

Repeal the USA Patriot Act

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This is a six-part series of articles on the USA Patriot Act [Also known as House Resolution 3162, a local copy is available on [ratical](#)]: "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." This Act, passed in response to the September 11th, 2001 terrorist attacks on our country, was passed hastily and in a time of fear. It affects all of us in some very basic and important ways.

- Part I of this series states briefly why we should demand the immediate repeal or amendment of the USA Patriot Act.
- Part II walks the reader back in time to look at two acts, which were also passed hastily and in a time of fear. The Alien & Sedition Acts of 1798 parallel the USA Patriot Act in many respects, and offer some important warnings.
- Part III discusses the recent emergence of troubling evidence of violations of civil rights under the USA Patriot Act, and looks at the disturbing possibility of torture being used.
- Parts IV and V look at specific sections of the Act. Part IV covers how the Act mixes criminal law and foreign intelligence work, puts the CIA back in the business of spying on Americans, allows law enforcement to enter your home without you knowing it, and can track your emails and internet activity. Part V will discuss how the Act punishes some people for engaging in innocent First Amendment associational activity, violates other civil rights of immigrants, uses secret evidence, curbs judicial oversight, and invades financial and student records.
- Part VI discusses national security concerns, sums up, and closes with a potent exhortation to Americans, made over 200 years ago by Senator Edward Livingston.

Part I: This Law is Dangerous

The USA Patriot Act is an insult to Americans. The name, itself, is insulting, given what the Act contains and what it will someday be known for: its complete abdication of democratic law and principles. It should be called the Constitution Shredding Act.

In particular, it utterly relinquishes any semblance of due process, violates the First, Fourth, Fifth, Sixth and Eighth Amendments, and unacceptably mixes aspects of criminal investigations with aspects of immigration and foreign intelligence laws.

Let me state it even more bluntly. This law is dangerous. It's a travesty.

What is worse is that few Americans have the slightest idea what this law contains or what it means.

Why is this? Because, the USA Patriot Act has several clever catches in it that have enabled it to slip by the awareness of the average law-abiding citizen. First, it relates mostly to foreign nationals. (So it can't affect U.S. citizens, right? Wrong.) Second, it deals with terrorism. (And we're not terrorists, are we? Don't be so sure.)

If you think this law applies only to the bad guys who attacked our nation, think again. Many provisions in this law apply to and will affect Americans, in many, bad ways.

What is more frightening about it is that, despite the fact that the USA Patriot Act was passed hastily without any debate or hearings and under a cloak of fear, its provisions were obviously very carefully thought out and crafted to take power out of the hands of courts and ensure absolute lack of oversight of law enforcement and intelligence gathering.

There is no way that the USA Patriot Act came into existence solely in response to September 11th. In fact, it is clear from prior legislative and case history that law enforcement and intelligence have been trying for many years to obtain these powers. It is only the unreasoning "bunker mentality" that followed September 11th that allowed its planners to pass it.

Indeed, one might question whether Congress could sincerely have intended this Act, given that portions of it are re-enactments of the 1996 anti-terrorism laws which had been repeatedly ruled unconstitutional by federal courts. One must wonder whether congresspersons were in their right minds. If they were not, this law cannot be valid.

Most troubling is that most of these powers do little to increase the ability of law enforcement or intelligence to bring terrorists to justice) but, they do much to undermine the Constitution and violate the rights of both immigrants and American citizens alike.

Another reason why Americans do not yet know what a terrifying weapon has been put in their government's hand is that the Act is extremely nuanced and amends numerous other laws.

One provision, for example, merely amends the words of an earlier act, which had read "the purpose," to read "a significant purpose." What difference could that tiny change make? It opens the door for the FBI to evade the probable cause warrant requirement in criminal investigations whenever the FBI decides the information might have "a significant purpose" in an intelligence investigation. No court can intervene.

In other words, the legal protection that a court must determine that there is probable cause of criminal activity before a search or seizure can be made is totally discarded here. If the FBI thinks the information might contribute to an investigation, whatever the target's activity might be, legal or not, the FBI can simply go search and seize. (And under the new "sneak and peek" provisions, they can do so without you ever knowing it.)

Notice also that this clause mixes foreign intelligence gathering with domestic criminal

investigation, allowing the FBI to spy on Americans whom no court has determined have done anything wrong.

Finally, this information, under another provision of the Act, can now be shared with the CIA, in violation of its charter, which bars it from engaging in domestic spying.

As the ACLU analysis of this section states, this simple little clause is being used "as an end-run around the Fourth Amendment." It is a "power grab [that] will sweep in Americans" as well as aliens.

It behooves us to take a good, solid look at the USA Patriot Act, so we can tell our representatives what we think of it.

Part II walks the reader back in time to look at two acts, which were also passed hastily and in a time of fear. The Alien & Sedition Acts of 1798 parallel the USA Patriot Act in many respects, and offer some important warnings.

Part II: The Wheel of History

In 1798, the United States almost went to war with France.

France, angry that we had signed a treaty with England behind its back, began attacking American ships at sea. The United States sent a special peace delegation to France, but France tried to extract money from the delegates in exchange for receiving them.

The event became known as The XYZ Affair, after the three French operatives who demanded the bribe, whose identities President John Adams refused to reveal.

When Adams released the insulting dispatches, war fever swept the land.

"Millions for defense, not one cent for tribute!" became the cry of the warlike Federalist Party, and Americans of all political persuasions rashly agreed to increased defense expenditures and limits on personal freedoms.

Xenophobia became so great that many French immigrants who had sought refuge here from the guillotines of the French Revolution had to leave the U.S., often with nowhere to go.

With the country in a vengeful mood, the Alien and Sedition Laws were enacted.

The Alien Act allowed the President to arrest, imprison, and deport "dangerous" immigrants on mere suspicion of "treasonable or secret machinations against the government." If a deported alien returned, the President could imprison him for as long as he thought "the public safety may require."

Sound strangely familiar? (If it does, then you know something about the USA Patriot Act.)

The Sedition Act made it unlawful for any person to write, print, publish, or speak anything "false, scandalous and malicious" about the government, either Congress or the Executive, if it was done with the intent to defame or to bring the government "into contempt or disrepute," or to excite the hatred of the people against the United States.

Does this remind you of John Ashcroft's December 6th rant before Congress in which he equated civil liberties with aid to terrorists and declared that any public debate would "give ammunition to America's enemies"?

The Alien and Sedition Laws were a blot on the democratic record of this country. They were not used to protect against dangerous aliens. The Alien Act was used by Federalists to keep out of Congress qualified Democratic candidates who had only recently become U.S. citizens (such as Swiss immigrant, Albert Gallatin, who two years later became Secretary of the Treasury under President Thomas Jefferson). The Sedition Act was used to arrest, prosecute, and jail Democratic newspaper editors who dared to oppose the Administration.

Thomas Jefferson and James Madison wrote resolutions that challenged the federal government's power to enact these laws. These became known as the Kentucky and Virginia Resolutions. These resolutions declared that states do not have to accept unconstitutional laws passed by Congress. The Kentucky Resolution further declared that states could nullify such laws.

These resolutions were never tested in the courts or in Congress, but many historians feel they provided the doctrinal basis for the secession of the South from the Union sixty-two years later, which began the Civil War.

It is frightening to make the comparison. War fever in 1798 led the extreme Right (Federalists) to push through acts that targeted immigrants but were used to persecute political opponents and violate the civil rights of citizens. These rash enactments led moderates to endorse two constitutionally dangerous doctrines, nullification and secession, which over half a century later opened the door for civil war.

We should think carefully about these events.

One member of the ill-fated 1798 peace delegation was John Marshall, subsequently the Chief Justice of the United States Supreme Court whose most famous decision, "*Marbury v. Madison*," established the doctrine of judicial supremacy, making the Supreme Court and not Congress the final arbiter of the law.

Marshall did more to establish the power of the Supreme Court than any other Justice did. Without his establishment of judicial supremacy, the present Supreme Court arguably could not have put George W. Bush into office.

As one legal commentator put it: "The principal objection [to the doctrine of judicial supremacy] is the seeming paradox in a democracy of non-elected officials overruling policy judgments of the people's elected representatives." Or, for that matter, the popular vote.

Interesting, is it not, how the wheel of history turns and comes back to stare us in the face?

Tomorrow, Part III, civil rights violations and the possibility of torture under the USA Patriot Act. Part III discusses the recent emergence of troubling evidence of violations of civil rights under the USA Patriot Act, and looks at the disturbing possibility of torture.

Part III: Civil Rights Violations and Torture

Yesterday, I noted how similar the Patriot Act is to the abhorrent 1798 Alien Act. I illustrated how both were enacted after attacks on Americans, and in times of fear and hysteria. I pointed out how the Alien & Sedition Acts failed to protect Americans and ended up causing extreme violations of American's civil rights. I remarked upon the long-term effects of these laws, the blowback of which ultimately contributed to the outbreak of The Civil War sixty years later. Finally, I closed by noting how the wheel of history turns, as the Supreme Court was able to put Bush into office on the basis of a now, long-accepted doctrine laid down in those earlier precarious times.

The wheel-of-history analogy reminds me of the lines W. S. Gilbert wrote a hundred years ago in the satirical operetta, "Trial by Jury:"

*"The screw may twist and the rack may turn,
And men may bleed and men may burn. . . ."*

W.S. Gilbert's haunting words were written in the context of a fictive and farcical trial by jury, but they could be applied metaphorically just as well to the twists and turns of time and fate, to the repetitions and revolutions of history. Those who do not know history are doomed to repeat it. Democracy is a fragile thing.

But another point: one can also construe Gilbert's words literally. What is worrisome now, under the Patriot Act and the Administration's ensuing measures, is that our government might actually consider such things.

I mean, the screw and the rack. Torture.

Does the Bush Administration advocate torture? No. Not publicly, at least, although the obvious pleasure Bush has shown at applying the death penalty, and his response to one condemned woman's plea for clemency suggests he might. (His response was to mock her.)

Does John Ashcroft? Not yet. But, unbelievably, the idea has been bandied about in the press. (A CNN poll revealed that 45 percent of Americans would not object to torturing someone if it would provide information about terrorism.)

More importantly, the Patriot Act opens the door for exactly that type of abuse.

Indeed, evidence is already leaking out of cruel treatment toward detainees. A recent Amnesty International release states: "Reports of cruel treatment include prolonged solitary

confinement; heavy shackling of detainees during visits . . . and lack of adequate exercise."

According to the March 18th amended complaint in the case brought by the Center for National Security Studies to compel the Department of Justice to release information on detainees (CNSS v. DOJ):

"There are also many reports about detainees being abused or treated improperly while in federal custody. Detainees have alleged that they have been beaten by guards. The *Los Angeles Times* reported that a Pakistani detainee was stripped and beaten in his cell by inmates while guards did nothing; that five Israelis were blindfolded during questioning, handcuffed in their cells and forced to take polygraph tests; and that a Saudi Arabian man "was deprived of a mattress, a blanket, a drinking cup and a clock to let him know when to recite his Muslim prayers."

This is the treatment afforded to detainees who are being held on routine visa violations, people who would not normally be detained at all. The complaint states: "Less than five of the 718 immigration charges detailed by the government relate to terrorism."

Americans should be outraged. This is a country of immigrants. This is a democracy, not a tyranny.

Some detainees have been held several months without being charged with any violation. Others report they continued to be held after bail had been granted and they were ready to meet it, according to Amnesty International (AI), which has joined the suit against the DOJ.

These conditions are in direct contravention of international standards, according to AI. AI has also called for a full inquiry into the conditions in the federal Metropolitan Detention Center in New York, to which AI was denied access, where some 40 detainees are reported to be confined in solitary cells for 23 hours or more a day.

The Seven-Day Rule

Under the USA Patriot Act, once the Attorney General has "certified" that an alien is a terrorist or a threat to national security, the Immigration and Naturalization Service (INS) may detain him without indictment for seven days before it brings any immigration or criminal charges.

This sounds very much like the Prevention of Terrorism Act that was in place in Great Britain in the 1970s under which IRA suspects could be held and interrogated for seven days without indictment or counsel. The 1993 film, "In the Name of the Father," starring Daniel Day-Lewis and Emma Thompson, showed just how brutally and unfairly such laws can be used. "The Guildford Four" were arrested, detained without counsel, beaten, interrogated under extremely coercive conditions, then, of course, convicted and imprisoned. They continued to be imprisoned even after a convicted IRA member informed the authorities the four were innocent. After serving fifteen years in prison, the four were cleared of all charges and released.

This is exactly the type of thing that seems already to be occurring under the Patriot Act.

Although it is extremely difficult to obtain information about those detained, several

attorneys testified before the Senate of such abuses. One: "Gerald H. Goldstein testified before the Senate Judiciary Committee that his client had been arrested on September 12 and held incommunicado from his lawyers until September 19, despite both his and his lawyers' repeated requests for access to each other. During that time, he was repeatedly interrogated despite his requests to speak with counsel."

The Attorney General can essentially throw anyone in jail he wants. All he has to do is point his finger at someone and say the magic words, "terrorist," or "threat to national security," and the suspect is detained. The Attorney General need give no reasons or explanations. He can do this on "evidence" he never reveals. Such evidence could be mere implication or hearsay without proof or corroboration.

As the ACLU has said, this sort of "'trust us, we're the government' solution . . . is entirely unacceptable."

Furthermore, the government, once it has certified someone as a terrorist or threat to national security under the seven-day holding provision, can then detain the person indefinitely on nothing more than a visa violation.

Once these people are out-of-sight, the government hopes they will be out-of-mind. What makes this worse is that the label of terrorist affixes without any trial or proof of guilt. In other words, the law turns the presumption of innocent-until-proven-guilty upside-down. "Label first; find guilty later," is the new law.

Under these conditions, the question of treatment becomes even more significant.

Torture

Unbeknownst to most Americans, claims of torture have arisen repeatedly in U.S. terrorism cases from the 1970s onward. Defendants have made claims that they were subjected to torture at the hands of mercenaries under U.S. control, foreign governments who were acting in collusion with agents of the U.S., or in foreign custody but under the watchful and ostensibly approving eye of FBI agents.

These claims, of course, are not reported in the news, as the civil rights of suspected terrorists naturally do not draw much empathy. Courts are also generally not sympathetic to such claims, and in some cases have even failed to hold evidentiary hearings required by law to determine whether there is any factual basis to the claim. Some, if not most, claims are thrown out for the simple reason that proof of such torture is impossible to come by.[1]

In a few instances, however, an appeals court has overturned a lower court's verdict, or refused to adjudicate a case, due to a claim of torture.

Did you get that? More than one court has had to throw out a case against a suspected terrorist because there was evidence that our government was involved in torturing him.

This should be an embarrassment to a democratic country. How dare we call ourselves an advanced civilization?

In these cases, the torture was alleged to have occurred outside of the United States, of course. That does not make it any less wrong.

There is evidence that such practices are not isolated to the past era of intelligence agency abuses of the 1950's through the 1970's -- which included government experiments on unwitting adult and children U.S. citizens -- but have continued into the 1990's and beyond. (I personally worked on a case in which a suspect claimed he was tortured for four months by Pakistani military police in 1994 with the knowledge and under the supervision of the FBI. The suspect was convicted, and, to date, as far as I know, no hearing has been held to give the defendant the opportunity to prove his claim or to ascertain its credibility. This is a matter of public record, but who has heard about it?)

The existence of police brutality unfortunately no longer surprises most people, because the cases come out in the media. They come out in the media because victims are Americans who have constitutional rights that have been violated.

But, federal agent brutality is unknown to us because, where it does take place, it only does so in the deepest shadows of overseas covert ops in cooperation with sleazy and abusive foreign governments, and is only directed at foreign nationals. Our government can thus maintain deniability by laying the blame on foreign governments for the torture, and no one has to worry about the rights of the suspect who will be tried in our courts (but who may not yet have even been charged with a crime).

This picture should be a deeply disturbing one to us. Why? Why should we care about how alien terrorist suspects are treated? First of all, because torture is inhumane and wrong.

Secondly, because if the suspect confessed under torture, he may not even be guilty. (Ask yourself, if you were being tortured, would you hesitate to say anything in order to make it stop?) The government may have gotten the wrong guy, which means the real perpetrator remains at large.

Thirdly, because it flies in the face of what a democracy is about.

A fourth reason is that the abuses carried out under these laws may come to be used against us, as well. Remember what happened with the Alien & Sedition Laws? The Alien Act, which was meant to protect Americans from dangerous foreign nationals, was used to keep out of office qualified immigrant citizens. The Sedition Law, purportedly enacted to preserve national security, was used to persecute newspaper editors who dared to oppose the Administration.

Are these the kinds of laws we want to live under? Is this what a democracy is about?

1. It is my belief that evidentiary hearings on claims of torture should use a similar standard as that used in asylum applicant claims of persecution. The asylum applicant is not required to meet the impossible standard of supplying eyewitness testimony or documentary proof of past or probable future persecution in his homeland, and the court may rely on information compiled from credible sources such as international organizations, private voluntary agencies, news organizations, or academic institutions, to corroborate the applicant's testimony. Were this standard applied to torture claims in terrorism cases, a substantiated claim of torture by a suspected terrorist would not per se exonerate him, but would go

towards a valid defense. Thus, for example, if it is established that a torture-claiming suspect was held by the authorities of a regime for which Amnesty International has documented torture, the court should determine whether a confession obtained by the FBI immediately after obtaining custody of the suspect -- whether or not he supposedly waived his Miranda rights -- should be inadmissible.

Tomorrow, in Part IV, we will look at how the Patriot Act affects U.S. citizens.

This is Part IV of a six-part *truthout* series on the USA Patriot Act. Previous parts have focused on reasons why the Act should be repealed or amended, a comparison of the USA Patriot Act with the Alien and Seditions Acts of 1798, and evidence of civil rights violations of current detainees and of torture in previous terrorism cases.

Parts IV and V give a survey of the different provisions of the USA Patriot Act. Part IV covers how the Act mixes criminal law and foreign intelligence work, puts the CIA back in the business of spying on Americans, allows law enforcement to enter your home without you knowing it, and track your emails and internet activity. Part V will discuss how the Act punishes some people for engaging in innocent First Amendment associational activity, violates other civil rights of immigrants, uses secret evidence, curbs judicial oversight, and invades financial and student records. Part VI discusses national security.

Part IV: Patriotism or Tyranny?

Awareness of events in other parts of the world -- poverty, starvation, internal wars, genocide -- may make Americans feel reticent to acknowledge the shock and fear that followed the September 11th attack on U.S. soil. These emotions are no less real, nonetheless, and our concern for safety is warranted. The USA Patriot Act, however, does little to increase our safety and much to undermine it further by internal means.

Nancy Chang, Senior Litigation Attorney at the Center for Constitutional Rights, sums it up well: "To an unprecedented degree, the Act sacrifices our political freedoms in the name of national security and upsets the democratic values that define our nation by consolidating vast new powers in the executive branch of government." [This and the following quotes are from *The USA PATRIOT Act: What's So Patriotic About Trampling on the Bill of Rights?* by Nancy Chang, November 2001 --ratitor]

Chang points out that the USA Patriot Act "launches a three-pronged assault on our privacy."

First, Chang says, "the Act grants the executive branch unprecedented, and largely unchecked, surveillance powers, including the enhanced ability to track email and Internet usage, conduct sneak-and-peek searches, obtain sensitive personal records, monitor financial transactions, and conduct nationwide roving wiretaps."

Second, "the Act permits law enforcement agencies to circumvent the Fourth Amendment's requirement of probable cause when conducting wiretaps and searches that have, as a 'significant purpose,' the gathering of foreign intelligence."

Third, "the Act allows for the sharing of information between criminal and intelligence operations and thereby opens the door to resurgence of domestic spying by the Central Intelligence Agency."

When I talk to people about the USA Patriot Act, many say, "The USA Patriot Act? What's

that?" That's where we are. Many Americans have no idea this law was even enacted, let alone how it affects them. Those who know what the Act was intended to do, do not know what it actually does.

The proponents of this Act used American shock and fear to slip this law past our awareness.

However, unlike the Act's proponents (who really think they can get away with this), I believe in the intelligence of the average American. I believe that regular Americans, armed with knowledge, know how to use common sense. I believe that American common sense is the bedrock of our country.

Prepare now to carry on a great American tradition: find out what your government is up to, so you can form your own opinion and talk about it with your friends, colleagues, coworkers, relatives, and neighbors.

Let's take a closer look at some of the provisions.

- **DOMESTIC CRIME INVESTIGATIONS VERSUS FOREIGN INTELLIGENCE GATHERING**

Criminal investigations and foreign intelligence investigations have historically, and with good reason, been kept separate in our country.

The USA Patriot Act blurs the dividing line between these two areas of law, undermining procedural protections inherent in criminal law.

For example, before the USA Patriot Act, domestic electronic surveillance was governed by Title III of the Omnibus Crime Control and Safe Streets Act (OCCSSA). OCCSSA provided adequate safeguards for basic constitutional rights, such as the Fourth Amendment probable cause warrant requirement and judicial review. The crimes that were covered by this law were specifically-defined serious crimes.

Foreign intelligence, on the other hand, was governed by the Foreign Intelligence Surveillance Act (FISA). FISA granted the Attorney General authority to certify an alien as an agent of a foreign power. There were no Fourth Amendment probable cause protections, and no judicial review.

Under the USA Patriot Act, the boundaries between these two territories of law are breached. An immediate and direct consequence of this breach is an immediate and direct loss of constitutional protections for both American citizens and immigrants. Read on.

- **"THE USA PATRIOT ACT PUTS THE CIA BACK IN THE BUSINESS OF SPYING ON AMERICANS"**

That's how the American Civil Liberties Union put it. Section 203 of the Act allows law enforcement to share with intelligence agencies -- including the FBI, CIA, NSA, INS, Secret Service, and Department of Defense -- sensitive information gathered during a criminal investigation. The types of information that could be shared include information revealed to a grand jury (previously prohibited by law), telephone and

internet intercepts obtained without court order and without restrictions on the subsequent use of the intercepted information, and any other "foreign intelligence" information obtained as part of a criminal investigation.

This, alone, is reason enough to amend the Act. As the ACLU says: "The USA Patriot Act would tear down [procedural] safeguards and once again permit the CIA to create dossiers on constitutionally protected activities of Americans and eliminate judicial review of such practices."

Not to mention that it is a violation of the CIA's charter to engage in law enforcement or internal security functions.

The Foreign Intelligence Surveillance Act (FISA) was enacted to halt just this sort of activity. The USA Patriot Act arrogantly overrides the protections secured by FISA.

- **"SNEAK AND PEEK" WARRANTS**

This is another provision that not only does not protect Americans from terrorism, but rather exposes us to incursions from our own government.

This one enables the government to go into your house when you are not home, look around, take pictures, and even seize your property, all without telling you.

This is the movie, "Enemy of the State," come to life. Don't get used to this, people. It's an outrage. It's your home. It's your privacy. It's your life.

Law enforcement is still required under this provision to obtain a warrant to enter, but it no longer has to give you the timely notice which both the Federal Rules of Criminal Procedure and the Fourth Amendment require. The only justification law enforcement now needs to enter without notice is that notice might "seriously jeopardize an investigation or unduly delay a trial."

This clause is actually adopted from existing law (18 USC 2705). However, the USA Patriot Act sneakily changes the meaning of the existing law, since the delayed-notice exception was previously only applied to communications in the custody of a third party. Now, this authority is available to law enforcement for any kind of search and in any kind of criminal case.

Other grounds for delaying notice encompassed by this provision have some semblance of meaning. For example, the possibility that if the target had notice, he might destroy evidence or flee prosecution. But, jeopardizing an investigation? This is the snake eating its own tail.

- **YOUR TELEPHONE AND COMPUTER ARE BEING TAPPED . . . AND NO JUDGE CAN STOP IT!**

Under Section 216 of the Act, law enforcement now not only has the authority to intercept transmissions from people suspected of terrorist activity, but also from people under investigation for other crimes as well.

Okay, so what? They're still criminals, right? Wait.

This authority now contains no constitutional safeguards. Judges are now required to issue blank warrants without reference to a location or jurisdiction, as long as law enforcement certifies that the surveillance is "relevant to an ongoing criminal investigation."

What happened to the Fourth Amendment? What happened to the requirement that law enforcement go to a judge and show there is probable cause that criminal activity is occurring?

The Act doesn't stop there. Section 216 of the Act extends this low threshold of proof beyond the mere "trapping and tracing" of telephone numbers. It extends it to tracing your emails and internet activities.

Telephone numbers can easily be separated from telephone conversations; email addresses are not so easily separated from email contents. The FBI says that it can be trusted to separate the email addresses from the content. Oh, really? I suppose defendants should also trust prosecutors, and the poor should trust the rich.

Morton Halperin, former National Security Council consultant, writes in *The New Yorker* that if a government intelligence agency "thinks you're under the control of a foreign government, they can wiretap you and never tell you, search your house and never tell you, break into your home, copy your hard drive, and never tell you that they've done it."

The Electronic Frontier Foundation states: "The civil liberties of ordinary Americans have taken a tremendous blow with this law . . . Yet there is no evidence that our previous civil liberties posed a barrier to the effective tracking or prosecution of terrorists." [See the complete detailed exposition quoted from here at: EFF Analysis Of The Provisions Of The USA PATRIOT Act That Relate To Online Activities, 31 Oct 2001.]

Tomorrow, Part V will discuss how the Act punishes some people for engaging in innocent First Amendment associational activity, violates other civil rights of immigrants, uses secret evidence, curbs judicial oversight, and invades financial and student records.

This is Part V of a six-part *truthout* series on the USA Patriot Act. This part discusses how the Act punishes some people for engaging in innocent First Amendment associational activity, violates other civil rights of immigrants, uses secret evidence, curbs judicial oversight, and invades financial and student records.

Tomorrow, Part VI, the last part of the series, discusses national security and proposes a few steps we can take.

Part V: Who's a Terrorist?

Yesterday, in Part IV, I discussed the violation of constitutional protections under the USA Patriot Act, the blurring of lines between foreign and domestic investigations, the sharing of sensitive personal information between agencies, the sneak and peek law, and the Fourth Amendment violations under the new electronic surveillance provision. Today: who's a terrorist, indefinite detention of innocent immigrants, violation of immigrant's rights of association, and the invasion of financial and student records.

- **WHO'S A TERRORIST?**

You think you know who the terrorists are? They are extreme fanatical Muslims from other lands, right? Think again. A terrorist could be anyone who tries to influence the policy of the government by intimidation or coercion, if their actions break any laws and are dangerous to human life, presumably including their own. A 1960's anti-Vietnam War protester would fit this definition.

Section 802 of the Act, borrowing from the definition of international terrorism contained in 18 USC 2331, creates the federal crime of "domestic terrorism."

Among other things, this section states that acts committed within the United States "dangerous to human life that are a violation of the criminal laws" can be considered acts of domestic terrorism if they "appear to be intended" to "influence the policy of a government by intimidation or coercion," or "to intimidate or coerce a civilian population."

This provision applies to United States citizens, as well as aliens.

One must ask what kind of legal standard this is. "Appear to be intended"? How does one determine that? This leaves tremendous latitude in the hands of zealots and paranoiacs. If a Senator wrote Ashcroft that he wanted documents from him, for all we know Ashcroft might think that the Senator was breaking the law and appeared to intend to influence policy.

This is not as far-fetched as you might think, given Ashcroft's interpretation of executive privilege. He appears to think (!) that any public request for information from him is an illegal incursion on his "right" to secrecy. In addition, with the Administration's views of what constitutes national security, who knows but that it even might view such a request as "dangerous to human life."

In commenting on this provision, Nancy Chang of the Center for Constitutional Rights writes:

"Vigorous protest activities, by their very nature, could be construed as acts that 'appear to be intended . . . to influence the policy of a government by intimidation or coercion.' Further, clashes between demonstrators and police officers and acts of civil disobedience --- even those that do not result in injuries and are entirely non-violent -- could be construed as 'dangerous to human life' and in 'violation of the criminal laws.' Environmental activists, anti-globalization activists, and anti-abortion activists who use direct action to further their political agendas are particularly vulnerable to prosecution as 'domestic terrorists.'"

Notice, further, that there is no requirement of imminent danger in this clause. In other words, you could tear down a fence, such as the protesters in Vieques, Puerto Rico did to oppose government nuclear testing there, and if somebody fell and bumped his head -- or perhaps if it was only possible that someone might --, this could be grounds enough to call you a terrorist.

○ **Foreign Terrorist Organizations**

Section 411 of the Patriot Act purportedly defines foreign terrorist organizations. However, as the ACLU points out, this provision "permits designation [of] foreign and domestic groups," since the provision defines these groups as "any political, social or other similar group whose public endorsement of acts of terrorist activity" -- which, of course, under the Section 802 could mean lawful protest -- which "the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities."

Again, how does one determine when a "public endorsement . . . undermines" the U.S. government's "efforts" to "reduce or eliminate terrorist activities"? If you openly admire the bravery of your enemies, that could be considered a public endorsement.

In terms of undermining government efforts, Attorney General Ashcroft made perfectly clear he would interpret any public debate or dissent as just that, when he said such public discussion would "erode our national unity . . . diminish our resolve . . . give ammunition to America's enemies, and pause to America's friends."

This law transforms publicly beneficial discussion into a crime, and turns our law enforcers' slightest fears into acts of oppression against their own people.

○ **Supporting Terrorism**

Under existing law (8 USC 2339b), an American citizen who gives money to an organization that the Attorney General or Secretary of State has designated a terrorist organization, can be prosecuted for the crime of "providing material support or resources to a designated foreign terrorist organization."

What is different now under the USA Patriot Act is the definition of a terrorist organization. The definition is much broader now.

The USA Patriot Act pulls together and redefines several different existing laws, none of which really define what constitutes a "terrorist organization." Under Section 411, a terrorist organization can now include not only organizations designated by the Attorney General, but those identified by the Secretary of State as having provided material support for, committed, incited, planned or gather information on potential targets of, terrorists acts of violence (drawing from 8 USC 1182).

Section 411, according to a report by the Congressional Research Service, therefore "recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support."

Thus, a terrorist activity is defined as an act in support of a terrorist activity. It's like saying "You're bad because you're bad."

You can be prosecuted for terrorist activity if you have supported or associated with an organization that is *NOT* even designated as a terrorist organization, since a terrorist organization can be anyone who provides material support to so-called terrorist activity, which could be someone supporting the Northern Alliance against the Taliban, or someone protesting the U.S. bombing of Afghanistan.

This is nearly a conundrum. It would be amusing if it weren't so alarming.

- **INNOCENT IMMIGRANTS ARE BEING INDEFINITELY IMPRISONED AND HELD IN SOLITARY CONFINEMENT . . . USING SECRET EVIDENCE**

Immigrants fare much worse under the USA Patriot Act.

Under Section 412, any immigrant who innocently supports the activities of a designated terrorist organization could be deported or indefinitely detained. Again, the government can detain or deport an immigrant who provides lawful assistance to groups that are not even designated as terrorist organizations.

This violates the First Amendment, which protects the right of association for citizens and immigrants alike. The ACLU points out that "the history of McCarthyism shows the very real dangers of abuse" of the right of association.

It also violates the Eighth Amendment, which prohibits cruel and unusual punishment (indefinite detention), and the Sixth Amendment right to a speedy and public trial.

Further, an alien's wife and children can also be deported or detained, if they cannot prove they did not know of the terrorist activity.

An alien suspect may be held for seven days without being charged with any crime. In addition, a period of indefinite detention may begin when the suspect is charged with *ANY* crime, a crime that has nothing to do with terrorism at all, such as a minor visa violation that would not otherwise result in detention at all. Indeed, CNSS claims that

the DOJ gave them a list of over 700 unnamed detainees, only five of whom were being held on terrorism charges.

In order to detain an alien, Ashcroft must "certify" that there are "reasonable grounds" to believe that that person is engaged in conduct which threatens national security or is deportable on grounds of terrorism, espionage, sabotage, or sedition.

"Yes, but," I hear you say, "these are terrorists!" And how do we know that, when we have only the word of John Ashcroft?

○ **The Sixth Amendment and Secret Evidence**

Under the USA Patriot Act, the government may use secret evidence against either immigrants or citizens in these cases. The 1798 Alien Act (discussed in Part II of this series), as bad as it was, applied the evidentiary standards of the day. All evidence had to be presented in open court, subject to authentication, challenge, and cross-examination.

The Sixth Amendment protects the rights of citizens and immigrants alike to confront their enemies. Reliance on secret evidence violates this right.

Secret evidence was permitted under the 1996 antiterrorism laws, but numerous federal courts declared its use in violation of the Constitution, and over 100 congressmen had signed support for the Secret Evidence Repeal Act (H.R. 2121) in 2000 -- an act that fell by the wayside in the wake of September 11th.

As one U.S. District Court judge wrote: "The [Immigration and Naturalization Service's] reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of governmental processes initiated and prosecuted in darkness."

U.S. Supreme Court Justice Jackson wrote in 1950: "The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."

○ **The Sixth Amendment Right to Counsel**

In a criminal trial, a defendant is entitled to have a lawyer assigned to them. Under the USA Patriot Act, immigration detainees are not entitled to such assignment.

This does not mean they have no right to counsel. It just means they have to obtain their own attorney. However, many detainees come from countries with few legal protections for their citizens, and, thus, have no idea they are even entitled to constitutional rights in this country, much less what those rights might be.

In criminal law, a suspect's invocation of his right to counsel protects him from further interrogation. Law enforcement may not ask any further questions of a suspect once he has asked for an attorney, until after he has consulted with an attorney and only in the presence of the attorney, if the suspect requests. Any information obtained from a suspect by law enforcement, including a confession, elicited after the right to counsel is invoked, is inadmissible in court.

It is clear from lawyers' affidavits in the lawsuit brought by the Center for National Security Studies (CNSS) against the Department of Justice (discussed in Part III of this series) that the right to counsel of immigrants is already being violated. Reports have emerged of detainees requesting and being denied access to counsel.

Again, this is an outrage in a democratic nation. Unless we Americans want to find ourselves under the same yoke, we should be raising a ruckus about this.

- **FINANCIAL AND STUDENT RECORDS AT RISK**

It should at this point be no surprise to readers that the USA Patriot Act requires financial institutions to monitor your financial transactions and share that information with other agencies (Sections 351 and 358).

The same with student records (sections 507 and 508). If the records are certified as "relevant to an investigation," educational institutions have no choice but to turn over student information, including fields of study, grades, coursework, financial information, and ethnicity.

Existing law provided adequate tools to conduct investigations. These provisions of the Patriot Act lead to more privacy violations that do nothing to further terrorism investigations.

Tomorrow, Part VI, the last part of the series, discusses national security and proposes a few steps we can take.

This is Part VI of a six-part series on *truthout* on the USA Patriot Act. This part discusses national security and some steps we can take to retain both our security and our liberty.

Part VI: National Security & Civil Liberty

This is a time of fear. What is even more frightening to some people than the terrorists attacks we suffered -- or perhaps one should say, on top of the attacks -- are the warlike measures of President Bush. Others feel that Bush is doing a good job of protecting us, while yet others think that he is a crook, but even if he is, it is good to have someone like that doing our dirty work for us. Terrorism is a big issue. National security is a big issue. Civil rights is a big issue. Who is right: the hawks or the doves? (Thomas Jefferson, himself the Great Dove, resorted to the dark uses of slanderous hack writers, treasonous double agents in

foreign pay, and, it is suspected, even assassins.)

I have no doubt that Al Qaida is a dangerous terrorist network. It is dangerous. It is lethal. Its members hate Americans of all creeds and races. And they will do whatever they can, even destroy themselves, in order to destroy us and our way of life.

But, these dangers do not require us to abandon our commitment to the democratic ideals of our Constitution. If democracy cannot stand up to terrorism, it is not worth much. This is the time of all times for democracy to show its colors. All the colors that make up this nation of immigrants. A free and open society is the true antidote to terrorism. This neither requires blind self-exposure to danger nor blind policing.

The Eagle does not have to mean war. It can mean foresight, insight, and the ability to soar above paranoid prejudices.

To look in the face of terror, one must be willing to see into the darkness. It is not a comfortable thing to do. Many of us want the dirty work done, as long as we don't have to look into that darkness ourselves. But, looking at terror is not the same as abandoning fairness. The USA Patriot Act does abandon fairness, in many respects.

National security does not require this. As Bruce M. Ramer testified on behalf of the American Jewish Committee during the House Judiciary Subcommittee Hearings on the Secret Evidence Repeal Act (H.R. 2121) of 2000: "There is nothing inconsistent in assuring that law enforcement authorities are properly equipped to respond to the threat of terrorism while, at the same time, assuring that immigrants and refugees are treated fairly and decently."

Mr. Ramer's recommendations are worth noting here. He proposed adopting the procedural protections that were originally enacted in the Alien Terrorist Removal Act (ATRA) of 1996. This Act was amended by the immigration reform law later in 1996, which removed some of ATRA's protections. ATRA applied only to alien removal cases. It was intended to kick in only where an alien "would pose a risk to . . . national security." Once that was determined, ATRA established rules that assured the basic procedural protections of the alien's right to a public hearing, representation by counsel, the opportunity to examine evidence, including an unclassified summary of classified evidence, and to introduce exculpatory evidence.

These due process procedures were not preserved in the 1996 Anti-Terrorism and Effective Death Penalty Act, and although more and more federal courts were finding portions of that law unconstitutional, many of the same provisions were again enacted in the USA Patriot Act. As I pointed out in Part I of this series, one might question the lucidity of our congressman in doing this -- and, thus, the legal validity of the Patriot Act.

Ramer's recommendations do not answer the question of how one determines that an alien, or an American for that matter, is a risk to national security, but it does address the problem of the use of secret evidence.

As Parts III and IV of this series show, the ability to use secret evidence opens the door for wide abuse of civil rights. Under the USA Patriot Act, although the Supreme Court has

rejected indefinite detention of aliens in deportation, an alien can be detained his entire life on the basis of evidence he has no opportunity to meet or refute. This is appalling and unacceptable in a democratic society.

In addition, in the cases in which an alien has finally been given the opportunity to challenge the secret evidence, courts have found no basis for detention. For example, the case of Hany Kiareldeen, released after 18 months of detention in October 1999, apparently held solely on accusations made by his wife during a custody battle. Upon his release, she disappeared with their child. Or Nasser Ahmed, released after three years in solitary confinement on no charges. Or Anwar Hammad, never charged with a crime, never found to have been engaged in or associated with terrorism, released after over four years. Or Dr. Mazen al-Najjar, a respected university professor, a stateless Palestinian, and a resident in the U.S. for 18 years before he was detained. After several years in prison, al-Najjar was released in December 2000, the judge finding the classified evidence insufficient grounds to hold him. Free for about a year, he was then taken again into custody, where he currently remains, on deportation proceedings.

To date, secret evidence has been used largely in immigration cases. It is clear that under the USA Patriot Act, its use will be extended to cover domestic criminal cases. Only recently, the Department of Justice announced its plans to use secret evidence to justify financial sanctions against an American Muslim charity based in Chicago.

No person should be detained, indicted, or convicted on secret evidence alone in order to protect national security. The idea is an oxymoron. The true threat to national security is a government that can jail people on evidence that couldn't stand the light of day.

The phrase "a threat to national security" should not be used so often that it sounds like the boy who cried wolf. Americans need to question how a threat to national security should be determined. Do we simply round up all the Arabs or Muslims, like in the movie, "The Siege"? Why not then round up all the peace activists, environmentalists, and political opponents?

There should be procedures established to determine what meets the criteria of "a threat to national security." At this time, at best, federal judges are merely given the opportunity to view classified evidence in camera and *ex parte*, and apply their own individual, personal judgment as to whether revealing the evidence would endanger covert operations or operatives or national security, the evidence is adequate grounds to further detain the alien suspect, whether and what portions of the secret evidence should be summarized in an unclassified summary for the defendant to challenge, and whether such a challenge would be sufficient to successfully refute all the charges.

Judges must now use their best judgment to make these determinations, but they have no standards or baseline criteria to follow in making such determinations.

This is, as I say, at best. At worst, judges are not even given an opportunity to review such evidence or to determine whether the indictees or detainees are held on the slightest rational ground. Judicial oversight must never be relinquished, especially on cases that concern national security or use secret evidence.

The USA Patriot Act raises many additional concerns. This series has raised only a few of the worst ones.

In closing, it is worth quoting the words of a senator speaking before one of our early congresses. On June 21, 1798, the last day of the congressional debates on the Alien and Sedition Acts, Senator Edward Livingston spoke the following words to the Senate:

"If we are ready to violate the Constitution, will the people submit to our unauthorized acts? Sir, they ought not to submit; they would deserve the chains that these measures are forging for them. The country will swarm with informers, spies, delators, and all the odious reptile tribe that breed in the sunshine of despotic power . . . The hours of the most unsuspected confidence, the intimacies of friendship, or the recesses of domestic retirement, afford no security. The companion whom you trust, the friend in whom you must confide, the domestic who waits in your chamber, are all tempted to betray your imprudent and unguarded follies; to misrepresent your words; to convey them, distorted by calumny, to the secret tribunal where jealousy presides -- where fear officiates as accuser, and suspicion is the only evidence that is heard . . . Do not let us be told that we are to excite a fervor against a foreign aggression to establish a tyranny at home; that like the arch traitor we cry "Hail Columbia" at the moment we are betraying her to destruction; that we sing "Happy Land," when we are plunging it in ruin and disgrace; and that we are absurd enough to call ourselves free and enlightened while we advocate principles that would have disgraced the age of Gothic barbarity."

The USA Patriot Act returns us to the age of Gothic barbarity. This Act does not belong in a democracy. It should be repealed. If it is not repealed, it should be amended to remove those provisions, which violate the civil rights of citizens and immigrants.

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Repeal the USA Patriot Act

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