

The Patriot Act: Sunset on the Law or Sunset on American Civil Liberties?

A superb symposium was recently published in the *Pennsylvania Bar Association Quarterly*, with respect to the so-called Patriot Act, portions of which will sunset at the end of 2005.

The arguments are many and passionate. Philadelphia is one of over 250 cities and communities which passed resolutions calling for Congress to repeal the law. It is unusual that citizen towns would become enmeshed in complex federal criminal laws, but does show the depth of feelings with respect to this response to terrorism.

Beryl A. Howell, Managing Director and General Counsel of a well-respected Washington D.C. law firm, attempted to expose myths surrounding arguments concerning the Patriot Act in the magazine.

It is beyond the scope of this piece to expose all of those “myths,” but suffice it to say that the authors believe the Act was not rushed through Congress “without due deliberation”. As Howell pointed out, the “antidote to ... skepticism about the USA PATRIOT Act was inclusion of a sunset provision requiring the most controversial surveillance provisions to lapse at the end of 2005.” Those controversial portions of the law regard electronic surveillance changes made to a preexisting pen register statute and the new computer trespass exception to the wiretap law.

Pen registers track the numbers (not content) of all outgoing calls on the telephone. When applied to internet communications, a pen register will collect addressing information on e-mails or header information on data packets, showing where on the internet the user is going. The Act permits the government to get one order when trying to install a pen register rather than having to go to different federal courts around the country. Further, the language of the Act was updated to clarify that pen registers may be used for computer transmissions as well as telephone.

The Act provided a new exception to the wiretap law, permitting government wiretaps where the owner or operator of a computer consents to law enforcement to do wiretap surveillance on unauthorized persons on the system.

The authority of the government to conduct electronic surveillance was expanded in the USA PATRIOT Act by increasing the duration of wiretaps, allowing roving wiretap authority, and changing the standard for use of electronic surveillance where a “significant purpose” rather than a “primary purpose” is to obtain foreign intelligence information. The law retained the requirement of judicial review of wiretap applications and court orders to use pen registers and similar devices.

Congress modified the Administration's proposal on "sneak and peek" language with restrictions that prohibit any seizure of tangible items, unless, in addition to showing probable cause for the search, the government can make a showing of reasonable necessity for the seizure.

The forum in the *Pennsylvania Bar Quarterly* contained an article written by Timothy Edgar, National ACLU Legislative Counsel and Wigold Walczak, Legal Director for the ACLU of Pennsylvania. Those authors look at the same provisions of the Act and find them horrifying. The article points out that the USA PATRIOT Act differs from prior law because it does not include any specific time limit with respect to warrants, but rather allows the delay of notice to be extended for any "reasonable" time period. The Act also permits searches whenever the government shows that notice would "seriously jeopardize" a prosecution or "unduly delay" at trial. Such ambiguity and whittling away of civil liberties is always proven dangerous.

The detractors of the act does include an impressive chart comparing surveillance powers before 911, now, and under an act proposed as an alternative to the USA PATRIOT Act.

One of the biggest concerns under the Act are so-called "library searches." It is true that under the Act as written, it would be conceivable that library and other personal records could be searched. Prior to 911, search orders were available only for certain travel-related "business" records, and presumably not library or personal records, and even then only when the FBI had "specific and articulable facts" connecting records to foreign agents. Now, these orders are available for any and all records, including library records, without individual suspicion.

The final article in the *Pennsylvania Bar Quarterly* publication was written by Joseph G. Poluka, Assistant United States Attorney and Coordinator for the Anti-Terrorism Advisory Council, United States Attorney's Office, Eastern District of Pennsylvania. Joe Poluka (honestly, I am not kidding about his name) thinks the Act is terrific. Why are we not surprised that the U.S. Attorney and the ACLU disagree? Of the three articles, the Poluka article is the most skimpy in terms of addressing the issues. This author seems to agree that there are potentials for danger under the Act, but he says that such dangers are "hypothetical." The authors of the three articles do not seem to disagree (thankfully) about what is in the Act, but rather how it impacts civil liberties. Poluka addresses § 215 of the Act, in particular permitting an investigation to protect against terrorism or clandestine intelligence activities. Under this section, the government may obtain an *ex parte* (without notice to the person being searched) order requiring the production of any tangible things, such as books, records, papers, and other documents. This is the so-called "libraries provision" objected to by the ACLU and others. The U.S. Attorney defends this provision by saying that grand juries can utilize subpoenas to do the same sort of intrusive searches. It is asserted that there must be a bona fide grand jury investigation regarding federal crimes where grand juries do issue such subpoenas. The U.S. Attorney then states, "The standard is admittedly a low one...."

Only the public can ultimately decide whether The Patriot Act should be reenacted *carte blanche*, whether it should be modified, strengthened, or weakened

A free society will always have the difficulty of determining whether it should act like the terrorists that it is trying to eradicate, or whether it should set an example to the world of how freedoms are to be enforced. The question is a difficult one, but worthy of great public debate.

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