

WHAT PATRIOT II PROPOSES TO DO
Prof. David Cole, Georgetown Univ. Law Center
February 10, 2003

The Bush Administration's draft Domestic Security Enhancement Act of 2003 would radically expand law enforcement and intelligence gathering authorities, reduce or eliminate judicial oversight over surveillance, authorize secret arrests, create a DNA database based on unchecked executive "suspicion," create new death penalties, and even seek to take American citizenship away from persons who belong to or support disfavored political groups.

Here are a few highlights:

1. **Secret Arrests.** Section 201 would authorize secret arrests, overturning a federal court decision requiring the government to disclose the identity of persons it has detained in the September 11 investigation. This provision would mandate that all arrests in connection with "international terrorism" investigations be secret until an indictment is filed. Never before in our history have we permitted secret arrests.

2. **Ending Consent Decrees Against Illegal Police Spying.** Section 312 would automatically terminate any consent decree governing police spying abuse that was entered before September 11, 2001, no matter what the basis of that decree. It would essentially eliminate consent decrees for the future with respect to police spying, and place substantial restrictions on judicial injunctions.

3. **Unchecked Deportation Authority.** Section 503 would give the Attorney General unchecked power to deport foreign nationals, including lawful permanent resident aliens, whenever he determines that their presence is inconsistent with our "national security," which is defined to include "economic interests" or "foreign policy." The D.C. Circuit has already held that courts cannot review what actions violate our "foreign policy," and therefore this would give the Attorney General license to deport any foreign national of his choosing.

4. **Stripping Citizenship for Political Associations.** Section 501 would seek to strip citizenship from persons for their political associations. It would provide that even activity that is currently *legal* to engage in – such as belonging to or supporting the lawful activities of a group designated "terrorist" by the Attorney General – would be presumptive grounds for losing one's citizenship.

5. **Bypassing Judicial Oversight.** Section 103 would authorize the Attorney General to bypass the courts altogether for Foreign Intelligence Surveillance Act searches and wiretaps whenever Congress has authorized the use of force. Section 128 would allow government to bypass grand juries for subpoenas in terrorism investigations. Section 126 allows government to bypass courts or grand juries in seeking access to credit reports.

6. **DNA Database for "Suspected" Terrorists.** Section 301-306 would authorize

creation of a DNA database on “suspected terrorists,” expansively defined to include mere association with suspected terrorist groups, and noncitizens suspected of everyday crimes or of having supported any group designated as terrorist.

7. **Eliminating Privacy Protections for U.S. Citizens.** Section 107 would eliminate protections in the current FISA law for U.S. persons (citizens and lawful permanent residents). It would allow the government to get pen registers on U.S. persons for any foreign intelligence investigation, without regard to any criminal or terrorist nexus.

8. **Collapsing Distinction Between Domestic and International Terrorism Investigations.** Section 121 eliminates the distinction between international terrorism and domestic terrorism. The reason for that distinction has been that domestic terrorism is a crime, and should be treated as a criminal matter, while international terrorism is both a crime and a matter of foreign intelligence. As a result, international terrorism investigations have used broader surveillance under looser restrictions than domestic terrorism investigations, which are subject to the traditional restrictions that apply to all criminal investigations.. This bill would eliminate that distinction, treating wholly domestic criminal acts and conspiracies as subject to the same authorities that extend to foreign intelligence gathering.

9. **Access to Credit Reports** Section 126 would give federal law enforcement authorities access to credit reports on the same basis as private companies. Historically, law enforcement access has been more limited, because of concerns that law enforcement is more susceptible to serious abuse than private companies. This provision would eliminate that distinction.

10. **Secrecy.** Section 128 and 206 impose gag orders on persons subjected to terrorism investigations. Section 204 would presumptively give the government authority to make secret presentations to courts in criminal cases related to the Classified Information Procedures Act.

11. **New Death Penalties.** Section 411 creates new death penalties for certain terrorist offenses.

12. **Extradition Without Treaty.** Section 322 authorizes extradition even where there is no treaty authorizing and setting criteria for extradition.

13. **Expedited Removal for “Criminal Aliens.”** Section 504 has nothing to do with terrorism whatsoever. It creates an “expedited removal” process, radically limiting judicial review, for any foreign national convicted of a wide range of minor and major crimes, irrespective of when the crime was committed. This simply exacerbates the already harsh immigration laws governing those who have committed a crime, and seeks to deprive them of any meaningful judicial review, without any connection to terrorism or national security.