

THE DRAFTING OF PATRIOT II

In recent months DOJ officials have drafted a new legislative proposal to further expand the administration's USA PATRIOT powers. On February 7, 2002, the Center for Public Integrity released a leaked copy of the "Domestic Security Enhancement Act of 2003," which has been nicknamed PATRIOT II.¹ The draft bill would sweep away important constitutional checks on executive power that are fundamental to American democracy. In particular, the bill would wall off from judicial oversight precisely those areas in which the courts have questioned the constitutionality of the administration's actions in the first 18 months after September 11.

Former Representative Bob Barr (R-GA) has said that he finds the draft of PATRIOT II deeply worrying. He emphasized that the DOJ's initial draft of the first USA PATRIOT Act had asked for "all sorts of powers far beyond what any normal person would deem necessary to fight terrorist acts," and in the end, "they got an awful lot of what they asked for."² He noted:

Now just a year and a half later — without the opportunity to even digest the enormous powers they got in the PATRIOT Act — apparently they're getting ready to draft another bill to get more powers that go far beyond what was in the PATRIOT Act.³

The secrecy surrounding the drafting of PATRIOT II has deepened concerns about the accrual of executive power in the wake of September 11. Although rumors of the DOJ's plans had been circulating for months, the DOJ had repeatedly denied reports that it was preparing any such draft legislation.⁴ As late as February 3, 2002, the DOJ had reassured the staff of Senator Patrick Leahy, the ranking Democrat on the Senate Judiciary Committee, that no such proposals were being drafted.⁵ The concern has been that the DOJ was planning to introduce its proposals at a time of weakened congressional resistance — during a war in Iraq for example — in order to repeat the hasty passage of the USA PATRIOT Act.⁶

These concerns came to a head at a hearing before the Senate Judiciary Committee on March 4, 2003, where Attorney General Ashcroft was questioned about the PATRIOT II proposal. Senator Patrick Leahy emphasized to the attorney general that a member of his own staff had been told by a Justice Department official that no new proposal was being drafted less than a week before the leaked copy of PATRIOT II was made public. Senator Leahy told Attorney General Ashcroft, "Somebody who reports

¹ See Draft Domestic Security Enhancement Act of 2003, January 9, 2003, available at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed March 2, 2003).

² Ibid.

³ Ibid.

⁴ See Jake Tapper, "More Secret Arrests, More Power to Spy," *Salon*, February 11, 2003.

⁵ Ibid.

⁶ See, e.g., Ibid.; Jack Balkin, "A Dreadful Act II: Secret Proposals in Ashcroft's Anti-Terror War Strike Yet Another Blow at Fundamental Rights," *Los Angeles Times*, February 13, 2003.

directly to you lied to [Leahy's aid], and this is not a good thing. I think it shows a secretive process in developing this.”⁷

Senator Russell Feingold questioned the attorney general about the administration's plans for the PATRIOT II proposal. In response, Attorney General Ashcroft assured the Senator that neither he nor the administration was prepared to present a PATRIOT II proposal to Congress. He said that the administration was continuing to “think expansively” about these issues, and did not rule out the possibility that any of the proposals contained in the PATRIOT II draft might be submitted to Congress in the future. He concluded, “Until I have something I think is appropriate, I don't know that I should engage in some sort of discussion.”⁸ Given the administration's pressure for quick passage of the USA PATRIOT Act, and the lack of congressional debate prior to its adoption, the current draft bill needs to be fully debated, and so we explore its content in detail throughout this report.

Among the most troubling of the changes the draft law would introduce are:

- **Authorizes Secret Arrests.** The PATRIOT II draft overturns a federal court decision requiring the Justice Department to turn over the names of the people it detained in post-September 11 sweeps, a ruling that the government has appealed. Although the Justice Department has argued on appeal that current law does not require the disclosure of these names, the draft hedges those bets by explicitly authorizing the government to keep secret the names of those it arrests and jails without charge.
- **Authorizes Stripping Americans of their Citizenship for Engaging in Constitutionally Protected Conduct.** The proposals to allow the executive branch to strip American citizens of their nationality, reminiscent of Soviet practices at the height of the cold war, is among the most extraordinary of the bill's assaults on fundamental American rights and values. Citizenship is often described as the fundamental safeguard of all rights.

Current law reflects the sacrosanct nature of American citizenship by making it very difficult for the government to take it away from people. Only in rare cases, for example when a person serves in the armed forces of a state at war with the United States, can the government deprive an American of his or her citizenship. And even in those cases, the government must prove that there was a specific intention to relinquish American citizenship by engaging in that conduct.

In 1967, Supreme Court Justice Hugo Black wrote in *Afroyim v. Rusk* that “[t]he very nature of our free government makes it completely incongruous to

⁷ Jesse H. Holland, “Ashcroft, Mueller, Ridge Talk to Senate Committee about Terrorism Battle,” Associated Press, March 4, 2003.

⁸ Ibid.

have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.”⁹

The Justice Department's PATRIOT II draft takes a different approach to citizenship. It would create a system where the government can strip an American of citizenship as a form of punishment if, for example, the person gave “material support” to a group designated by the government as “terrorist.” The question of what constitutes “material support” has been challenged in the courts, because it is vague and appears to include political association and speech that is protected by the Constitution. The draft defines “material support” to include “instruction or teaching designed to impart a specific skill.”

- **Permits Extradition — including of U.S. Citizens — without Treaty.** The Justice Department proposes in the draft to upend a fundamental principle of liberty established virtually at the foundation of our democracy: that the executive may not deliver a person to prosecution by a foreign government except pursuant to treaty or explicit statutory authority. Extradition treaties between countries typically provide specific conditions for prosecution (for example, ensuring a fair trial and protecting against a prosecution under unjust laws). The Administration could, if it wanted to, negotiate extradition treaties to cover any gaps it finds. Instead, it proposes to bypass the treaty process, creating a situation in which even American citizens could be sent for trial to countries with which the United States does not have extradition treaties — countries that include Saudi Arabia, Syria, Libya, China, Yemen, and Indonesia.
- **Eliminates Court Orders Issued to Prevent Police Spying.** Last year, Attorney General Ashcroft unilaterally lifted restrictions on domestic spying by the FBI that had been put in place after revelations that the government had conducted oppressive surveillance on Martin Luther King, Jr. and other civil rights leaders deemed “subversive.” Many state and local law enforcement agencies, some with disturbing histories of similar abuses, are party to court-supervised consent decrees arising out of legal challenges to these practices. These consent decrees prohibit illegal spying by police departments, and as such the Justice Department argues that they inhibit “effective cooperation” with the federal spying now permissible under the new Ashcroft guidelines. The draft would address this problem by abolishing all of these consent decrees.

In the Senate Judiciary Committee hearing on March 4, 2003, Senator Feingold probed the need for the elimination of the consent decrees, asking Attorney General Ashcroft repeatedly whether actual investigations had been constrained by these safeguards:

⁹ U.S. Supreme Court, *Afroyim v. Rusk*, 387 U.S. 253 (1967), BLACK, J., Opinion of the Court.

FEINGOLD: Can you cite an example of a terrorist plot that went undetected because local police had their hands tied by a consent decree placing limits on their domestic spying capabilities?

ASHCROFT: I cannot.¹⁰

- **Radically Expands Grounds on which Non-Citizens — Including Legal Permanent Residents — Can be Deported Without a Hearing and Further Limits Judicial Review of Attorney General Decisions.** The draft has a number of provisions that are simply unrelated to terrorism, including one that broadens the already overly-broad grounds on which non-citizens can be deported without a hearing, and another that applies those provisions to legal permanent residents, as well as other immigrants. What this means in practice is, for example, a long-time legal permanent resident who wrote a bad check in 1976 is now subject to mandatory deportation under “expedited removal,” a form of administrative decision that skips the courts altogether. For whole categories of people, the proposal would eliminate the possibility of judicial review of the attorney general’s decision to deport them.

In expanding executive surveillance and detention powers, PATRIOT II would also enhance the administration’s capacity to exercise those powers in secret. Section 204 of the draft would require judges to consider *in camera* (alone in chambers) and *ex parte* (considering one side only) the government’s applications to submit secret evidence at trial, when so requested by the government.¹¹ Section 206 would gag grand jury witnesses in terrorism cases, preventing them from discussing their testimony publicly — even to contradict false information reported about them in the press.¹² Most significantly, as discussed above, Section 201 would explicitly authorize secret arrests, overturning a federal court decision requiring the DOJ to release the names of the hundreds of people detained within the United States in the post-September 11 sweeps. In so doing, Section 201 would deal a further blow to FOIA, the open-government statute under which the administration was ordered to release the detainees’ names. The eventual fate of PATRIOT II will be a new test of congressional autonomy.

In light of the speed with which the administration pushed the USA PATRIOT Act through Congress and the lack of substantive debate on its provisions, we believe that each and every one of the provisions of the PATRIOT II draft should receive a full public

¹⁰ Senate Judiciary Committee, Hearing on the War against Terrorism, March 4, 2003, testimony of U.S. Attorney General John Ashcroft, Homeland Security Secretary Tom Ridge, and Federal Bureau Of Investigation Director Robert Mueller, Federal News Service, March 4, 2003.

¹¹ Under current law, it is up to the judge to determine how much of the government’s application to consider *in camera* and *ex parte*. See Timothy H. Edgar, “ACLU Interested Persons Memo: Section-by-Section Analysis of Justice Department Draft “Domestic Security Enhancement Act of 2003,” February 14, 2003, p. 10, available at <http://www.aclu.org/news/NewsPrint.cfm?ID=11835&c=206> (accessed March 10, 2003).

¹² Ibid. Rule 6(e) of the Federal Rules of Criminal Procedure requires attorneys and grand jurors to refrain from publicly commenting on “matters occurring before the grand jury.” The current rule does not apply to grand jury witnesses.

airing and debate. With that in mind, we examine a number of its specific provisions in greater detail elsewhere in this report.