

Patriot Act Redux
Patriot Act II: Huge & Hugely Important
Halls of Justice: A Weekly Look Inside the Justice Department
by Beverley Lumpkin
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WASHINGTON, Feb. 21 -- I guess this seems a couple of weeks late, but as one of my dearest sources pointed out regarding the leaked draft of Justice's proposed "Domestic Security Enhancement Act of 2003" -- great God, it is huge!

It's not just the length of the document, either, but also its awesome scope, and, some say, its audacity.

We've known for months that Assistant Attorney General Viet Dinh, head of the Office of Legal Policy, had been drafting a wish list of new changes to various laws to "tweak" the USA Patriot Act, which was passed in a hurry in the wake of the 9/11 attacks.

And certainly the copy nicely obtained and published by the Center for Public Integrity is stamped "draft." But as one Hill staffer pointed out, this was "clearly not an unpolished product." With its themes and titles, it seems to have been in the works for a very long time.

This Democratic staffer was annoyed that whenever his office had called Justice and asked about the rumors that a draft "Patriot Act II" was in the works, the answer was always "no" -- even right up to the moment that the center published the "draft." The staffer noted that the most cynical view of the proposal is that it was a "draft waiting on a war."

He cited *The Washington Post* editorial as having mentioned two or three changes that are reasonable "and about 37 that are not," but complained there is no balance; you cannot say on-the-one-hand-this but on-the-other-hand-that: "this is not an ambidextrous proposal!"

The staffer cited what he considered to be several overarching themes to the lengthy draft. I am also including below my own comments on certain provisions that particularly struck me; this is by no means an exhaustive analysis, but I hope it's a little more insight than some of the immediate reactions you may have seen.

Expansion of Title III Wiretaps:

This is significant, the staffer maintained, as it marks a sea change from Justice's position of the recent past, in which it concentrated on needed changes to the Foreign Intelligence Surveillance Act (FISA), which authorizes national security wiretaps.

Title III wiretaps are those OK'd by federal judges in federal criminal investigations; such warrants have in the past required a greater amount of oversight and scrutiny than FISA orders that are mainly focused on foreigners. But one of the new provisions would carve out a terrorism exception to Title III, requiring little or no court supervision in such criminal cases.

The warrant's duration would be upped from 30 to 90 days, and the necessity of filing 10-day reports, hated by agents, would be removed. The required notification to the target could be delayed even more easily than it is now.

This development, frankly, surprised me, as I could vividly recall the words of the senior Justice official who briefed us on the attorney general's new FISA guidelines, ultimately upheld by the FISA Court of Review.

This official, several times, had pointed out that there was no need for civil libertarians to become alarmed, because the law still only applied to foreign agents and terrorists; this was not aimed at Al Capone or even Tim McVeigh, he would say, adding that "no red-blooded American criminal needed to fear" its impact. And yet here they are, barely a year later, seeking to change the law so that it indeed could have an impact on such red-blooded crooks.

As the staffer wryly noted, having gotten what they wanted using that argument, now they're coming back for more. Additional wish-list items amending criminal law include:

- authorizing a warrant for one function of a multi-function device (e.g., a cell phone that can send e-mail or includes a calendar) would allow access to all its functions.
- expanding "the types of terrorism crimes for which judges may issue search warrants that are valid nationwide."
- allowing the government to obtain financial information about targets "without issuing multiple time-consuming subpoenas," enabling investigators "to obtain credit reports on virtually the same terms that private entities may."
- federal autopsy authority would allow the attorney general to conduct autopsies of U.S. victims killed overseas; currently the lack of such authority "may significantly delay both the return of the loved one's remains to family members, as well as cause significant delays in the criminal investigation."

More FISA Changes:

But don't worry that FISA is being ignored; there's a whole new round of amendments proposed for that law, most aiming to diminish the court's supervisory role. This is disturbing, the staffer maintained, because during the arguments over the Patriot Act and the attorney general guidelines, the constant reassurance was that the court would still stand as a guardian.

Emergency FISA orders, for example, could be in place for 72 instead of 24 hours before being brought before a judge. Under Section 104, some special national security orders that fall under the "presidential authorization exception" could last up to a year, upon the decision of the attorney general -- not the court.

And here's a change that has a certain resonance with current events: the wartime exception, allowing the attorney general to authorize FISA orders without court approval for up to 15 days during time of war, would be expanded to include periods not just when Congress has formally declared war, but also "to be invoked after Congress authorizes the use of military force, or after the United States has suffered an attack creating a national emergency." (The quotation is from the draft's section-by-section analysis.) [See Section 103]

Increased Secrecy:

The Democratic staffer pronounced this series of changes to be "the most shocking." They include Section 201, which would amend the Freedom of Information Act (FOIA) so that information about aliens detained during terrorism investigations would not be publicized.

The staffer was shocked because, as he noted, Justice has been fighting this very issue in the federal courts, with mixed success. The issue will no doubt reach the Supreme Court ultimately -- but here Justice proposes an end-run around that pesky process. As the draft notes breezily, defending Justice's interpretation "requires extensive Department of Justice resources, which would be better spent detecting and incapacitate [sic] terrorists." Far better to change the law than labor in the courtrooms.

Another proposed change would be alarming to any reporter who has ever covered a grand jury investigation: Section 128 would (in addition to allowing administrative subpoenas issued by an agent rather than by a grand jury in criminal investigations of terrorism) prohibit recipients of subpoenas in terrorism investigations "from disclosing to any other person (except to a lawyer in order to obtain legal advice) the fact that he has received a subpoena."

This gag order on witnesses, who frequently want to talk to reporters, could have a huge impact on public knowledge of these matters. And don't forget, targets are seldom subpoenaed, so we are not talking about safeguarding their rights. Section 206 expands this concept.

Section 202 would allow private companies required to file "worst case scenarios" with the EPA to withhold such information from public release. Section 203 allows Congressional officials to withhold information about compliance with OSHA standards that could include "security-sensitive information."

"The Chutzpah Stuff":

The staffer was plainly outraged about Section 205, in which, in his words, "they have the nerve to create tax breaks for Cabinet members."

This provision would lift the requirement that federal officials "whose movements are restricted, or who are required to use specific facilities, for their physical protection in the interest of the United States' national security -- may be taxed on the value of these protective 'services.' . . . Due to the recent terrorist threats, an increasing and variable

number of government officials -- including Cabinet and sub-Cabinet officers, congressional leaders, and Justices of the Supreme Court -- have begun to receive protective services, and now find themselves taxed on the value of these services."

Section 205 would amend the Internal Revenue Code so that required security measures would be excluded from those officials' gross income. The staffer fumed, "public service is an honor; being protected comes with the territory."

There is actually a somewhat amusing story behind this change. When John Ashcroft first became attorney general (*Newsweek* and I earlier reported), he was furious to learn that he would be required to pay taxes on the value of his security detail's company on his short journeys from his home on Capitol Hill to his office at Justice. At the time, one official told me, "he was being a cheap jerk," because the value of the trip was literally *de minimus*.

However, this source believes that since 9/11 the landscape has shifted so much that the tax is now unfair; "this may actually start biting these guys -- especially the attorney general -- in the a-- now," given how much round-the-clock protection they are now deemed to need.

The final sentence in this section mystified me: "This provision is limited to provisions from appropriate[d] funds to be consistent with restrictions on the receipt of private funds for public purposes, and to ensure that the exclusion is limited to the public security purpose."

But my source cleared up the confusion: The IRS Code is not limited to public officials, but covers everybody who gets portal-to-portal service. So the Justice draft is apparently trying to make sure that this "tax break" will not apply to corporate fat cats or athletic multimillionaires, but rather exclusively to dedicated public servants.

OTHER:

Several other sections caught my eye and piqued my interest.

Section 101 : The very first section would incorporate the proposed Schumer-Kyl amendment, changing FISA's definition of a foreign power to include "lone wolves." This is something the FBI is particularly hot for -- in fact, this week's Intelligence Bulletin to all law enforcement agencies warns of the dangers of "lone extremists" who operate alone or on the fringes of terrorist groups.

Civil libertarians find the proposed change alarming; in testimony last year they pointed out it would stand the FISA, originally aimed at foreign countries and organizations, on its head to have it apply to a single individual.

Subtitle A of Title III governs the creation and use of a DNA database of information collected from suspected terrorists, something that has already been started to some extent.

Section 312 deals with "appropriate remedies with respect to law enforcement surveillance activities" -- i.e., large cities such as New York that have been under court orders for years to limit their surveillance of domestic groups, should have these pesky decrees dismissed.

"This proposal would discontinue most consent decrees that could impede terrorism investigations conducted by federal, state or local law enforcement agencies." The proposed law would sweep away all pre-9/11 decrees, and allow only those "necessary to correct a current and ongoing violation of a Federal right . . ."

Section 401 would amend federal law to "create a new prohibition on terrorism hoaxes." Currently the law is unwieldy in dealing with this problem, which mushroomed during the weeks after the anthrax attacks of fall 2001; the only way to deal with them now is through the "threat" statutes. "But some terrorism hoaxes are simply false reports that cannot easily be characterized as outright threats."

Section 402 would deal with a perceived shortcoming in Justice's current favorite tool against supporters of terrorism groups: 18 USC 2339A, which prohibits providing material support to terrorists.

Although so far Justice has prevailed when defense attorneys have complained about the breadth of prosecutors' interpretation of the law, the proposal admits that the law on the books is "unnecessarily narrow; it currently does not reach all situations where material support or resources are provided to facilitate the commission of 'international terrorism.' Rather, Section 2339 A only encompasses those acts of international terrorism which are prohibited by some other federal statute."

Section 406 would make a "technical correction" to the statute under which would-be shoe bomber Richard Reid was originally charged with (among other counts) wrecking a "mass transportation vehicle." The judge in that case, you may recall, found that "mass transportation" was defined in an adequate (and obvious) way in the U.S. Code, but "vehicle" was not. The judge was forced to agree with Reid that an airplane was not a vehicle. This provision would fix that little glitch.

Section 501 would amend current law on how an American may voluntarily lose his citizenship "to make clear that, just as an American can relinquish his citizenship by serving in a hostile foreign army, so can he relinquish his citizenship by serving in a hostile terrorist organization." This would include both being a member of and providing material support to any group designated by the government as a foreign terrorist organization.

Section 502 misuses the verb "flaunt" when it means "flout," but it would increase penalties for immigration violations.

Section 503 would increase the attorney general's authority to bar aliens or remove them on national security grounds. Section 504 would expand his ability to expedite the removal of aliens convicted of certain crimes.

Prospects:

This proposed legislation is by no means a done deal, even though a Republican administration pushing it through a Republican Congress with a war looming may sound like the best possible atmosphere.

But some House Republicans are annoyed that Justice has refused to respond to its detailed questions about how the first Patriot Act is working. And Sen. Chuck Grassley, R-Iowa, one of the fiercest overseers of Justice and the FBI, had this to say about the draft: "I'm going to be very cautious about that legislation. Quite frankly, I'm not going to be for dramatic expansion of it, even knowing the environment of terrorism I know is now a threat to Americans. I think we need to move very cautiously. And I think we've had about enough expansion as we should have for a while."

Bye For Now

Friday, Feb. 21, marks my last day as Justice Department producer for *ABCNEWS*.

After spending 17 years trying to get a handle on this endlessly fascinating and frequently frustrating beat, on Monday, I will take on the challenge of covering the brand-spanking-new Department of Homeland Security.

I am elated and excited about this new assignment, but I still have many pangs about leaving this department, which I must quite frankly admit I love. I know that sounds corny, maybe creepy. But it's the institution and the folks who maintain it that I love.

I love the courtyard and the murals and the aluminum fittings (and yes, the aluminum statues), but most of all I love and admire the career folks who labor so hard with so little return and even less respect to investigate and prosecute the bad guys. I never cease to be amazed that so many brilliant lawyers would rather Do the Right Thing than earn The Big Bucks. One of the saddest spectacles is the attorney who's been forced by financial need to go into private practice and loathes every minute of it.

Of course I've known brilliant and dedicated political appointees, but they come and go; it's the career people who keep the place standing.

So, before I become completely lugubrious, this is my last column from Justice, but I hope in the time to bring you some information and maybe a little insight from Homeland Security.

Beverly Lumpkin has covered the Justice Department for 17 years for ABCNEWS.

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