support from a very broad range of organizations and groups. Such non-controversial provisions include those dealing with the protection of our borders, stopping money laundering, increasing translation facilities, increasing forensic cyber-crime capabilities, and providing for aid to victims of terrorism. On the other hand, several titles have caused an uproar of dissent. In particular, the amendments to the Foreign Intelligence Surveillance Act of 1978 (known as FISA)¹⁸ and to the Omnibus Crime Control and Safe Streets Act of 1968¹⁹ have caused some of the greatest amount of discord.²⁰ The amendments to these two acts clearly come into direct conflict with two highly cherished civil liberties: the First Amendment right of "freedom of speech"²¹ and the Fourth Amendment right ". . . of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."²² Several other sections also raise great concerns

under both the First and Fourth amendments, such as no-notice and roving warrants. Finally, the USA PATRIOT Act allows the Attorney General to arbitrarily detain immigrants, in many cases indefinitely, without “due process of law” under the Fifth Amendment.²³

There was such concern in Congress with the broad powers conveyed to the Executive Branch in the sections concerning surveillance authority that a few of these enactments contain a “sunset provision” that results in expiration of the amendment on December 31, 2005.²⁴ Most do not, however, and all other changes contained in the USA PATRIOT Act, such as the highly controversial arbitrary detention of immigrants and the new crime of domestic terrorism, are permanent laws of the land. Even Senator Leahy was not sure that the wide-ranging new powers would withstand judicial scrutiny. While discussing the Act before the full Senate, Leahy stated:

I do believe that some of the provisions contained both in this bill and the original USA Act will face difficult tests in the courts, and that we in Congress may have to revisit these issues at some time in the future when the present crisis has passed, the sunset has expired or the courts find an infirmity in these provisions.²⁵

GENERAL OVERVIEW OF THE USA PATRIOT ACT

NON-CONTROVERSIAL TITLES OF THE USA PATRIOT ACT

The USA PATRIOT Act is divided into ten separate titles containing 150 sections amending laws throughout the entire U.S. Code. It is not the purpose of this paper to detail each section of the Act, but a general overview of the Act is warranted. With a few exceptions, Title I, III, VI, VII, and X have raised little or no concern from civil libertarians, academicians, the legal profession, or the media.²⁶ What follows is a brief highlight of the important sections of these five rather non-contentious titles of the Act.

Title I establishes a new counter-terrorism fund without limitations to fiscal years, establishes a national network of electronic crimes task force to be operated by the Secret Service to prevent, detect, and investigate terrorist attacks against critical infrastructures and financial institutions, and condemns discrimination against Arab and Muslim Americans.²⁷ Title III establishes very strict money transfer laws to abate money laundering. It requires banks to track identities of persons opening new bank accounts, extends jurisdiction over money laundering laws beyond the United States, and allows the government access without civil liability to financial records without a court order and without notice to the individual.²⁸ Title VI

expedites payment for public safety officers involved in the intervention, investigation, rescue, or recovery efforts related to a terrorist attack, and provides for payments to the victims of September 11, 2001 and future terrorist attacks.²⁹ Title VII establishes a major initiative for a secure information sharing system to assist all law enforcement agencies, including state and local law enforcement agencies.³⁰ The last of the non-contentious sections is Title X that, among other things, provides grants for technology and equipment for intelligence gathering and analysis to state and local fire and emergency response departments, under the “First Responders Assistance Act,” and allows for the contracting with local and state governments for performance of security functions at United States military installations.³¹

THE CONTROVERSIAL TITLES OF THE USA PATRIOT ACT

Mixed within the controversial sections of Titles II, IV, V, VIII, and IX of the USA PATRIOT Act are a variety of Constitutional challenges under the First Amendment’s freedom of speech and right of association, the Fourth Amendment’s search and seizures provisions, the Fifth Amendment’s due process clause, along with the Constitutionally inherent right to privacy.

Title II contains many of the divisive and potentially most litigious provisions of the Act.³² It mandates information sharing of criminal investigations between the intelligence and immigrations authorities. It also broadens the scope of foreign intelligence investigations to include criminal investigations and allows the surveillance of United States citizens without a probable cause determination. In addition, it creates the “sneak and peek” searches and allows courts under a very low standard to allow the “search” of internet sites, e-mail, and other electronic communications.

Another highly contentious title is Title IV.³³ This title creates a new and very broad definition of “terrorist organizations” and provides for mandatory detention of immigrants, allows a person to be held without charges, permits indefinite detention for immigrants not deportable (while giving them no information as to why they are detained), and very limited court review of these uncharged detentions.

Title V allows government investigators access to and production in secret of consumer reports and education records without a court order and without civil liability.³⁴ Another title that contains highly objectionable sections is Title VIII.³⁵ This title creates the new federal crime of “domestic terrorism.” This new crime contains a very broad definition of terrorism to include conduct that “influence[s] the policy of a government by intimidation or coercion”³⁶ The last

of the contentious titles is Title IX which mandates information sharing between intelligence agencies and law enforcement agencies.³⁷

As will be demonstrated below, these five titles of the USA PATRIOT Act reach into every space that Americans have always held as private and assumed protected under the Constitution. The government's new and widely expanded powers under titles II, IV, V, VIII, and IX allow law enforcement agents to arrest without probable cause, detain without due process of law, and to conduct search and seizures without giving prior notice. All of these protections go back as far as the founding of America and some as far back in history as the Thirteenth Century.³⁸ The potential for abuse under the USA PATRIOT Act strikes at the foundation of America's freedom.

THE USA PATRIOT ACT VERSUS THE UNITED STATES CONSTITUTION

The amendments to the FISA and the Omnibus Crime Control and Safe Street Act of 1968 that challenge the Fourth Amendment search and seizure rights are sections 206, 213, 215, and 218 of Title II of the USA PATRIOT Act. As mentioned above, these four sections contain sweeping new powers that are not limited to terrorist investigations, but include criminal and intelligence investigations. Specifically, they relax the requirements needed to conduct surveillances,³⁹ allow U.S. citizens to be the subject of intelligence surveillances,⁴⁰ and broadly expand search and seizure laws,⁴¹ to include entering and searching private residences without probable cause and without notifying the occupants of the search.⁴²

The First Amendment protections of free speech, the right of the people to associate, and to petition the government for a redress of grievances are challenged by section 802 of the USA PATRIOT Act.⁴³ Section 802 creates a new crime of "domestic terrorism." This new crime includes acts "to intimidate or coerce a civilian population" or "to influence the policy of a government by intimidation or coercion."⁴⁴ Civil rights groups are vehemently arguing that this amendment makes any act of civil disobedience in protest against government policies a terrorist act.⁴⁵

Finally, sections 411⁴⁶ and 412⁴⁷ of the Act come in conflict with the Fifth Amendment right of due process. These two sections remove constitutional protections under the Fifth Amendment to immigrants in denying them due process rights by allowing their arrest and indefinite detention based on an arbitrary decision of the Secretary of State and the Attorney General with little or no court review.

CONSTITUTIONAL PROTECTIONS DERIVED THROUGH THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 AND THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

Since most of the controversial provisions of the USA PATRIOT Act amend the FISA and the Omnibus Crime Control and Safe Streets Act, it is helpful to understand the history and constitutional implications of both statutes. FISA, itself a contentious act, was passed in 1978 as a result of a Blue Ribbon Senate Committee known as the Church Committee (named after Idaho Senator Frank Church, its chairman).⁴⁸ The Church committee was convened to investigate the abuses by the various intelligence communities during the height of the Vietnam antiwar protests and the race riots of the 1960s. During that time the Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, and the military were used to spy on American citizens participating in lawful, but distasteful activities.⁴⁹ During this abhorrent period in our history, the government did more than collect information on U.S. citizens; it also used the information to discredit citizens and disrupt their lawful activities. Perhaps the most notorious example of this activity was the dissemination of alleged derogatory information about Dr. Martin Luther King to the press, including in 1964 an effort to deny Dr. King the Nobel Peace Prize.⁵⁰ The most telling finding of the Church Committee was that “[t]he American people need to be reassured that never again will an agency of the government be permitted to conduct a secret war against those citizens it considers threats to the established order.”⁵¹

Out of this abuse, the FISA was passed to force the Executive Branch to obtain a court order before it could conduct surveillances, including wiretaps, bugging, and other communications monitoring, against a non-U.S. citizen rather than have the Attorney General approve such actions.⁵² For U.S. citizens, criminal procedures were required to be followed, including the strict warrant requirements of the Fourth Amendment and surveillances could only be conducted by law enforcement agencies.⁵³

A much lesser standard was required for foreign nationals. The FISA merely required that the government establish probable cause that a non-U.S citizen was an agent for a foreign power conducting clandestine intelligence activity, sabotage, or international terrorism within the United States.⁵⁴ Finally, the FISA has very strict limitations on sharing of the intelligence information obtained under the act with law enforcement personnel and generally prohibited sharing of criminal surveillance information by the law enforcement agencies with the intelligence community.⁵⁵

The Omnibus Crime Control and Safe Streets Act of 1968 is another controversial statute grounded in a strong right to privacy foundation under the Fourth Amendment. In a landmark Supreme Court decision, the Court ruled that government interception of a person's telephone conversation, without the individual's consent, was a search and seizure under the Fourth Amendment and required a warrant based on a probable cause determination by a judge or independent magistrate.⁵⁶ Justice William O. Douglas stated that:

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers . . . I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.⁵⁷

In response, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 authorizing law enforcement officials to engage in surveillance during criminal investigations upon a judge's finding of probable cause under the requirements of the Fourth Amendment.⁵⁸ The Omnibus Crime Control and Safe Streets Act includes the controversial provision that allows for "roving wiretaps" in criminal investigations. Where law enforcement agents demonstrate to a judge that a suspect is purposely changing telephones to evade government wiretaps, they can obtain a "roving wiretap" allowing the agents the ability to target the individual rather than a particular phone.⁵⁹ As a means of protecting innocent conversations from unnecessary invasion of privacy, such a wiretap allows the agent to tap phones the subject has used or is likely to use, but only intercept those conversations when the subject is using the phone. No other conversations or communications can be recorded or used as evidence against a party not named in the warrant.

FOURTH AMENDMENT OBSTACLES TO THE USA PATRIOT ACT

Now that there is an understanding of the statutes that form the bases for many of the most controversial sections of the USA PATRIOT Act, it is time to analyze how those provisions may hold up under Constitutional and potential legal scrutiny. This analysis begins with the challenges the USA PATRIOT Act will face under the Fourth Amendment protections afforded "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" unless a warrant is issued "upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” and to be given notice before commencing the search.⁶⁰

Section 213--Sneak & Peek Search and Seizures

Section 213, one of the more troublesome amendments contained in the USA PATRIOT Act, allows law enforcement agencies to delay giving notice when they conduct a search.⁶¹ This means that the government could enter a private residence, apartment, or office with a search warrant when the subject of the search is away, conduct a search, seize physical property, including electronic communications where a court finds it reasonably necessary, take photographs, and not inform the subject until sometime after the search is completed. This amendment directly violates Constitutional Law, common law, and the Federal Rules of Criminal Procedure. Under the Fourth Amendment’s prohibition against unreasonable searches and seizures, the Supreme Court has included the common law “knock and announce” rule which requires the government to give notice to the person whose property will be searched before beginning the search.⁶² This requirement is codified in Rule 41 of the Federal Rules of Criminal Procedure. Rule 41 states that “[t]he officer taking property under the warrant shall give to the person from whom . . . the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.”⁶³ This notice requirement allows the person whose property is to be searched an opportunity to determine if there are any deficiencies in the warrant and if so, to challenge the search before it begins and later in the courts. For example, the police may have the wrong address, the warrant may be limited to a search of a particular part of the property, for example the garage rather than the main residence, or certain things cannot be searched within the house, such as small closed containers, jewelry boxes, etc. The Fourth Amendment was added to the Constitution specifically to minimize the invasion of privacy by the government and to give those subject to such invasions of their privacy the right to challenge the intrusion.⁶⁴ Under the new “sneak and peek” contained in section 213, these longstanding constitutional rights are virtually taken away.

There is a very limited exception to the “knock and announce” rule codified covering the interception of oral and wire communication.⁶⁵ These forms of invasion of privacy, however, are considered less invasive than the USA PATRIOT Act’s amendment that would allow secret physical searches. The interception of oral or wire communications does not require the invasion of one’s home as is allowed by this change. But even this limited invasion has come

under fire in the courts. Only one of the eleven United States Courts of Appeals has ruled this limited interception constitutional, but only where the agents did not seize any items.⁶⁶ The Supreme Court is yet to rule on “sneak and peek” searches, and although this may be an area, at least in the short term, where public support can be garnered in this current terror environment, the Justice Department will be hard pressed to convince the Supreme Court that the Fourth Amendment needs to be reinterpreted to allow “sneak and peek” searches as a tool in the war on terrorism. It is highly likely that this will be one of the first sections of the USA PATRIOT Act to be challenged, especially since this is one of the sections that does not contain a sunset provision.

Searches and Seizures under the FISA without Probable Cause

Section 215 makes sweeping changes to the FISA. First, it allows the Director of the FBI or a lower-level designee such as an Assistant Special Agent in Charge to apply for a court order requiring the production of “any tangible things” upon his written statement that the “tangible things” are being sought in an investigation “to protect against international terrorism or clandestine intelligence activities,”⁶⁷ a far cry from the Fourth Amendment requirement that there exist probable cause that a crime has been committed and that the items to be seized are evidence of that crime. Secondly, the FISA only allowed for the collection of records in the possession of a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility⁶⁸—clearly areas with lesser expectations of privacy. In marked contrast, the changes in Section 215 contain no limitation on where the collection can take place, e.g., a private residence, and it is not limited to “records”, but all “tangible things.”⁶⁹ Thirdly, the judge has no discretion to deny the request if the FBI agent meets the administrative requirements of this section, i.e. the agent certifies that the order is needed “to protect against international terrorism or clandestine intelligence activities.”⁷⁰ The mere certification requirement is intended to substitute for the probable cause requirement of the Fourth Amendment.

The three changes made by section 215 of the USA PATRIOT Act will allow an FBI agent astonishing new authority. The agent is able to avoid all the requirements of the Fourth Amendment by merely certifying to a judge that all “tangible things” located anywhere, of an individual who may not have done anything wrong are needed in an investigation involving the prevention of terrorism or covert intelligence activities. These “tangible things” could consist of highly personal medical records, mental health records, banking records, personal diaries or journals, DNA samples, employment records, immigration records, etc. Furthermore, the agent

can get these “tangible things” without ever establishing probable cause of a crime or that the “tangible things” would establish evidence of a crime. Many of these records are protected under the Privacy Act⁷¹, but more importantly, without a probable cause showing, all are protected under the Fourth Amendment. It is hard to imagine any court allowing such broad seizures to be conducted without the protections guaranteed in the Fourth Amendment. It is even harder to imagine the American public being willing to give up their privacy rights to such things as their personal diaries or medical records without the protections afforded under the Fourth Amendment.

Contrary to the sweeping changes made by Section 215, Section 218 makes one small change to the FISA. Although this change adds but one word, that word being “significant,” it creates a large gap in Fourth Amendment protections and directly conflicts with Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which allows law enforcement officials to engage in surveillance during criminal investigations solely upon a judge’s finding of probable cause under the requirements of the Fourth Amendment.⁷² This one word also now allows the government to use the FISA rather than criminal procedures to conduct electronic surveillances not only of foreigners, but of United States citizens. The government is able to do this by stating that “a **significant** purpose of a [criminal] investigation is to obtain foreign intelligence.”⁷³ Prior to this amendment, the government had to show that “the purpose of the surveillance is to obtain foreign intelligence evidence” against “a foreign power or foreign agent.”⁷⁴ As a result, section 218 permits Federal agents to obtain a surveillance order under the FISA’s lax standards where the primary purpose of the surveillance is a criminal investigation, but the agent certifies that gathering of foreign intelligence is a “significant purpose” of the criminal surveillance. Since United States citizens are obviously subject to criminal surveillance, if the agent certifies that there is also a foreign intelligence purpose, the United States citizen becomes subject to the previously forbidden intelligence surveillance.

A one-word change to the FISA now allows the government, without providing the stringent protections guaranteed under the Constitutional and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the right to conduct surveillance against anyone, including United States citizens, where it is merely alleged that foreign intelligence may likely be gathered during a criminal investigation. The Supreme Court ruled in 1967 that an attempt by President Nixon to avoid the Fourth Amendment probable cause standard through warrantless wiretaps when investigating national security threats by United States citizens was unconstitutional.⁷⁵ Section 218 appears to try to do the same thing that President Nixon tried thirty-five years ago without success. Once again, it is hard to imagine a court disregarding the

Fourth Amendment and Supreme Court precedence. And even though this may be an area where the American public does not pick up on the subtlety of the one-word change, it most surely will not be missed by the courts.

Section 206--Extension of Roving Wiretaps under The Omnibus Crime Control and Safe Streets Act of 1968 to FISA

Section 206 of the USA PATRIOT Act adds the highly controversial roving wiretaps of the Omnibus Crime Control and Safe Streets Act of 1968 to the FISA.⁷⁶ But contrary to the roving wiretap authority under the 1968 law, section 206 does not contain the restriction protecting innocent conversations by requiring that interception take place only when the subject of the wiretap is using the wire communication. Consequently, pursuant to FISA authorization, the government will be able to conduct an interception even if the subject is not using the phone, so long as the agent certifies that the subject may visit the location sometime in the future or has used the electronic communication device at a location in the past. Hence, the government will be allowed under this authority to listen to a phone in an innocent person's home and intercept all conversations whether the subject of the wiretap is using the phone or not. This means that the conversations of many individuals, where no probable cause exists that they are involved in any wrongdoing, can be intercepted without their permission in violation of the Fourth Amendment. Once again, it is highly unlikely this section will survive judicial scrutiny.

Back to McCarthyism and Un-Americanism?

Sections 206, 213, 215 and 218 clearly raise the same concerns the Senate committee faced in 1968 and 1975 when it passed the Omnibus Crime Control and Safe Streets Act of 1968 and the FISA.⁷⁷ Today, the amount of information and the ways of collecting it far surpass what was available 30-40 years ago. In the 1950s, Senator Joe McCarthy and J. Edgar Hoover's FBI conducted unfettered surveillance of American citizens and blacklisted tens of thousands of people as being communist or un-American.⁷⁸ Every aspect of American society was touched; people lost their jobs and some were even forced to move out of their homes. Perhaps the most damage was done to America's constitutionally protected liberties when what McCarthy and Hoover labeled as left-wing or un-American organizations, for example labor unions and civil rights group, were forced to go underground and a fair debate on many issues was lost.⁷⁹ Similarly, during the 1960s and early 1970s when unregulated surveillance of U.S. citizens by Hoover's FBI was the rule rather than the exception, views supporting civil rights and opposition to the war in Vietnam were severely stifled.⁸⁰ Moreover, citizens exercising their

rights and freedoms under the Constitution were beaten, as in Chicago during the 1968 Democratic Convention,⁸¹ and in some cases even killed, as in 1970 at Kent State.⁸² Even a committee in Congress was formed and named, of all things, the “House Committee on Un-American Activity,”--all this done in the name of protecting America.

Once again, the USA PATRIOT Act revives the potential for this abuse of surveillance authority in the name of national security. Racial profiling of Islamic and Arab-Americans is being justified under many sections of the Act. Since September 11, 2001, federal authorities have begun to enlist campus police to help fight the war on terrorism and have raised the fears among “faculty and student groups of overzealous FBI spying at colleges and universities that led to scandals in decades past.”⁸³ They “fear that the government is inching toward the kind of controversial spying it used in the 1950s and 1960s.”⁸⁴ Public outrage drove the hearings in the 1960s and 1970s to end the abusive behavior of the government’s law enforcement and intelligence agencies and this is clearly beginning to happen again.⁸⁵ As complaints about the Act are flowing into congressional offices, Congress is beginning debate on whether the USA PATRIOT Act goes too far in diminishing civil rights and whether it needs a serious overhaul to meet constitutional standards.⁸⁶ While this debate is taking place, a Federal Judge has already ruled that Section 218 must be narrowly read and that its application by the government was “not reasonably designed to protect the privacy rights of Americans.”⁸⁷ The biggest issue facing the Act, however, is whether circumventions of the Fourth Amendment by sections 206, 213, 215, and 218 are warranted in light of the current threat to our national security. As the Chairman of the Senate Judiciary Committee said, these provisions will “face [a] difficult test in the courts. . . .”⁸⁸ I concur and believe that the Fourth Amendment will carry the day for the Act’s opponents. There is no evidence that applying constitutional protections to terrorist investigations and surveillances will hamper law enforcement and intelligence agencies. There is, however, more than ample proof in our recent history that failure to enforce these protections leads to abuse of American citizens and a substantial weakening of our democratic values upon which this Country is founded.

FIRST AMENDMENT OBSTACLES TO THE USA PATRIOT ACT

In addition to the challenges the USA PATRIOT Act faces from the Fourth Amendment, section 802 of the Act will face a stern test under the First Amendment. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of

grievances.”⁸⁹ Section 802 limits all three of these rights in its creation of a new crime of “domestic terrorism.”

The new crime of domestic terrorism is created for the purpose of obtaining court orders, search warrants, or surveillance authority “involving acts dangerous to human life that are a violation of the criminal laws and appear to be intended to intimidate a civilian population [or] to influence the policy of a government by intimidation or coercion”⁹⁰ This extremely broad and vague definition opens the door to investigate, search, and conduct surveillance of political activists and organizations that oppose government policies. This new crime appears to give the Government the same powers it abused in the 1950s, 1960s, and early 1970s when investigating domestic activist groups. It is not hard to make a case that the civil rights and anti-war protesters of the 1960s and 1970s were guilty of “domestic terrorism” under section 802. The Kent State University students and Martin Luther King can easily be classified as violating this statute. The same can be said of pro- and anti-abortion protesters and environmentalists of today. Any peaceful protest which is challenged by an opposition group can very easily turn violent, and thus meet the definition of domestic terrorism. This is true if the only crime charged is a misdemeanor, since the broad language states that the acts need only be “a violation of the criminal laws,”⁹¹ not felony criminal laws.

The same is true for any act of civil disobedience. This is exactly what happened at Kent State University on May 4, 1970 when, with Hoover’s FBI watching, Alison Krause, Jeffrey Miller, Sandra Scheuer, and William Schroeder were killed by Ohio National Guardsmen while exercising their First Amendment right to peacefully protest the war in Vietnam. Some rocks were thrown and some windows broken, but these young men and women were clearly not terrorists. As a matter of fact, Scheuer was killed while on her way to class; Miller was killed when taking part in the rally; Schroeder was killed while observing the fight; and Krause, who may or may not have been taking part in the rally, was also killed. Nine others students were wounded.⁹² According to a Justice Department study, it was determined that the demonstrators “never came close enough to the Guard line to pose even a remote danger to the troops.”⁹³ Under the USA PATRIOT Act, these students could easily be declared terrorists.

It seems clear that Section 802 goes too far in abridging the rights guaranteed under the First Amendment. Are the critics of the USA PATRIOT Act, who are being branded as unpatriotic and labeled as “un-American,” domestic terrorists? Under the broad definition, nothing more would be needed to arrive at such a conclusion. This kind of thinking is what led to public outcry and the passage of the FISA and the Omnibus Crime Control and Safe Streets Act of 1968. The same outrage will develop in the American public at large and constitutional

challenges under the First Amendment will never allow such rights to be taken away, even in the name of national security.

FIFTH AMENDMENT OBSTACLES TO THE USA PATRIOT ACT

The last Constitutional hurdle the USA PATRIOT Act will likely face is a challenge under the Fifth Amendment. Sections 411 and 412 of the Act will face a stern test under this amendment. The Fifth Amendment guarantees, among other rights, that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . .”⁹⁴ Due process is perhaps the most fundamental right contained in the Constitution. It has its origin in the Magna Carta, an agreement signed in 1215 that defined the English subjects’ rights before the king.⁹⁵ Although there are two forms of due process, substantive and procedural, the challenges to the USA Patriot Act will come under procedural due process. Procedural due process guarantees that all legal proceedings are conducted fairly, that notice of the proceedings be given, and that an opportunity to be heard is afforded before the government acts to take away a person’s life, liberty, or property.⁹⁶

Section 412 removes the Fifth Amendment due process rights of immigrants and greatly expands the class of immigrants who will be subject to detention and deportation on terrorism grounds through section 411’s expansive definition of the term “engage in terrorist activity.”⁹⁷ Section 411 broadly defines “engage in terrorist activity” as an individual or member of an organization who helps prepare a terrorist plan, solicits funds or other things of value for a terrorist, solicits someone to join an organization prohibited by the Secretary of State, or provides a safe house, transportation, communications, funds, weapons, or false identification to a terrorist organization or individual so designated by the Secretary of State.⁹⁸ This designation is not limited to officially designated organizations by the government, but includes “two or more individuals, whether organized or not [who] engage in terrorist activity.”⁹⁹

Section 412 authorizes the Attorney General to detain arbitrarily immigrants he suspects are “engaging in terrorist activities” as defined under section 411 or who “is engaged in any other activity that endangers the national security of the United States”¹⁰⁰ as determined by the Attorney General. The only requirement to jail the immigrant is a certification by the Attorney General that he has “reasonable grounds to believe”¹⁰¹ that the immigrant engaged in one of the activities defined in sections 411 or 412. Furthermore, there is no judicial review of the Attorney General’s decision and no requirement to notify the immigrant of the evidence used to make the certification. The Attorney General must review his own decision once every six months. The

only right to contest the detention is through a habeas corpus proceeding which does not entitle the immigrant to a right to counsel under the Sixth Amendment of the Constitution.¹⁰² This means that, for example, immigrants lawfully in the United States will not be allowed to associate with organizations in Palestine, even if the association's purpose is to promote peace between the Palestinians and Israelis or to provide humanitarian assistance to people within Palestine. The same could be true for immigrants who support organizations such as Doctors Without Borders, or the Catholic Church which has missionaries supporting the poor, many of whom are opposing their own governments, in places like Kashmir, Sudan, Somalia, Colombia, and many other countries.

The Supreme Court has held that the Fifth Amendment's due process clause "applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."¹⁰³ Nonetheless, section 412 mandates depriving immigrants of their "liberty" through detention, some for indefinite periods, without procedural due process of the law guaranteed under the Fifth Amendment.

It will be all but impossible for an immigrant to receive a fair hearing required under the Fifth Amendment since these sections allow the Attorney General to withhold all evidence used to detain the individual and then not provide the individual with counsel, and provide him only limited access through habeas corpus to the courts where the immigrant has the burden of showing that his detention is unlawful. Since September 11, 2001, the United States has detained over 700 people on immigration charges. The Immigrations and Naturalization Service and the Department of Justice have refused to provide any details about these detentions, going so far as refusing to name the detainees.¹⁰⁴ Once again, I believe the USA PATRIOT Act has gone too far in removing cherished liberties in the name of security. Once detained the immigrant is not a threat against the United States, so nothing is gained in the fight against terrorism in denying him a right founded eight centuries ago in the Magna Carta.

WAYS TO FIX THE CONSTITUTIONAL OBJECTIONS TO THE USA PATRIOT ACT

There are several ways to fix the constitutional objections to the USA PATRIOT Act, maintain public support, and meet the President's objectives concerning the amendment of the FISA. On one end of the spectrum, the President and Congress can let the courts decide which provisions have intruded on the Constitutional rights and then have Congress pass revisions to the Act that will meet constitutional scrutiny. On the other end, Congress could provide for a constitutional amendment making the USA PATRIOT Act the XXVIII Amendment to the United

States Constitution. A third way is for the President to issue an Executive Order directing that all governmental law enforcement and intelligence agencies use the new powers provided by the USA PATRIOT Act in a way that protects the current civil rights granted under the Constitution and suspends the use of the most controversial provisions. Last but not least, and the one I recommend, is the approach Congress is currently debating, i.e., the amendment of the current Act to address the constitutional issues raised in this paper.

STATUS QUO

There are advantages and disadvantages to allowing the courts to sort out whether all sections of the USA PATRIOT Act meet constitutional scrutiny, however, the disadvantages of this approach unmistakably outweigh any advantages. To use the courts as the arbiters of the Act will take many years, and if it is then decided that sections of the Act are unconstitutional, anyone arrested and/or convicted under the Act for terrorism stands a good chance of going free. In addition, while waiting years for the Act to wind its way through the district and appellate courts, many innocent people run the risk of having their civil liberties violated. As mentioned earlier, we need not look back very far in our history to find where law enforcement and intelligence agencies violated the civil rights of thousands of innocent people in the name of national security. To wait years for an answer while our precious rights are violated is not the answer. Once the damage is done through violations of constitutionally protected civil liberties, it is hard, if not impossible, to repair the damage; one need only reflect on the tragedy at Kent State to find this to be true.

CONSTITUTIONAL AMENDMENT

A sure-fire way to ensure the constitutionality of all provisions of the USA PATRIOT Act is to make it the XXVIII Amendment to the Constitution. The obvious advantage of this approach is that all sections of the Act could be included in such an amendment and there could be no constitutional challenges to any provision of the Act. Secondly, since the amendment would have to be ratified by 38 state legislatures,¹⁰⁵ passage of the amendment would ensure public support. The disadvantage to this course of action is that it is very difficult to pass such an amendment to the Constitution. The Act would have to first be passed by two-thirds vote in both houses of Congress and then sent to each state legislature for approval. Such a process would take years and hence defeat the urgent need for such legislation.¹⁰⁶ Moreover, there is no guarantee, as currently written, it would even make it out of the Congress.

EXECUTIVE ORDER

After a thorough review of the USA PATRIOT Act, the President could order that all executive branch employees comply with current law and court precedence when acting under the controversial sections of the Act or he could suspend the use of these sections.¹⁰⁷ This approach has the advantage of fixing the troublesome areas immediately. But that being said, the disadvantages are numerous. First, such an order can be changed, suspended, or abolished at the whim of the President. Secondly, because it was the President and the Attorney General who insisted in the first place that the controversial provisions be included in the Act, and because they have repeatedly stated since the passage of the Act that no provisions of the Act violate the Constitution, it is highly unlikely the President would issue such an order. Thirdly, even if the President was inclined to consider such an executive order, it is extremely unlikely there would be consensus among Congress and the American public as to which sections should be limited by the order. This would defeat the purpose of having an executive order since court challenges would still be raised on sections that groups or individuals believe violate their civil liberties. Lastly, trust in the government is itself based on the Constitution's highly structured checks and balances—the dialectic of federalism. To allow the President, without the weighing and reconciling of juxtaposed or contradictory arguments through the Constitutional process is itself the loss of our republican form of government.

FULL DEBATE IN CONGRESS AND REVISION OF THE USA PATRIOT ACT

The final course of action, and the one I recommend, is the approach Congress is currently debating, that is, to amend the USA PATRIOT Act. Under this course of action, the concerns of the public and the constitutional challenges could be overcome by simply: (1) requiring that all surveillances of U.S. citizens be approved by a Federal Magistrate or Judge using the probable cause standard of the Fourth Amendment; (2) if exigent national security circumstances require action where there is no time to obtain a warrant, a provision could be included that would allow such surveillance where the FBI seeks approval of its actions within 24 hours of the commencement of the surveillance; (3) if the court denies the request, the government would be forced to stop its surveillance activity and turn over to the court any information gathered from such activity; (4) by removing from the definition of the “domestic crime of terrorism” the phrase, “to influence the policy of a government by intimidation or coercion;” and finally, (5) to provide for due process rights when detaining immigrants labeled as

being “engaged in terrorist activity,” to include requiring the Attorney General to inform the immigrant of the reason for the detention, disclose the evidence used to make the determination, and provide for at least an administrative hearing to determine whether the Attorney General has not acted arbitrarily or capriciously.

There is precedence for each of these proposed changes and procedures under traditional criminal law standards and I believe that the Supreme Court would rule favorably on each of these changes. Under this course of action, surveillance, searches, and seizures could proceed without delay, terrorists could be apprehended and detained without the worry of being set free because of constitutional challenges, and the public could be assured that their rights are being protected while our country is made safer from terrorist attacks.

CONCLUSION

President Bush stated in his National Security Strategy that terrorism will be defeated by “using every tool in our arsenal . . . [including] law enforcement”¹⁰⁸ He went further in his National Strategy for Homeland Security, where he stated that we have historically “used our laws to promote and safeguard our security and our liberty. The law will both provide mechanisms for the government to act and define the appropriate limits of that action.”¹⁰⁹ While the USA Patriot Act is a good start in developing effective “mechanisms” to defend the Homeland and protect our national interests, it falls short in several areas to “safeguard . . . our liberties” and define the “appropriate limits.” These liberties, the right to be secure in one’s home, the right to free speech, the right to assemble freely, the right to petition the government for redress, and the right to due process of the law are the heart and soul of what makes America what it is--the greatest country in the world. As one of the greatest statesmen of all time, Benjamin Franklin, warned, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”¹¹⁰ It can be said that al Qaeda has already won the war on terrorism, if the USA PATRIOT Act stands as written. What’s more, the Act as currently written may not achieve the President’s purpose, since it will be challenged in court and most likely many sections will be declared unconstitutional. If this happens, cases will be lost, terrorists will go free, the President and Congress will lose public support, and our country will be no safer than it was on September 11, 2001.

More than our national security has been put to the test by the tragic murders committed by al Qaeda in New York and Washington, D.C. Our entire way of life, our commitment to the Constitution and to our democratic way of living are challenged, not only by terrorism, but by the

willingness of Congress and the President to sacrifice our freedom in the name of keeping us free. It is highly likely that the public, even in this heightened state of terror, will demand that Congress revisit the USA PATRIOT Act. Even absent such Congressional action, the courts will surely engage in strict scrutiny of the Act as they have always done when Constitutional liberties are at issue.

It is not the American way to permit terrorism to destroy our way of life. A return to McCarthyism of the 1950s or the dreadful divisiveness in our country during the 1960s should never be a way to fight al Qaeda and terrorism. Rather, a few simple changes after thoughtful debate and careful reflection can overcome the constitutional obstacles to the Act, while providing an effective tool in our fight against terrorism and ensuring enduring freedom. A grateful public and a protected homeland will be the winners and terrorism will stand defeated.

WORD COUNT = 8,613

ENDNOTES

¹ David Jablonsky, "The State of the National Security State," in War, National Security Policy & Strategy, Vol. 1, Department of National Security and Strategy (Carlisle Barracks, U.S. Army War College, 2002), 395.

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, short title: USA Patriot Act, Public Law No. 107-56 (2001).

³ George W. Bush, National Strategy for Homeland Security (Washington, D.C.: The White House, July 2002), 47.

⁴ See for example, Susan Price-Livingston, "Surveillance Provisions in USA PATRIOT Act," November 30, 2001; available from <<http://www.cga.state.ct.us/2001/rpt/olr/htm/2001-r-0871.htm>>; Internet; accessed 12 December 2002; American Civil Liberties Union, "How the USA Patriot Act Enables Law Enforcement to Use Intelligence Authorities to Circumvent the Privacy Protections Afforded Criminal Cases," December 2001; available from <<http://www.aclu.org/congress/11023012.html>>; Internet; accessed 14 September 2002; and Alan Charles Raul and Amanda L. Tyler, "The USA Patriot Act of 2001: Electronic Surveillance and Privacy," November 2001; available from <<http://www.sidley.com/cyberlaw/features/patriot.asp>>; Internet; accessed 12 December 2002.

⁵ See for example, Price-Livingston, "Surveillance Provisions in USA PATRIOT Act"; Raul and Tyler, "The USA Patriot Act of 2001: Electronic Surveillance and Privacy"; American Civil Liberties Union, "How the USA-Patriot Act Expands Law Enforcement 'Sneak and Peek' Warrants," 7 March 2002; available from <<http://archive.aclu.org/congress/1102301b.html>>; Internet; accessed 14 September 2002; Electronic Frontier Foundation, "EFF Analysis of the Provisions of the USA PATRIOT Act," 31 October 2001; available from <http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html>; Internet; accessed 8 December 2002;.

⁶ Robert O'Harrow, Jr., "Six Weeks in Autumn," 27 October 2002; available from <www.washingtonpost.com/ac2/wp-dyn/A1999-2002Oct22>; Internet; accessed 2 November 2002; Declan McCullagh, "USA Act Stampedes Through," 25 October 2001; available from <<http://www.sweetliberty.org/issues/war/terroract.htm>>; Internet; accessed 31 August 2002; and Declan McCullagh, "Terror Act Has Lasting Effects," 26 October 2001; available from <<http://www.sweetliberty.org/issues/war/terroract.htm>>; Internet; accessed 31 August 2002.

⁷ Ibid.

⁸ Congress, Senate, The USA PATRIOT Act of 2001, 25 October 2001; available from <<http://wais.access.gpo.gov/DOC1D:CR25OC01-91>>; Internet; accessed 14 September 2002 and O'Harrow, Jr., "Six Weeks in Autumn."

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² George Lardner, Jr., "On Left and Right, Concern Over Anti-Terrorism Moves," Washington Post, 16 November 2001, sec. A, p. 40.

¹³ American Civil Liberties Union, "Letter to Senate," 23 October 2001, available from <<http://archive.aclu.org/congress/1102301k.html>>; Internet; accessed 23 November 2002.

¹⁴ Lardner, "On Left and Right, Concern Over Anti-Terrorism Moves," sec. A, p. 40.

¹⁵ Jim McGee, "An Intelligence Giant in the Making – Antiterrorism Law Likely to Bring Domestic Apparatus Of Unprecedented Scope," Washington Post, 4 November 2001, sec. A, p. 4.

¹⁶ Center for Constitutional Rights, "The State of Civil Liberties: One Year Later. Erosion of Civil Liberties in the Post 9/11 Era," undated; available from <http://www.ccr-ny.org/whatsnew/civil_liberties.asp>; Internet, accessed 10 January 2003 and American Civil Liberties Union, "How the USA-Patriot Act Enables Law Enforcement to Use Intelligence Authorities to Circumvent the Privacy Protections Afforded in Criminal Cases."

¹⁷ Robert E. Pierre, "Wisconsin Senator Emerges as Maverick," Washington Post, 27 October 2001, sec. A, p. 8.

¹⁸ Foreign Intelligence Surveillance Act of 1978 (FISA), U.S. Code, vol. 50, secs. 1081 et seq.

¹⁹ Omnibus Crime Control and Safe Streets Act of 1968, U.S. Code, tit. III, Vol. 18, secs. 2501 et seq,

²⁰ See for example American Civil Liberties Union, "How the USA Patriot Act Enables Law enforcement to Use Intelligence Authorities to Circumvent the Privacy Protections Afforded Criminal Cases"; Jennifer Van Bergen, "The Constitutional Implications of the USA PATRIOT Act," 14 June 2002; available from <http://truthout.org/docs_02/09.15A.jvb.Usapa.adr.p.htm>; Internet; accessed 4 September 2002; Steve Jones, "New Law Attacks Civil Rights," November 2001; available from <http://www.marxist.com/Europe/new_law_attacks_civil_rights.html>; Internet; accessed 8 August 2002; and Susan Herman, "The USA Patriot Act and the Replacement of Justice: Losing Our Balance?" 3 December 2001; available from <<http://jurist.law.pitt.edu/forum/forumnew40.htm>>; Internet; accessed 4 September 2002.

²¹ U.S. Constitution, First Amendment.

²² *Ibid.*, Fourth Amendment.

²³ *Ibid.*, Fifth Amendment.

²⁴ Congress, House of Representatives, Res. 3162, 107th Cong. sec. 224, (2001) (enacted).

²⁵ Congress, Senate, The USA PATRIOT Act of 2001, p. S10990.

²⁶ This author has found no articles raising any concerns with these five titles of the USA Patriot Act with the one exception mentioned in footnote 28 below.

²⁷ H.R. Res. 3162, secs. 101-106.

²⁸ *Ibid.*, secs. 301-377. It should be noted that section 351 and 358 of Title III allowing government access without civil liability to financial records without a court order has raised concern by civil libertarians as a violation of the right to privacy. See for example, American Civil Liberties Union, "How The USA-PATRIOT Act Puts Financial Privacy at Risk," 23 October 2001; available at <<http://archive.aclu.org/congress/1102301f.html>>; Internet, accessed 14 September 2002.

²⁹ H.R. Res. 3162, secs. 611-624.

³⁰ *Ibid.*, sec. 701.

³¹ *Ibid.*, secs. 1001-1016.

³² *Ibid.*, secs. 201-225.

³³ *Ibid.*, secs. 401-428.

³⁴ *Ibid.*, secs. 501-508.

³⁵ *Ibid.*, secs. 801-817.

³⁶ *Ibid.*, sec. 802.

³⁷ *Ibid.*, secs. 901-908.

³⁸ The Fifth Amendment's due process clause has its genesis in the Magna Carta signed in 1215 by the king of England.

³⁹ *Ibid.*, sec. 215.

⁴⁰ *Ibid.*, sec. 218.

⁴¹ *Ibid.*, secs. 206, 213, 215, 218.

⁴² *Ibid.*, sec. 213.

⁴³ *Ibid.*, sec. 802.

⁴⁴ *Ibid.*

⁴⁵ See for example, American Civil Liberties Union, "Letter to Senate"; Lardner, Jr., "On Left and Right, Concern Over Anti-Terrorism Moves," sec. A, p. 40; and Catherine Herridge and Eric Shawn, "Were Civil Liberties a Casualty of 9/11?," 8 September 2002; available from <<http://www.foxnews.com/story/0,2933,62495,00.html>>; Internet, accessed 8 September 2002.

⁴⁶ H.R. Res. 3162, sec. 411.

⁴⁷ *Ibid.*, sec. 412.

⁴⁸ See, Americo R. Cinquegrana, "The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978," 137 University of Pennsylvania Law Review 793, (1989) and Congress, Senate, The USA PATRIOT Act of 2001.

⁴⁹ *Ibid.*

⁵⁰ See James Haskins, The Life and Death of Martin Luther King (New York: Lothrop, Lee and Shepard Co., 1997), 142-146 and William Robert Miller, Martin Luther King, Jr.: His Life, Martyrdom and Meaning for the World (New York: Weybright and Talley, Inc., 1968) 200-201.

⁵¹ D. van Wyk, "Bye, Bye Civil Liberties," 18 December 2001; available from <http://www.sacp.org.za/discussion/_disc1/000004b7.htm>; Internet, accessed 10 December 2002.

⁵² FISA, secs. 1081 et seq.

⁵³ Omnibus Crime Control and Safe Streets Act of 1968, secs. 2516(1), 2518(3)(a) and U.S. Constitution, Amendment IV which 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."

⁵⁴ FISA, secs. 1804 and 1805(a)(1)-(5).

⁵⁵ *Ibid.*, sec. 1806.

⁵⁶ Katz v. United States, 38 U.S. 347 (1967). Petitioner Katz was convicted with transmitting wagering information by telephone across states lines in violation of 18 U.S.C. 1084. The petitioner was convicted with an eight count indictment in violation of a federal statute. At trial the FBI introduced evidence obtained without a warrant of the petitioner's end of the conversations. The FBI agents had attached an electronic listening and recording device to the outside of the telephone booth from where Katz had placed his calls. The Supreme Court ruled that there was a violation of Katz' rights because the interception of an individual's telephone conversation, without consent, constituted a search and seizure within the meaning of the Fourth Amendment.

⁵⁷ *Ibid.* at 359-60.

⁵⁸ Omnibus Crime Control and Safe Streets Act of 1968, secs. 2516 and 2518 (1994 and Supp. V 1999).

⁵⁹ *Ibid.*, sec. 2518(11).

⁶⁰ U.S. Constitution, Fourth Amendment.

⁶¹ H.R. Res. 3162, sec. 213.

⁶² Wilson v. Arkansas, 514 U.S. 927 (1995). The Supreme Court citing English common law dating back to 1603 in the *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194 (K. B. 1603) stated that under the Fourth Amendment the government is required to give prior notice before executing a warrant.

⁶³ Federal Rules Of Criminal Procedure, Rule 41(d) (1993).

⁶⁴ The Fourth Amendment grew out of strong colonial objections to Writs of Assistance or general warrants, which gave crown officials the right to enter any home and search and seize belongs without probable cause. "Every man's house is his castle" was a maxim much celebrated in England and fervently carried over to the colonies. See for example, FindLaw, "Search and Seizure: History and Scope of the Fourth Amendment," undated; available from <[http:// caselaw.lp.findlaw.com/data/constitution/amendment 04/01.html](http://caselaw.lp.findlaw.com/data/constitution/amendment%2004/01.html)>; Internet; accessed 14 November 2002.

⁶⁵ Crimes and Criminal Procedure, U.S. Code, vol. 18, secs. 2703, 2705 (1998).

⁶⁶ U.S. v. Villegas, 899 F. 2d 1324 (2ND Cir. 1990).

⁶⁷ H.R. Res. 3162, sec. 215.

⁶⁸ FISA, sec. 1862.

⁶⁹ H.R. Res. 3162, sec. 215.

⁷⁰ *Ibid.*

⁷¹ The Privacy Act of 1974, U.S. Code, vol. 5, sec 552a (2000).

⁷² H.R. Res. 3162, sec. 218.

⁷³ *Ibid.*

⁷⁴ FISA, secs. 1804(a)(7)(B) and 1823(a)(7)(B).

⁷⁵ United States v. United States District Court, 407 U.S. 297 (1972).

⁷⁶ H.R. Res. 3162, sec. 206.

⁷⁷ Congress, Senate, The USA PATRIOT Act of 2001; Kelly Patricia O'Meara, "Police State," 9 November 2001; available from <http://oghgul.org/Politics/watch/house_watch.htm>; Internet; accessed 12 December 2002; Electronic Frontier Foundation, "EFF Analysis of the Provisions of the USA PATRIOT Act"; and Ann Harrison, "Behind the USA Patriot Act," 5 November 2001; available from <[http://www.alternet.org/story.html? StoryID=11854](http://www.alternet.org/story.html?StoryID=11854)>; Internet; accessed 8 December 2002.

⁷⁸ Ellen Schrecker, "Blacklisted: The Impact of McCarthyism," 1995; available from <<http://www.weisbroth.com/blacklisted/biblio3final.html>>; Internet; accessed 17 December 2002.

⁷⁹ Ibid.

⁸⁰ Congress, Senate, The USA PATRIOT Act of 2001, 25 October 2001, available from <<http://wais.access.gpo.gov/DOCI D:CR25OC01-91>>; Internet; accessed 14 September 2002; Ellen Schrecker, "Blacklisted: The Impact of McCarthyism," 1995, available from <<http://www.weisbroth.com/blacklisted/biblio3final.html>>; Internet; accessed 17 December 2002.

⁸¹ Dean Blobaum, "Chicago '68," 2000; available from <<http://www.geocities.com/Athens/Delphi/1553/>>; Internet; accessed 17 December 2002.

⁸² William A. Gordon, Four Dead in Ohio: Was There a Conspiracy at Kent State? (Laguna Hills, CA: North Ridge Books, 1995).

⁸³ Dan Eggen, "FBI Taps Campus Police in Anti-Terror Operations," Washington Post, 25 January 2003, sec. A, p. 1.

⁸⁴ Ibid.

⁸⁵ Richard Marin and Claudia Deane, "Altered Lives, Changing Attitudes," Washington Post, 8 September 2002, sec. A, p. 19.

⁸⁶ Noelle Straub, "USA PATRIOT Act of 2001," 1 May 2002; available from <<http://www.Weisbroth.com/blacklisted/biblio3final.html>>; Internet; accessed 4 October 2002.

⁸⁷ Fox News, "Administration Appeals Privacy Ruling on Wiretaps," 23 August 2002; available from <http://foxnews.com/printer_friendly_story/0,3566,61112,00.html>; Internet; accessed 23 August 2002.

⁸⁸ Congress, Senate, The USA PATRIOT Act of 2001.

⁸⁹ U.S. Constitution, First Amendment.

⁹⁰ H.R. Res. 3162, sec. 802.

⁹¹ Ibid.

⁹² Rikke B. Johansen, "The Kent State Killings, 1970," May 1995; available from <<http://www.stud.hum.ku.dk/rikkebj/kentframe.htm>>; Internet; accessed 12 November 2002.

⁹³ AOL Members, "The Kent State Shootings: New Information and Conclusions In William A. Gordon's Book," undated; available from <<http://members.aol.com/nrbooks/bibliog.htm>>; Internet; accessed 14 December 2002.

⁹⁴ U.S. Constitution, Fifth Amendment.

⁹⁵ West Legal Services, "Due Process of Law," undated; available from <<http://www.wld.com/conbus/weal/wdueproc.htm>>; Internet; accessed 14 December 2002.

⁹⁶ Ibid.

⁹⁷ H.R. Res. 3162, secs. 411 and 412.

⁹⁸ *Ibid.*, sec.411.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, sec. 412.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Zadvydas v. Davis, 121 S. Ct. 2491, 2500 (2001).

¹⁰⁴ See Steven Miller and Laurie Bernbaum, "September 11 Aftermath: Immigration Effects," April 2000; available from <<http://www.wsba.org/barnews/2002/04/miller-bernbaum.htm>>; Internet; accessed 15 November 2002; Human Rights Watch, "U.S.: Incomplete Access to Sept. 11 Detainees," 2 December 2002; available from <<http://www.Columbia.edu/cu/cssn/cssn-list/2002/02/00062.html>>; Internet; accessed 16 January 2003; and Amnesty International, "Amnesty International's Concerns Regarding post September 11 detentions in the USA," 14 March 2002; available from <<http://web.amnesty.org/ai.nsf/recent/AMR510442002>>; Internet; accessed 15 January 2003.

¹⁰⁵ U.S. Constitution, Article V, which allows for two methods of amending the Constitution, but under each method ratification by three-quarters (or 38 of 50) of the state legislatures or special state conventions is required.

¹⁰⁶ *Ibid.* It is also possible that two-thirds of the states may call a special constitutional convention, but this seems even more unlikely than Congress initiating a Constitutional amendment.

¹⁰⁷ The term Executive Order does not appear in the Constitution. The Executive Order authority derives from the President's Article II, Section 3 power to "take care that the laws be faithfully executed." However, "laws" must mean laws that are already passed, *not* laws that an Executive Order purports to create. The validity of particular Executive Orders has often been questioned, but neither Congress nor the Supreme Court has ever defined the extent of their power, and courts have rarely invalidated or even reviewed EO.

¹⁰⁸ George W. Bush, National Security Strategy (Washington, D.C.: The White House, July 2002), iii.

¹⁰⁹ Bush, National Strategy for Homeland Security , 47.

¹¹⁰ John Bartlett, Familiar Quotations (Boston: Little, Brown, and Company, 1919), 359.

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