
FINANCIAL SERVICES

PATRIOT GAMES: COMMON MYTHS ABOUT THE USA PATRIOT ACT

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Editor's note: After 9/11, Congress enacted the USA PATRIOT Act. The Act's provisions have given rise to many allegations about its contents and effects. More than 27 states and 140 local governments have passed resolutions opposing it. On July 30, 2003, the American Civil Liberties Union filed suit challenging some of the Act's provisions. This article is a condensed version of a longer piece the author penned for use by U.S. attorneys and officials at the Department of Justice.

MYTH: Thousands of people were rounded up after September 11, 2001 and detained for long periods of time without any criminal charges.

As the Director of Public Affairs of the Department of Justice recently explained:

"[A]bout 750 foreign nationals" were detained. "Thousands" would imply two or three thousand for which there is no basis in fact. All were in the country illegally, and all were charged with immigration and/or criminal charges. In addition, most of them — approximately 500 to date — have been deported, not "let go" or "released." That an alien was deported rather than prosecuted does not mean that the alien had no knowledge of or connection to terrorism. In many cases, the best course of action to protect national security may have been to remove potentially dangerous individuals from the country and ensure that they could not return."

MYTH: The USA PATRIOT Act permits the indefinite detention of immigrants on minor visa violations.

The USA PATRIOT Act ("PATRIOT Act") gives the Attorney General the power to detain aliens suspected of terrorism and also delineates the process by which detentions are to be reviewed. The AG must certify them as a threat to the national security of the United States. The certification must be based upon reasonable grounds to believe that the alien has or will commit espionage or sabotage; attempt an overthrow of the government; has or will commit terrorist acts; or is otherwise engaged in activities that threaten national security. Following detention, the Attorney General must place the alien in removal proceedings or file criminal charges against the alien. This must be done within seven days following commencement of the detention or the alien must be released. In situations where the alien is not likely to be deported within "the reasonably foreseeable future," the alien "may be detained for addi-

tional periods of up to six months, only if the release of the alien will threaten the national security of the United States or the safety of the community or any other person."

MYTH: The USA PATRIOT Act empowers the government to start monitoring e-mails and web surfing by ordinary citizens.

The PATRIOT Act authorizes courts to issue pen register and trap and trace orders that are valid "anywhere within the United States" and apply to facilities other than telephone lines. The court must have jurisdiction over the crime being investigated and the government must certify that the information "likely to be obtained" is "relevant to an ongoing criminal investigation." With such orders, the government is not permitted to intercept the content of the communication and is restricted to obtaining routing and addressing information. A search warrant issued by a court is required to read the contents of email, if the email message is unopened and less than 180 days old.

MYTH: The USA PATRIOT Act is a present danger to the constitutional rights and privacy rights of library users.

The PATRIOT Act permits an agent to apply for, and the Foreign Intelligence Surveillance Act (FISA) court to issue, a court order to produce "tangible things," which could include the records of library users. It also permits the FISA court to order the installation of pen register or trap and trace devices on wire or electronic communications media, which could include library computers with Internet access and email capability. Contrary to the myth, however, these devices only reveal the electronic addresses of the users of these media; they do not give law enforcement agents access to the contents of communications that are transmitted over them.

A February 2003 report prepared by the Congressional Research Service states: "Moreover, a Justice Department response to House Judiciary Committee questioning suggests that thus far exercise of the authority of Section 215 in a library context has been minimal or nonexistent."

MYTH: The Electronic Surveillance Provisions of the USA PATRIOT Act enables law enforcement to conduct "roving wiretaps."

Prior to the advent of the USA PATRIOT Act, the government was permitted to conduct "roving wiretaps." A court

order authorizing a wiretap did not have to specify the person whose assistance in the surveillance was required (e.g., a specific telecommunications carrier), where the court found that there was “probable cause to believe that the [target’s] actions could have the effect of thwarting interception from a specific facility.” Each time a terrorist used a new phone, the government was required to apply to the FISA court for a new order directing the telecommunications carrier associated with the new phone to assist the government with the wiretap. The USA PATRIOT Act simply amended the Foreign Intelligence Surveillance Act to conform to the parallel provision found in the Federal Wiretap Statute.

MYTH: The USA PATRIOT Act enables the government to conduct large-scale investigations of U.S. citizens for “intelligence purposes.”

The Federal Rules of Criminal Procedure permit the disclosure of grand jury information with other agencies only when “the matters involve foreign intelligence or counterintelligence or foreign intelligence information...to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.” Under the Federal Rules of Criminal Procedure, the federal official to whom the grand jury information is disclosed “may use the information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.”

The USA PATRIOT Act requires that the government must provide the district court with written notice that the disclosure was made and identify those to whom the disclosure was made. Prior to the PATRIOT Act amendments, the government was permitted to disclose grand jury information to other attorneys for the government. No notice of the disclosure to the district court was required.

MYTH: Various provisions of the USA PATRIOT Act violate the Fourth Amendment.

The USA PATRIOT Act added subsection (b) to Title 18, United States Code, Section 3103a. The statute provides that notice of search and seizure may be *delayed* (not eliminated) where:

“(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result;

(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication, or...any stored wire or electronic communication, except where the court finds reasonable necessity for the seizure; and

(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may be extended by the court for good cause.”

An “adverse result” consists of: the endangerment of the life or physical safety of another individual; flight; the destruction of evidence; the intimidation of potential witnesses; or placing an investigation in serious jeopardy. Delayed notification under Section 3103a(b) depends wholly and solely upon judicial approval. The section also provides for delayed notice and not the absence of notice. Section 3103a(b) also comports with the common law “knock and announce” requirement. The constitutionality of the doctrine was upheld in *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

MYTH: The USA PATRIOT Act is unconstitutional.

To date, no provision of the PATRIOT Act has been held unconstitutional.

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