

The USA PATRIOT Act:

What's So Patriotic About Trampling on the Bill of Rights? ^[1]

by **Nancy Chang, Senior Litigation Attorney**

Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

November 2001

Contents

- I. THE USA PATRIOT ACT CONFERS VAST AND UNCHECKED POWERS TO THE EXECUTIVE BRANCH
 - II. SUSPENSION OF CIVIL LIBERTIES
 - A. Silencing Political Dissent
 - B. Tolling the Death-Knell on Privacy
 - 1. Enhanced Surveillance Powers
 - a. Sneak and Peek Searches
 - b. Access to Records in International Investigations
 - c. Tracking Internet Usage
 - 2. Allowing Law Enforcement Agencies to Evade the Fourth Amendment's Probable Cause Requirement
 - 3. Sharing of Sensitive Criminal and Foreign Intelligence Information
 - C. Stripping Immigrants of Constitutional Protections
 - 1. Expanding The Class of Immigrants Subject to Removal
 - 2. Detention at the Attorney General's Decree
 - 3. The Political Implications of the USA PATRIOT Act for Immigrants
 - III. WILL THE JUDICIARY REIN IN THE EXECUTIVE AND UPHOLD THE BILL OF RIGHTS?
- Endnotes

Just six weeks after the September 11 terrorist attacks on the World Trade Center and the Pentagon, a jittery Congress -- exiled from its anthrax-contaminated offices and confronted with warnings that more terrorist assaults were soon to come -- capitulated to the Bush Administration's demands for a new arsenal of anti-terrorism weapons. Over vigorous objections from civil liberties organizations on both ends of the political spectrum, Congress overwhelmingly approved the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, better known by its acronym, the USA PATRIOT Act.^[2] The House vote was 356-to-66, and the Senate vote was 98-to-1. Along the way, the Republican House leadership, in a raw display of force, jettisoned an anti-terrorism bill that the House Judiciary Committee had unanimously approved and that would have addressed a number of civil liberties concerns.^[3] The hastily-drafted, complex,

and far-reaching legislation spans 342 pages. Yet it was passed with virtually no public hearing or debate, and it was accompanied by neither a conference nor a committee report. On October 26, the Act was signed into law by a triumphant President George W. Bush.[4]

I. THE USA PATRIOT ACT CONFERS VAST AND UNCHECKED POWERS TO THE EXECUTIVE BRANCH

Although a number of its provisions are not controversial, the USA PATRIOT Act nevertheless stands out as radical in its design. 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. The Act enhances the executive's ability to conduct surveillance and gather intelligence, places an array of new tools at the disposal of the prosecution, including new crimes, enhanced penalties, and longer statutes of limitations, and grants the Immigration and Naturalization Service (INS) the authority to detain immigrants suspected of terrorism for lengthy, and in some cases indefinite, periods of time. And at the same time that the Act inflates the powers of the executive, it insulates the exercise of these powers from meaningful judicial and Congressional oversight.

It remains to be seen how the executive will wield its new authority. However, if the two months that have elapsed since September 11 serve as a guide, we should brace ourselves for a flagrant disregard of the rule of law by those charged with its enforcement. Already, the Department of Justice (DOJ) has admitted to detaining more than 1,100 immigrants, not one of whom has been charged with committing a terrorist act and only a handful of whom are being held as material witnesses to the September 11 hijackings.[5] Many in this group appear to have been held for extended time periods under an extraordinary interim regulation announced by Attorney General John Ashcroft on September 17 and published in Federal Register on September 20.[6] This regulation sets aside the strictures of due process by permitting the INS to detain aliens without charge for 48 hours or an uncapped "additional reasonable period of time" in the event of an "emergency or other extraordinary circumstance." Also, many in this group are being held without bond under the pretext of unrelated criminal charges or minor immigration violations, in a modern-day form of preventive detention. Chillingly, the Attorney General's response to the passage of the USA PATRIOT Act was not a pledge to use his new powers responsibly and guard against their abuse, but instead was a vow to step up his detention efforts. Conflating immigrant status with terrorist status, he declared: "Let the terrorists among us be warned, if you overstay your visas even by one day, we will arrest you." [7]

Furthermore, the Administration has made no secret of its hope that the judiciary will accede to its broad reading of the USA PATRIOT Act just as pliantly as Congress acceded to its broad legislative agenda. 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.[8] 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 counter intelligence 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.[9]

II. SUSPENSION OF CIVIL LIBERTIES

The Administration's blatant power grab, coupled with the wide array of anti-terrorism tools that the USA PATRIOT Act puts at its disposal, portends a wholesale suspension of civil liberties that will reach far beyond those who are involved in terrorist activities. First, the Act places our First Amendment rights to freedom of speech and political association in jeopardy by creating a broad new crime of "domestic terrorism," and by denying entry to non-citizens on the basis of ideology. Second, the Act will reduce our already lowered expectations of privacy under the Fourth Amendment by granting the government enhanced surveillance powers. Third, non-citizens will see a further erosion of their due process rights as they are placed in mandatory detention and removed from the United States under the Act. Political activists who are critical of our government or who maintain ties with international political movements, in addition to immigrants, are likely to bear the brunt of these attacks on our civil liberties.

A. Silencing Political Dissent

Section 802 of the USA PATRIOT Act creates a federal crime of "domestic terrorism" that broadly extends to "acts dangerous to human life that are a violation of the criminal laws" if they "appear to be intended...to influence the policy of a government by intimidation or coercion," and if they "occur primarily within the territorial jurisdiction of the United States." [10] Because this crime is couched in such vague and expansive terms, it may well be read by federal law enforcement agencies as licensing the investigation and surveillance of political activists and organizations based on their opposition to government policies. It also may be read by prosecutors as licensing the criminalization of legitimate political dissent. 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."

In addition, political activists and the organizations with which they associate may unwittingly find themselves the subject of unwanted government attention in the form of surveillance and other intelligence-gathering operations. The manner in which the

government implements the Act must be carefully monitored to ascertain whether activists and organizations are being targeted selectively for surveillance and prosecution based on their opposition to government policies. The First Amendment does not tolerate viewpoint-based discrimination.[11]

Furthermore, Section 411 of the Act poses an ideological test for entry into the United States that takes into consideration core political speech. Representatives of a political or social group "whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities" can no longer gain entry into the United States.[12] Entry is also barred to non-citizens who have used their "position of prominence within any country to endorse or espouse terrorist activity," if the Secretary of State determines that their speech "undermines United States efforts to reduce or eliminate terrorist activities." [13]

B. Tolling the Death-Knell on Privacy

The USA PATRIOT Act[14] launches a three-pronged assault on our privacy. First, 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 a resurgence of domestic spying by the Central Intelligence Agency.

1. Enhanced Surveillance Powers

By and large, Congress granted the Administration its longstanding wish list of enhanced surveillance tools, coupled with the ability to use these tools with only minimal judicial and Congressional oversight. In its rush to pass an anti-terrorism bill, Congress failed to exact in exchange a showing that these highly intrusive new tools are actually needed to combat terrorism and that the Administration can be trusted not to abuse them.

The recent decision in *Kyllo v. United States*[15] serves as a pointed reminder that once a Fourth Amendment protection has been eroded, the resulting loss to our privacy is likely to be permanent. In *Kyllo*, the Supreme Court concluded that the use of an advanced thermal detection device that allowed the police to detect heat emanating from marijuana plants growing inside the defendant's home constituted a "search" for the purposes of the Fourth Amendment and was presumptively unreasonable without a warrant. The Court placed great weight on the fact that the device was new, "not in general public use," and had been used to "explore details of a private home that would previously have been unknowable without physical intrusion." [16] Implicit in the Court's holding is the principle that once a technology is in general public use and its capabilities are known, a reasonable expectation of privacy under the Fourth Amendment may no longer attach.

Several of the Act's enhanced surveillance tools, and the civil liberties concerns they raise, are examined below.

a. Sneak and Peek Searches

Section 213 of the Act authorizes federal agents to conduct "sneak and peek searches," or covert searches of a person's home or office that are conducted without notifying the person of the execution of the search warrant until after the search has been completed. Section 213 authorizes delayed notice of the execution of a search warrant upon a showing of "reasonable cause to believe that providing immediate notification... may have an adverse result." [17] Section 213 also authorizes the delay of notice of the execution of a warrant to conduct a seizure of items where the court finds a "reasonable necessity" for the seizure.

Section 213 contravenes the "common law 'knock and announce' principle," which forms an essential part of the Fourth Amendment's reasonableness inquiry. [18] When notice of a search is delayed, one is foreclosed from pointing out deficiencies in the warrant to the officer executing it, and from monitoring whether the search is being conducted in accordance with the warrant. In addition, Section 213, by authorizing delayed notice of the execution of a warrant to conduct a seizure of items, contravenes Rule 41(d) of the Federal Rules of Criminal Procedure, which requires that, "The officer taking property under the warrant shall give to the person from whom or from whose premises 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."

Under Section 213, notice may be delayed for a "reasonable period." Already, DOJ has staked out its position that a "reasonable period" can be considerably longer than the seven days authorized by the Second Circuit Court of Appeals in *United States v. Villegas*, [19] and by the Ninth Circuit Court of Appeals in *United States v. Freitas*. [20] DOJ states in its *Field Guidance on New Authorities (Redacted) Enacted in the 2001 Anti-Terrorism Legislation* [21] that "[a]nalogy to other statutes suggest [sic] that the period of delay could be substantial if circumstances warrant," and cites in support of this proposition a case that found a 90-day delay in providing notice of a wiretap warrant to constitute "a reasonable time." Notably, Section 213 is not limited to terrorism investigations, but extends to all criminal investigations, and is not scheduled to expire.

b. Access to Records in International Investigations

Section 215 [22] is one of several provisions in the USA PATRIOT Act that relaxes the requirements, and extends the reach, of the Foreign Intelligence Surveillance Act of 1978 (FISA). [23] Under Section 215, the Director of the FBI or a designee as low in rank as an Assistant Special Agent in Charge may apply for a court order requiring the production of "any tangible things (including books, records, papers, documents, and other items)" upon his written statement that these items are being sought for an investigation "to protect against international terrorism or clandestine intelligence activities." [24] A judge presented with an application under Section 215 is required to enter an order if he "finds that the application meets the requirements of this section." [25]

Notably absent from Section 215 is the restriction in the FISA provision it amends that had required the government to specify in its application for a court order that "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." [26] Now, under Section 215, the FBI may obtain sensitive personal records by simply certifying that they are sought for an investigation "to protect against international terrorism or clandestine intelligence activities." The FBI need not suspect the person whose records are being sought of any wrongdoing. Furthermore, the class of persons whose records are obtainable under Section 215 is no longer limited to foreign powers and their agents, but may include United States citizens and lawful permanent residents, or "United States persons" in the parlance of the FISA. [27] While Section 215 bars investigations of United States persons "solely upon the basis of activities protected by the first amendment to the Constitution," it does nothing to bar investigations based on other activities that tie them, no matter how loosely, to an international terrorism investigation. [28]

The FISA provision that was amended by Section 215 had been limited in scope to "records" in the possession of "a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility." [29] Section 215 extends beyond "records" to "tangible things" and is no longer limited in terms of the entities from whom the production of tangible things can be required. [30] A Congressional oversight provision will require the Attorney General to submit semi-annual reports on its activities under Section 215. [31] Section 215 is scheduled to expire on December 31, 2005.

c. Tracking Internet Usage

Under Section 216 of the Act, courts are required to order the installation of a pen register and a trap and trace device [31] to track both telephone and Internet "dialing, routing, addressing and signaling information" [32] anywhere within the United States when a government attorney has certified that the information to be obtained is "*relevant* to an ongoing criminal investigation." [33] Section 216 states that orders issued under its authority cannot permit the tracking of the "contents of any wire or electronic communications." However, in the case of email messages and Internet usage, the Act does not address the complex question of where the line should be drawn between "dialing, routing, addressing and signaling information" and "content." Unlike telephone communications, where the provision of dialing information does not run the risk of revealing content, [35] email messages move together in packets that include both address and content information. Also, the question of whether a list of web sites and web pages that have been visited constitutes "dialing, routing, addressing and signaling information" or "content" has yet to be resolved.

By providing no guidance on this question, Section 216 gives the government wide latitude to decide what constitutes "content." Of special concern is the fact that Section 216 authorizes the government to install its new Carnivore or DCS1000 system, a formidable tracking device that is capable of intercepting all forms of Internet activity, including email messages, web page activity, and Internet telephone communications. [36] Once installed on an Internet Service Provider (ISP), Carnivore devours *all* of the communications flowing through the ISP's network -- not just those of the target of surveillance but those of all users -- and not just tracking information but content as well. The FBI claims that through the use

of filters, Carnivore "limits the messages viewable by human eyes to those which are strictly included within the court order." [37] However, neither the accuracy of Carnivore's filtering system, nor the infallibility of its human programmers, has been demonstrated. While Section 216 requires the government to maintain a record when it utilizes Carnivore, this record need not be provided to the court until 30 days after the termination of the order, including any extensions of time. [38] Section 216 is not scheduled to expire.

2. Allowing Law Enforcement Agencies to Evade the Fourth Amendment's Probable Cause Requirement

Perhaps the most radical provision of the USA PATRIOT Act is Section 218, which amends FISA's wiretap and physical search provisions. Under FISA, court orders permitting the executive to conduct surreptitious foreign intelligence wiretaps and physical searches may be obtained without the showing of probable cause required for wiretaps and physical searches in criminal investigations. Until the enactment of the Act, orders issued under FISA's lax standards were restricted to situations where the gathering of foreign intelligence information was "the purpose" of the surveillance. [39]

Under Section 218, however, orders may be issued under FISA's lax standards where the primary purpose of the surveillance is criminal investigation, and the gathering of foreign intelligence information constitutes only "a significant purpose" of the surveillance. [40] As a result, Section 218 allows law enforcement agencies conducting a criminal investigation to circumvent the Fourth Amendment whenever they are able to claim that the gathering of foreign intelligence constitutes "a *significant* purpose." In doing so, Section 218 gives the FBI a green light to resume domestic spying on government "enemies" -- a program that reached an ugly apex under J. Edgar Hoover's directorship.

In the seminal case of *United States v. United States District Court for the Eastern District of Michigan (Keith)*, [41] the Supreme Court rejected President Richard Nixon's ambitious bid for the unchecked executive power to conduct warrantless wiretaps when investigating national security threats posed by *domestic* groups with no foreign ties. The Court recognized that national security cases reflect "a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime." [42] With respect to the First Amendment, the Court wisely observed that "[o]fficial surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech" because of "the inherent vagueness of the domestic security concept... and the temptation to utilize such surveillances to oversee political dissent." [43]

With respect to the Fourth Amendment, the Court acknowledged the constitutional basis for the President's domestic security role, but refused to exempt the President from the Fourth Amendment's warrant requirement. [44] The Court explained that the oversight function assumed by the judiciary in its review of applications for warrants "accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." [45]

Notably, the *Keith* Court declined to examine "the scope of the President's surveillance power with respect to the activities of *foreign* powers, within or without this country." [46] To fill the vacuum left in the wake of the *Keith* decision, in 1978 Congress enacted FISA, which is premised on the assumption that Fourth Amendment safeguards are not as critical in foreign intelligence investigations as they are in criminal investigations. The Supreme Court has yet to rule on FISA's constitutionality. However, both the Fourth and Ninth Circuits have cautioned that applying FISA's lax standards to criminal investigations raises serious Fourth Amendment concerns. In *United States v. Truong Dinh Hung*, the Fourth Circuit held that "the executive should be excused from securing a warrant only when the surveillance is conducted '*primarily*' for foreign intelligence reasons," because "once surveillance becomes *primarily a criminal investigation*, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution." [47] In a similar vein, the Ninth Circuit held in *United States v. Johnson* that "the investigation of criminal activity cannot be the primary purpose of [FISA] surveillance" and that "[FISA] is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches." [48]

The constitutionality of Section 218 is in considerable doubt. The extremist position staked out by DOJ in the Bryant Letter, which argues that "[i]f the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches," would undermine the separation of powers doctrine. [49] Until the Supreme Court weighs in on this matter, the government will find itself in a quandary each time it seeks to prosecute a criminal defendant based on evidence that, although properly obtained under the lesser showing required by Section 218, does not meet the probable cause showing required by the Fourth Amendment. Should the government decide to base prosecutions on such evidence, it will run the risk that the evidence will be suppressed under the Fourth Amendment exclusionary rule. [50] Section 218 is scheduled to expire on December 31, 2005.

3. Sharing of Sensitive Criminal and Foreign Intelligence Information

Section 203 of the USA PATRIOT Act authorizes the disclosure, without judicial supervision, of certain criminal and foreign intelligence information to officials of the FBI, CIA, and INS, as well as other federal agencies, where receipt of the information will "assist the official... in the performance of his official duties." [51] Section 203(a) permits the disclosure of matters occurring before a grand jury -- a category that is as boundless in scope as the powers of a grand jury to subpoena records and witnesses. [52] Section 203(b) permits the disclosure of recordings of intercepted telephone and Internet conversations. [53] And Section 203(d) permits the disclosure of foreign intelligence obtained as part of a criminal investigation. [54]

While some additional sharing of information between agencies is undoubtedly appropriate given the nature of the terrorist threats we face, the Act fails to protect us from the dangers posed to our political freedoms and our privacy when sensitive personal information is widely shared without court supervision. A cautionary tale can be found in the 1976 report of the Senate's Church Committee, which revealed that the FBI and CIA had spied on

thousands of law-abiding citizens, from civil rights workers to anti-Vietnam War protestors, who had been targeted solely because they were believed to harbor politically dissident views.[55] Section 203(a) is not scheduled to expire. Subsections (b) and (d) of Section 203, however, are scheduled to expire.

C. Stripping Immigrants of Constitutional Protections

The USA PATRIOT Act deprives immigrants of their due process and First Amendment rights through two mechanisms that operate in tandem. First, Section 411 vastly expands the class of immigrants who are subject to removal on terrorism grounds through its broad definitions of the terms "terrorist activity," "engage in terrorist activity," and "terrorist organization." Second, Section 412 vastly expands the authority of the Attorney General to place immigrants he suspects are engaged in terrorist activities in detention while their removal proceedings are pending.

1. Expanding The Class of Immigrants Subject to Removal

Section 411 vastly expands the class of immigrants that can be removed on terrorism grounds. [56] The term "terrorist activity" is commonly understood to be limited to pre-meditated and politically-motivated violence targeted against a civilian population.[57] Section 411, however, stretches the term beyond recognition to encompass any crime that involves the use of a "weapon or dangerous device (other than for mere personal monetary gain)."[58] Under this broad definition, an immigrant who grabs a knife or makeshift weapon in the midst of a heat-of-the-moment altercation or in committing a crime of passion may be subject to removal as a "terrorist."

The term "engage in terrorist activity" has also been expanded to include soliciting funds for, soliciting membership for, and providing material support to, a "terrorist organization," even when that organization has legitimate political and humanitarian ends and the non-citizen seeks only to support these lawful ends.[59] In such situations, Section 411 would permit guilt to be imposed solely on the basis of political associations protected by the First Amendment.[60]

To complicate matters further, the term "terrorist organization" is no longer limited to organizations that have been officially designated as terrorist and that therefore have had their designations published in the Federal Register for all to see.[61] Instead, Section 411 now includes as "terrorist organizations" groups that have never been designated as terrorist if they fall under the loose criterion of "two or more individuals, whether organized or not," which engage in specified terrorist activities. [62] In situations where a non-citizen has solicited funds for, solicited membership for, or provided material support to, an undesignated "terrorist organization," Section 411 saddles him with the difficult, if not impossible, burden of "demonstrat[ing] that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity." [63] Furthermore, while Section 411 prohibits the removal of a non-citizen on the grounds that he solicited funds for, solicited membership for, or provided material support to, a designated "terrorist organization" at a time when the organization was not designated as a "terrorist

organization," Section 411 does not prohibit the removal of a non-citizen on the grounds that he solicited funds for, solicited membership for, or provided material support to, an undesignated "terrorist organization" prior to the enactment of the Act.[64]

2. Detention at the Attorney General's Decree

At the same time that Section 411 vastly expands the class of immigrants who are removable on terrorist grounds, Section 412 vastly inflates the Attorney General's power to detain immigrants who are suspected of falling into that class.[65] Upon no more than the Attorney General's unreviewed certification that he has "reasonable grounds to believe" that a non-citizen is engaged in terrorist activities or other activities that threaten the national security, a non-citizen can be detained for as long as seven days without being charged with either a criminal or immigration violation.[66] This low level of suspicion falls far short of a finding of probable cause, and appears even to fall short of the "reasonable and articulable suspicion" that supports a brief investigatory stop under the Fourth Amendment.[67]

If the non-citizen is charged with an immigration violation, he is subject to mandatory detention and is ineligible for release until he is removed, or until the Attorney General determines that he should no longer be certified as a terrorist.[68] While the immigration proceedings are pending, the Attorney General is required to review his certification once every six months.[69] However, Section 412 does not direct the Attorney General either to inform the non-citizen of the evidence on which the certification is based, or to provide the non-citizen with an opportunity to contest that evidence at an Immigration Judge hearing or other administrative review procedure. Instead, Section 412 limits the non-citizen's ability to seek review of the certification to a habeas corpus proceeding filed in federal district court, appeals from which must be filed in the Court of Appeals for the District of Columbia.[70] Since habeas proceedings are civil rather than criminal in nature, the government has no obligation under the Sixth Amendment to provide non-citizens with free counsel in such proceedings.[71]

Even where a non-citizen who is found removable is deemed eligible for asylum or other relief from removal, Section 412 does not permit his release.[72] Further, in the event that the non-citizen is found removable, but removal is "unlikely in the reasonably foreseeable future" -- most likely because no other country will accept him -- he may be detained for additional periods of six months "if the release of the alien will threaten the national security of the United States or the safety of the community or any person." [73] Only habeas review of such a determination is available under Section 412.[74]

The Due Process Clause "applies to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." [75] Yet, Section 412 exposes immigrants to extended, and, in some cases, indefinite, detention on the sole authority of the Attorney General's untested certification that he has "reasonable grounds to believe" that a non-citizen is engaged in terrorist activities. It remains to be seen what evidentiary safeguards, if any, the Attorney General will build into his regulations implementing Section 412. It also remains to be seen how rigorous federal court habeas reviews of such certifications will be and to what extent the courts will demand that the Attorney General base his certification on objective evidence. Nevertheless, it is hard to

avoid the conclusion that the Act will deprive non-citizens of their liberty without due process of law.[76]

3. The Political Implications of the USA PATRIOT Act for Immigrants

In short, immigrants who engage in political activities in connection with any organization that has ever violated the law risk being certified as terrorists, placed in mandatory detention, and removed, whether on a technical immigration violation or on terrorism grounds. Immigrants cannot protect themselves from such risks by simply avoiding association with organizations that have been designated as "terrorist organizations" because the Act broadens that term to include undesignated groups. Nor can immigrants protect themselves from such risks by limiting themselves to activities that are protected by the First Amendment, such as soliciting membership for, soliciting funds for, and providing material support to, a "terrorist organization" towards the goal of furthering the organization's lawful ends, because the Act broadens the term "engage in terrorist activity" to include these activities. Ironically, in the post-USA PATRIOT Act world, immigrants who are intent on avoiding such risks should refrain from any associations with organizations that could potentially be deemed terrorist, even if their association is strictly confined to activities that further the humanitarian and peace-oriented goals of the organization, such as training members of such a organization on how to present international human rights claims to the United Nations, representing such an organization in peace negotiations, and donating humanitarian aid to such an organization.

III. WILL THE JUDICIARY REIN IN THE EXECUTIVE AND UPHOLD THE BILL OF RIGHTS?

Our commitment to the Bill of Rights and to the democratic values that define this nation has been put to the test by the events of September 11. Already, Congress and the Administration have demonstrated their eagerness to sacrifice civil liberties in hopes of gaining an added measure of security. The task of upholding the Bill of Rights -- or acquiescing in its surrender -- will soon fall to the judiciary, as lawsuits testing the constitutionality of the USA PATRIOT Act wind their way through the courts.

In what we have come to regard as some of the most shameful episodes in our history, the judiciary has consistently bowed to the wishes of the political branches of government in times of crisis by finding the state interest in national security to be paramount to all competing interests. During World War I, the Supreme Court upheld the conviction of socialist Eugene Debs for expressing his opposition to World War I, refusing to recognize his non-violent, anti-war advocacy as speech protected by the First Amendment.[77] More recently, following the bombing of Pearl Harbor during World War II, the Supreme Court upheld an Executive Order mandating the internment of more than 100,000 Japanese-Americans and Japanese immigrants based solely on their ancestry, refusing to recognize their preventive detention as a violation of the Equal Protection Clause.[78]

The extent to which the judiciary will defer to the Administration's views on the troubling First and Fourth Amendment issues presented by the USA PATRIOT Act, will tolerate

ethnic and ideological profiling by the Administration as it implements the Act, and will allow the due process rights of immigrants in detention to be eroded remains to be seen. Certainly, the more anxious the times become, the more likely the judiciary will be to side with the Administration -- at least where judges are convinced that the measures are vital to the national security, are not motivated by discriminatory intent, and tread as lightly as possible upon civil liberties. The recent words of Supreme Court Justice Sandra Day O'Connor, who so often figures as the swing vote on pivotal decisions, do not hold out hope for a vigorous defense of our political freedoms by the judiciary. Following a visit to Ground Zero, where the World Trade Centers once stood, the Justice bleakly predicted, "We're likely to experience more restrictions on personal freedom than has ever been the case in this country." [79]

Endnotes

1. This article is an excerpt from the forthcoming book, *Silencing Political Dissent: How Post-September 11 Antiterrorism Measures Threaten Our Civil Liberties*, by Nancy Chang, which will be available from Seven Stories Press in March 2002. This article is available as a free eBook on the Seven Stories Press website, <http://www.sevenstories.com/book/index.cfm/GCOI/58322100208840>
2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56.
Local, multiple-format copies available on ratical at:
<http://www.ratical.org/ratville/CAH/index.html#HR3162>
3. Adam Clymer, "Antiterrorism Bill Passes; U.S. Gets Expanded Powers," *The New York Times*, Oct. 26, 2001, at A1; Robin Toner and Neil A. Lewis, "House Passes Terrorism Bill Much Like Senate's, but With 5-Year Limit," *The New York Times*, Oct. 13, 2001, at B6; Jonathan Krim, "Anti-Terror Push Stirs Fears for Liberties; Rights Groups Unite To Seek Safeguards," *The Washington Post*, Sept. 18, 2001, at A17; Mary Leonard, "Civil Liberties," *The Boston Globe*, Sept. 21, 2001, at A13.
4. Adam Clymer, "Bush Quickly Signs Measure Aiding Antiterrorism Effort," *The New York Times*, Oct. 27, 2001, at B5.
5. Amy Goldstein, et al., "A Deliberate Strategy of Disruption, Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, Nov. 4, 2001, at A1.
6. See 66 Federal Register 48334-35 (Sept. 20, 2001). Congress denied the Attorney General's request for the codification of this interim regulation in the USA PATRIOT Act and limited to seven days the time aliens suspected of terrorist activity can be detained without charge. Although the interim regulation would appear to be in tension with the Act, it has not yet been rescinded.

This interim regulation appears to have been drafted with the holding of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), in mind. In *County of Riverside*, the Supreme Court considered the Fourth Amendment rights of individuals who had been arrested without a warrant and placed in detention. The Court ruled that after such an arrestee has been held in detention for 48 hours, the burden shifts to the government to show a bona fide emergency or an extraordinary circumstance for failing to provide the arrestee with a judicial probable cause determination. In marked contrast to the arrestees in *County of Riverside*, all of whom were arrested based on a probable cause finding by the arresting officer, the interim regulation has been drafted to support the detention of any non-citizen in this country, even when a basis for suspecting him of a criminal or immigration violation is entirely lacking.

7. Dan Eggen, "Tough Anti-Terror Campaign Pledged -- Ashcroft Tells Mayors He Will Use NewLaw to Fullest Extent," *Washington Post*, Oct. 26, 2001, at A1.

8. This undated letter was sent to Senators Bob Graham, Orrin Hatch, Patrick Leahy, and Richard Shelby. A copy of this letter is on file with the author.
9. Bryant Letter at p. 9 (emphasis added).
10. USA PATRIOT Act § 802, amending 18 U.S.C. § 2331.
11. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).
12. USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(bb).
13. USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(i)(VI).
14. Out of concern for the dangers that the USA PATRIOT Act's enhanced surveillance procedures pose to our privacy, and over the strong objections of the Administration, Congress has scheduled some -- though not all -- of these procedures to sunset, or expire, on December 31, 2005. See USA PATRIOT Act § 224(a). However, Congress has exempted from the operation of any sunset clause: (1) foreign intelligence investigations that began before the sunset date, and (2) offenses that began or occurred before the sunset date. See USA PATRIOT Act § 224(b).
15. 121 S. Ct. 2038, 2046 (2001).
16. *Id.*
17. USA PATRIOT Act § 213, amending 18 U.S.C. § 3103a. The definition of the term "adverse result" in Section 213 is borrowed from a statute establishing the standards under which the government may provide delayed notice when it searches stored email and other wire and electronic communications -- searches that are not nearly as intrusive as physical searches of one's home or office. The term is defined in 18 U.S.C. § 2705(a)(2) as: "(A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial."
18. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).
19. 899 F.2d 1324, 1337 (2d Cir. 1990).
20. 800 F.2d 1451, 1456 (9th Cir. 1986).
21. See <http://cryptome.org/doj-at-guide.htm>
http://www.epic.org/privacy/terrorism/DOJ_guidance.pdf.
22. USA PATRIOT Act § 215, amending 50 U.S.C. § § 1862 and 1863.
23. 50 U.S.C. § 1801 et seq.
24. USA PATRIOT Act § 215, amending 50 U.S.C. § 1862(a)(1).
25. USA PATRIOT Act § 215, amending 50 U.S.C. § 1862(c)(1).
26. See 18 U.S.C. § 1862(b)(2)(B), prior to its amendment by USA PATRIOT Act § 215.
27. FISA defines the term "United States persons" to include United States citizens and lawful permanent residents. See 50 U.S.C. § 1801(i).
28. USA PATRIOT Act § 215, amending 50 U.S.C. § 1862(a)(1).
29. See 50 U.S.C. § 1862(a), prior to its amendment by USA PATRIOT Act § 215.

30. USA PATRIOT Act § 215, amending 50 U.S.C. § 1862.
31. USA PATRIOT Act § 215, amending 50 U.S.C. § 1863.
32. Pen registers record telephone numbers of outgoing calls. *See* 18 U.S.C. § 3127(3). Trap and trace devices record telephone numbers from which incoming calls originate. *See* 18 U.S.C. § 3127(4).
33. USA PATRIOT Act § 216(c)(3) amending 18 U.S.C. § 3127(4) (emphasis added).
34. USA PATRIOT Act § 216(b) amending 18 U.S.C. § 3123(a).
35. In the case of orders for pen registers and trap and trace devices, the Electronic Communications Privacy Act of 1986 demands only "a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation." 18 U.S.C. §§ 3122(b)(2). *See also Smith v. Maryland*, 442 U.S. 735 (1979). However, providing telephone dialing information does not reveal the contents of telephone communications.
36. USA PATRIOT Act § 216(b) amending 18 U.S.C. § 3123(a)(3)(A).
37. *Internet and Data Interception Capabilities Developed by the FBI*, Statement of Dr. Donald M. Kerr, Assistant Director, Laboratory Division, July 24, 2000.
http://www.tiaonline.org/standards/CALEA_JEM/CJEM727-126.pdf
38. USA PATRIOT Act § 216(b) amending 18 U.S.C. § 3123(b)(3).
39. 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B) (emphasis added).
40. USA PATRIOT Act § 218, amending 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B) (emphasis added).
41. 407 U.S. 297 (1972).
42. 407 U.S. at 313.
43. 407 U.S. at 320.
44. *Id.*
45. 407 U.S. at 317.
46. 407 U.S. at 309 (emphasis added).
47. *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980) (emphasis added).
48. *United States v. Johnson*, 952 F.2d 565, 572 (9th Cir. 1992).
49. *See supra* Note 8 and the accompanying text.
50. The exclusionary rule is a judicially created rule that bars prosecutors from using incriminating evidence obtained in violation of the Fourth Amendment to prove guilt. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 655 (1961).
51. USA PATRIOT Act § 203(a), (b), and (d). The information that may be shared must involve either "foreign intelligence or counterintelligence," as that term is defined in the National Security Act of 1947, at 50 U.S.C. § 401a, or "foreign intelligence information," as that term is defined in Section 203(a)(1), (b)(2)(C), and (d)(2).
52. USA PATRIOT Act § 203(a), amending Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure.

53. USA PATRIOT Act § 203(b), amending 18 U.S.C. § 2517(6).
 54. USA PATRIOT Act §§ 203(d) and 905(a).
 55. Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans, Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 2nd Sess. (1976).
 56. Under the Immigration and Nationality Act (INA), non-citizens who have or are engaged in "terrorist activities" or activities that threaten the national security are subject to removal from the United States. See 8 U.S.C. § 1227(a)(4)(A) and (B).
 57. Since 1983, the United States government has defined the term "terrorism," "for statistical and analytical purposes," as the "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience." See *Patterns of Global Terrorism 2000*, United States Department of State, Introduction (April 2001).
 58. USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b).
 59. USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(bb) and (cc), (V)(bb) and (cc), and (VI)(cc) and (dd).
 60. The Supreme Court has described guilt by association as "alien to the traditions of a free society and the First Amendment itself." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982). See also *Healy v. James*, 408 U.S. 169, 186 (1972).
 61. USA PATRIOT Act § 411(a) amended 8 U.S.C. § 1182(a)(3)(B)(vi)(I) to include as a "terrorist organization" any foreign organization so designated by the Secretary of State under 8 U.S.C. § 1189, a provision that was introduced in the Antiterrorism and Effective Death Penalty Act of 1996. As of October 5, 2001, 26 organizations had been designated as foreign terrorist organizations under 8 U.S.C. § 1189. See 66 Federal Register 51088-90 (Oct. 5, 2001). In order to qualify as a designated "foreign terrorist organization" under 8 U.S.C. § 1182(a)(3)(B)(vi)(I), the Secretary of State must find that "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity; and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." See 8 U.S.C. § 1189(a)(1)(A)-(C).
- In addition, USA PATRIOT Act § 411(a) amended 8 U.S.C. § 1182(a)(3)(B)(vi)(II) to include as a "terrorist organization" any domestic or foreign organization so designated by the Secretary of State in consultation with or upon the request of the Attorney General under Section 411. On December 5, 2001, the Secretary of State, in consultation with the Attorney General, designated 39 groups as Terrorist Exclusion List organizations under this provision. See 66 Federal Register 63619-63620 (Dec. 7, 2001). In order to qualify as a designated "terrorist organization" under 8 U.S.C. § 1182(a)(3)(B)(vi)(II), a "finding" must be made that the organization engages in one or more of the "terrorist activities" described in 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(III). These activities consist of: (1) "commit[ting] or incit[ing] to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;" (2) "prepar[ing] or plan[ning] a terrorist activity;" and (3) "gather[ing] information on potential targets for terrorist activity." See 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(III).
62. USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(vi)(III). In order to qualify as an undesignated "terrorist organization" under 8 U.S.C. § 1182(a)(3)(B)(vi)(III), "a group of two or more individuals, whether organized or not," must engage in one or more of the "terrorist activities" described in 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(III). See *supra* Note 59.
 63. USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc), (V)(cc), and (VI)(dd).
 64. USA PATRIOT Act § 411(c)(3)(A) and (B).
 65. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a).

66. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(3) and (5).
67. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 20-22 (1968).
68. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(2).
69. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(7).
70. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(b)(1) and (2)(A)(iii) and (iv).
71. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).
72. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(2).
73. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(6).
74. USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(b)(1).
75. *See Zadvydas v. Davis*, 121 S.Ct. 2491, 2500 (2001).
76. While the USA PATRIOT Act does not explicitly authorize the use of secret evidence in immigration proceedings, its provisions are certain to encourage its use. Since 1996, the INA has explicitly provided for the use of such evidence in removal proceedings before the Alien Terrorist Removal Court. See 8 U.S.C. § 1531 et seq. In addition, the INS has long taken the position that it is authorized to use secret evidence in bond proceedings. *See, e.g., Al Najjar v. Reno*, 97 F.Supp.2d 1329 (S.D.Fl. 2000); *Kiareldeen v. Reno*, 71 F.Supp.2d 402 (D.N.J. 1999).
77. *See Debs. v. United States*, 249 U.S. 211 (1919).
78. *See Korematsu v. United States*, 323 U.S. 214 (1944).
79. Linda Greenhouse, "In New York Visit, O'Connor Foresees Limits on Freedom," *The New York Times*, Sept. 29, 2001, at B5.

Copyright © 2001 Nancy Clark
Reprinted for Fair Use Only.