MYTHS AND REALITIES ABOUT THE PATRIOT ACT

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On June 8, 2005, the House Judiciary Committee held a hearing on reauthorization of the USA PATRIOT Act. The committee called a single witness, Deputy Attorney General James B. Comey.

Comey used misleading and inaccurate statements in defense of the Patriot Act provisions that are set to expire December 2005. These included a number of myths repeated by Justice Department spokespersons and other Patriot Act defenders. It's long past time to set the record straight.

Myth: *""Under the Patriot Act, I'm very confident in saying there have been no abuses found.""[*1]

Reality: The Patriot Act has been abused. The ACLU detailed these abuses in a 10-page letter to Senator Dianne Feinstein, dated April 4, 2005.

- Brandon Mayfield is a Portland, Oregon resident who is a convert to Islam and an attorney. Mayfield was wrongly accused by the government of involvement in the Madrid bombing as a result of evidence, including mistaken fingerprint identification, that fell apart after the FBI re-examined its case following its arrest and detention on Mayfield on a material witness warrant. Attorney General Gonzales acknowledged before the Senate Judiciary Committee that Section 218 of the Patriot Act was implicated in the secret search of Mayfield's house. FBI admitted that it entered Mayfield's house without a warrant based on criminal probable cause and copied four computer drives, digitally photographed sever

documents, seized ten DNA samples and took approximately 335 digital photographs of Brandon Mayfield's home.

- Tariq Ramadan is regarded by many as Europe's leading moderate Muslim intellectuals. Time Magazine named Ramadan among the Top 100 Innovators of the 21st Century. The government revoked Ramadan's visa to teach at the University of Notre Dame under Section 411 of the Patriot Act, which permits the government to exclude non-citizens from the country if in the government's view they have ""used [their] position of prominence to endorse or espouse terrorist activity or to persuade others to support terrorist activity."" Consequently, an individual who discusses politics that a terrorist organization may adopt as its own viewpoints may be excluded from the United States, even if the individual does not support terrorist activity. As such, the government can essentially use this provision to deny admission to those whose political views it disfavors. There is no doubt that Ramadan uses his position of prominence to espouse his political beliefs. Notably, Ramadan, who denounces the use of violence in the name of Islam, had already been granted a visa after undergoing an extensive security clearance process and had previously been permitted to enter the country on numerous occasions.

A number of other examples are also listed in the ACLU's letter. The Justice Department largely confirmed the substance of these examples in its response to the ACLU letter, dated April 26, 2005, while denying that the examples listed were ""abuses."" The Office of Inspector General of the Department of Justice is actively investigating the Brandon Mayfield case.

The extent of Patriot Act abuse is still unknown because of excessive secrecy enshrouding its use. For example, both special document FBI document snoop orders, called ""national security letters,"" (expanded by section 505 of the Patriot Act) and Foreign Intelligence Surveillance Act (FISA) document orders (expanded by section 215 of the Act), include permanent ""gag"" provisions. These automatic secrecy orders prohibit recipients from telling anyone they have received the order or letter to produce documents that include their customers' private information.

Myth: *The Patriot Act simply ""updated the tools of law enforcement to match the technology used by the terrorists and criminals today.""* [2]

Reality: The Patriot Act ""updated"" surveillance powers - but failed to ""update"" the checks and balances needed to ensure those surveillance powers include proper judicial oversight.

For example, a roving wiretap follows the target of the surveillance from telephone to telephone. Because there is a greater potential for abuse using roving wiretaps compared to traditional wiretaps, which apply to a single telephone, Congress insisted on important privacy safeguards when, prior to the Patriot Act, it first approved this ""updated"" surveillance power for criminal investigations. Section 206 of the Patriot Act created roving wiretaps in Foreign Intelligence Surveillance Act (FISA) investigations. Section 206 erodes the basic constitutional rule of particularization by allow the government to obtain ""roving wiretaps"" without empowering the court to make sure that the government ascertain that the conversations being intercepted actually involve a target of the investigation.

Section 206 also created ""John Doe"" roving wiretaps - wiretaps that need not specify a target or a device such as a telephone.

The failure to include an ascertainment requirement, and the failure to require naming either a target or a device, is what is controversial about section 206 of the Patriot Act. Congress ""updated"" the surveillance power, but didn't update the safeguards.

Another example is the use of ""pen registers"" and ""trap and trace"" devices to track detailed information about Internet use. Telephone pen/trap orders, as they are known, permit the government to obtain a list of telephone numbers for incoming or outgoing calls with a court order not based on probable cause. However, Internet addressing information reveals much more detail, such as the specific web pages viewed or search terms entered into a search engine. When Congress expanded the government's power to get pen/trap orders for Internet communications in the Patriot Act, however, these differences between

telephone and Internet communications were ignored. Congress failed to specify rules to ensure that the privacy of ordinary Americans web surfing and e-mail habits were protected.

Again, Congress updated the surveillance powers, but not the safeguards.

Myth: *The Patriot Act is ""mostly taking what we can do to track drug dealers and thugs and give those tools to people tracking spies and terrorists.""* [3]

Reality: This statement is both inaccurate and misleading. Most of the Patriot Act is not all related to this concept. Before the Patriot Act, the government could use the same tools, such as wiretapping or using grand jury subpoenas, to investigate drug dealers *and* terrorists. The government simply had to be investigating a *crime* of terrorism. There are more than forty such crimes in the United States code, ranging from hijackings and bombings to providing material support for terrorism. 18 U.S.C. § 2332b(g)(5). *All* of the surveillance powers available to investigate drug dealers are also available to investigate *any* of these crimes.

Drug dealing and terrorism, therefore, can both be investigated with all of the powers the government has to investigate crimes. Every power the government has to ""track drug dealers and thugs"" can be used, on the identical basis, to track ""spies and terrorists"" on exactly the same basis - e.g., relevance to a grand jury investigation for subpoenas, probable cause for searches and wiretaps, etc. The government's statement above makes an assumption that a criminal investigation is not a terrorist investigation. Such an assumption is *not* true because criminal investigations *do* include investigations of terrorists.

Unlike an ordinary drug investigation, however, international terrorism may *also* be investigated using foreign intelligence surveillance powers. Foreign intelligence investigations, however, are not limited to international terrorism. They may involve intelligence gathering for foreign policy or other purposes involving *lawful* activities. Expanding the government's surveillance powers in foreign intelligence investigations allows the government to do much more than ""track[] spies and terrorists"" but also allows them to track many other

people, including Americans and others not suspected of involvement in terrorism or crime at all.

Myth: *The codification of delayed notice warrants in the Patriot Act ""brought national uniformity to a court-approved law enforcement tool that had been in existence for decades.""* [4]

Reality: The Patriot Act's ""sneak and peek"" provision is about *lowering standards* for sneak and peek warrants, not imposing uniformity. The two circuit courts that upheld the use of delayed notice warrants imposed a very similar rule, including a presumptive seven-day limit on delaying notice. Delayed notice search warrants, or ""sneak-and-peak"" warrants, allow investigators to enter an individual's business or dwelling to obtain limited and specific information for an investigation and notifying the individual of the search at a later date. Section 213 of the Patriot Act overturns the seven-day rule and instead allows notice of search warrants to be delayed for an *indefinite* ""reasonable time."" Section 213 authorizes a judge to delay notice upon a showing of *reasonable* cause instead of probable cause to believe that there will be an adverse result if notice is given to the target of the search warrant.

Myth: *The primary effect of the Patriot Act was to ""bring down this 'wall' separating intelligence officers from law enforcement agents"" [5] in coordination and information sharing.*

Reality: Information sharing between criminal and intelligence investigations occurred before 9/11 and the Patriot Act. The primary effect of the Patriot Act was to remove necessary checks and balances in foreign intelligence investigations.

According to the 9/11 Commission Report, procedures only restricted information sharing between agents and criminal prosecutors, ""not between two kinds of FBI agents, those working on intelligence matters and those working on criminal matters.""[6] Moreover, agents could brief criminal prosecutors on the information obtained from investigations, but the

prosecutors could not control the information itself. Also, information gleaned from FISA surveillance was repeatedly used in criminal cases because communication of that evidence from intelligence investigators to criminal investigators was permitted before the Patriot Act.

The ""wall"" was more a product of bureaucratic misinformation than statutorily imposed impediments. Former Attorney General Reno issued formal procedures intended to manage only the information sharing between Justice Department prosecutors in intelligence investigations and the Federal Bureau of Investigations in criminal investigations to prevent appearances of impropriety in information sharing practices. The procedures, however, were immediately misunderstood and exaggerated. The FBI exaggerated this limitation to mean that it could not share any intelligence information with criminal investigators, even if the intelligence information was not obtained under the FISA procedures. The NSA also imposed informal caveats on NSA Bin-Laden-related reports that required approval before sharing the information with criminal prosecutors and investigators. Instead of following the procedures, agents kept information to themselves.

Because these problems resulted from a misunderstanding of the law, not the law itself, the Patriot Act is not the reason for improvements in information sharing. FISA information, properly obtained for foreign intelligence purposes, could always be shared with criminal investigators if relevant to crime. Rather, the Patriot Act is about *making it easier to use FISA as an end-run around the Fourth Amendment.*

Myth: *The Patriot Act's ""new powers have allowed authorities to charge more than 400 people in terrorism investigations since the attacks of Sept. 11, 2001, and convict more than half.""* [7]

Reality: The government often accuses critics of wrongly blaming the Patriot Act for terrorism-related abuses that are not related to the Patriot Act. Here, the government is attributing convictions it says are terrorism-related that have nothing to do with the Patriot Act, with no explanation as to how any of them were related, if at all, with the Patriot Act.

The government's numbers are also severely inflated. The ""400 convictions"" claim overstates actual number of convictions and omits a number of key facts related to these numbers. A list obtained by the Justice Department defines only 361 cases defined as terrorism investigations from September 11, 2001 to September 2004.[8] 31 of the entries on the list were blacked out. Only 39 of these individuals were convicted of crimes related to terrorism. The median sentence for these crimes was 11 months. This figure indicates that the crime that the government equated with terrorism was not serious. A study conducted by TRAC at Syracuse University notes that ""despite the three-and-a-half-fold increase in terrorism convictions, the number who were sentenced to five years or more in prison has not grown at all from pre-9/11 levels.""[9] The convictions were more commonly for charges of passport violations, fraud, false statements, and conspiracy.[10] Moreover, the median prison time for a serious offense, such as providing material support to a terrorist organization was only 4 months.[11]

Myth: *The Patriot Act does not contain a provision that allows the government to obtain library records, and ""[t]he reading habits of ordinary Americans are of no interest to those investigating terrorists or spies.""* [12]

Reality: Section 215 of Patriot Act *does* cover library records. It authorizes the government to more easily obtain a court order requiring a person or business to turn over documents or things ""sought for"" an investigation to protect against international terrorism. Business records include library records. Both Foreign Intelligence Surveillance Act records demands and national security letters (which cover more limited categories of records, including, according to the government, some types of library records relating to Internet access) can be used to obtain sensitive records relating to the exercise of First Amendment rights, including the reading habits of ordinary Americans. For example, a records demand could be used to obtain a list of the books or magazines someone purchases or borrows from the library. Moreover, the government can obtain medical records containing private patient information. The government can also obtain records and lists of individuals who belong to political organizations if it believes the organization espouses political rhetoric contrary to the government.

While both national security letters and section 215 records demands cannot be issued in an investigation of a United States citizen or lawful permanent resident if the investigation is based ""solely"" on First Amendment activities, this provides little protection. An investigation is rarely, if ever, based ""solely"" on any one factor; investigations based in large part, but not solely, on constitutionally protected speech or association are implicitly allowed.

Myth: *""[The] Patriot Act is chock-full of oversight in a lot of ways that regular criminal procedure is not: full of the involvement of federal judges?""* [13]

Reality: The statute authorizing the use of ""national security letters"" as amended by the Patriot Act 505(a) contains *no* judicial oversight. The statute allows the government to compel the production of financial records, credit reports, and telephone, Internet, and other communications or transactional records. The letters can be issued simply on the FBI's own assertion that they are needed for an investigation, and also contain an automatic and permanent nondisclosure requirement. In the most controversial portions of the Patriot Act that require judicial oversight, the judge wields a rubber-stamp. For example, Section 215 requires the FBI to apply to a Foreign Intelligence Surveillance Court to obtain an order for the production of business records. The FBI must only specify that the records pertain to a foreign intelligence investigation, a vague and broad concept. The judge is required to issue the order after the FBI makes this specification, making the judicial review a mere formality than actual oversight.

Myth: *Critics believe that the Patriot Act authorized federal law enforcement power to arrest and indefinitely detain material witnesses.*

Reality: Federal law enforcement is abusing the current material witness statute, which the Patriot Act did not amend, to improperly detain ""material witnesses"" and failing to provide these detainees their rights in accordance with criminal statutes. The material witness statute[14] was used prior to the Patriot Act and authorizes the federal government to arrest a witness if the government demonstrates in an affidavit to a federal district court that the witness has testimony that is material to a criminal proceeding *and* ""it is

shown that it may become impracticable to secure the presence of the person by subpoena.""[15] Congress enacted this material witness statute for use in limited circumstances. A court may authorize the arrest of a witness who will likely flee if subpoenaed or will otherwise avoid testifying in a criminal proceeding *and* if it accepts the affidavit demonstrating that the witness has ""material"" information to the criminal proceeding.

The government following September 11, however, has used this material witness statute to detain individuals whom the government believes has information concerning a terrorist investigation. It has failed to provide them their rights to counsel, an initial hearing to determine whether the individual poses a flight risk,[16] and prevented the individuals from contacting family members that they have been arrested. Most of these ""material witnesses"" have not been charged with any crime and were proven innocent.

Myth: *Critics are irresponsibly calling for the repeal of the Patriot Act.*

Reality: Most responsible critics do *not* call for the repeal of the Patriot Act. They believe that parts of the Patriot Act are necessary but they support including amendments to the Patriot Act that will restore reasonable checks and balances that will protect civil liberties while ensuring our national security. Such amendments include making explicit that a recipient of a national security letter has the right to file a motion to quash the records demand. They support amendments to the statute to time limit the non-disclosure of receiving a national security letter or a section 215 court order, and to exempt attorney-client communications from the ""gag"" rule. Attorney General Gonzales stated he also supports such amendments.

Myth: *The Patriot Act is ""certainly constitutional.""* [17]

Reality: This statement is inaccurate. Two sections of the Patriot Act have been declared unconstitutional. In *Doe v. Ashcroft,* a federal district court struck down a ""national security letter"" records power expanded by the section 505(a) of the Patriot Act, noting that the failure to provide any explicit right for a recipient to challenge a such a broad national security letter search

order power violated the Fourth Amendment. It also held that the automatic rule that the recipient can tell no one that the recipient has received the order or letter, including any attorney with whom they may want to consult, violated the First Amendment. Judge Marrero, who handed down the decision, noted as an example of the kind of abuse now authorized by the statute that it could be used to issue a NSL to obtain the name of a person who has posted a blog critical of the government, or to obtain a list of the people who have e-mail accounts with a given political organization. *Doe* struck down in its entirety the national security letter statute that was amended by the Patriot Act, rendering all of section 505(a) inoperative if the decision is upheld on appeal.

In *Humanitarian Law Project v. Ashcroft*,[18] the court held that specific phrases in Title 18 Section 2339A, as amended by the Patriot Act section 805(a)(2)(B), violated First Amendment free speech rights and Fifth Amendment due process rights. Section 2339A criminalizes providing "material support or resources" to terrorists and defines material support as including, inter alia, "expert advice or assistance."[19] The plaintiffs in the case sought to provide support to lawful support to organizations labeled as terrorist organizations. The court agreed with the plaintiffs' argument that the phrase ""expert advice or assistance"" was vague and it prohibited protect speech activities, such as distributing human rights literature or consulting with an attorney.[20] The court noted that the Patriot Act bans *all* ""expert"" advice regardless of the nature of the advice,[21] which assumes that all expert advice is material support to a terrorist organization. Moreover, the court held that the phrase violated due process by failing to give proper notice of what type of conduct was prohibited.[22]

Footnotes

[1] *Reauthorization of the USA PATRIOT Act: Hearing Before the Committee on the Judiciary United States House of Representatives*, 109th Congress, (2005) (testimony of James B. Comey, Deputy Attorney General, U.S. Department of Justice) [hereinafter *Comey Testimony June 8, 2005*].

[2] Id.

[3] Id.

[4] *Reauthorization of the USA PATRIOT Act: Hearing Before the Committee on the Judiciary United States House of Representatives*, 109th Congress, (2005) (written statement of James B. Comey, Deputy Attorney General, U.S. Department of Justice) at 11[hereinafter *Comey Written Statement*].

[5] Id. at 9.

[6] Final Report of the National Commission on Terrorist Attacks Upon the United States (""The 9/11 Commission Report""), 79 (2004).

[7] Jim VandeHei, *Bush Campaigns to Extent Patriot Act*, WASH. POST, June 10, 2005, A-06.

[8] Dan Eggen & Jule Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, A-18, A-18 [hereinafter *Dan Eggen et. Al*].

[9] Criminal Terrorism Enforcement Since the 9/11/01 Attacks: A TRAC Special Report, December 8, 2003, http://trac.syr.edu/tracreports/terrorism/report031208.html, (*last visited* June 20, 2005) [hereinafter TRAC Report].

[10] Dan Eggen et. Al, *supra* note 8, at A-18.

[11] TRAC Report, *supra* note 9.

[12] Testimony of Alberto Gonzales, Attorney General, before Senate Select Committee on Intelligence, April 27, 2005.

[13] Comey Testimony June 8, 2005, *supra* note 1.

[14] 18 U.S.C. § 3144.

[15] Id.

[16] See 18 U.S.C. § 3142.

[17] Comey Testimony June 8, 2005, *supra* note 1.

[18] Humanitarian Law Project v. Ashcroft, 309 F.Supp.2d 1185, (Cal. C.D. 2004).

[19] 18 U.S.C. § 2339A

[20] Humanitarian Law Project, 309 F.Supp.2d at 1201.

[21] Id.

[22] Id. at 1199.