

PATRIOT Propaganda: Justice Department's PATRIOT Act Website Creates New Myths About Controversial Law

ACLU Analysis

A new Justice Department website purporting to “dispel the myths” about the controversial PATRIOT Act in fact creates fresh myths about the law and gives new life to old ones. The following analysis by ACLU national staff attorney Jameel Jaffer explains how. All “myths” in quotation marks represent direct quotes from the Justice Department website.

Myth: **In enacting the PATRIOT Act, Congress “simply took existing legal principles and retrofitted them.” The PATRIOT Act “provided for only modest, incremental changes in the law.”**

Reality: **The PATRIOT Act made dozens of significant changes to the law, including a handful that are truly radical.**

The PATRIOT Act is hundreds of pages long, includes dozens of provisions, and substantially amends numerous federal statutes. Among other things, the PATRIOT Act:

- empowers the FBI to obtain records concerning anyone at all, including people who are not suspected of any involvement whatsoever in criminal activity or espionage, and prohibits organizations that are forced to disclose their records from telling anyone else about it (Section 215)
- for the first time in the country's history, empowers the FBI to disregard the Fourth Amendment's usual requirements – including the probable cause and notice requirements – in some criminal investigations (Section 218)
- empowers the FBI to conduct searches in criminal investigations, however minor the crime, without notifying the targets of the searches until weeks or even months later (Section 213)
- expands the Attorney General's power unilaterally to demand the credit and banking records of anyone at all, including people who are not suspected of any involvement whatsoever in criminal activity or espionage (Section 505)
- introduces a definition of “domestic terrorism” broad enough to include groups like Greenpeace and Operation Rescue (Section 802)

These provisions dramatically expand the power of the executive branch. They cannot fairly be characterized as effecting only “modest, incremental changes in the law.”

Myth: Before the PATRIOT Act, “the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists.”

Reality: The FBI has always had the authority to wiretap terrorists, both under the ordinary criminal laws and under the Foreign Intelligence Surveillance Act.

Laws that have existed for many years authorize the government to wiretap anyone suspected of serious criminal activity, including criminal activity normally associated with terrorism. *See* 18 U.S.C. § 2516.

In addition, since 1978 the FBI has had very broad statutory authority to conduct surveillance related to “foreign-intelligence.” The Foreign Intelligence Surveillance Act (FISA) gives the FBI the authority to obtain a court order allowing it to wiretap any person suspected of being an “agent of a foreign power.” Foreign powers include “group[s] engaged in international terrorism or activities in preparation therefore.”

In other words, the FBI didn’t need the PATRIOT Act in order to wiretap terrorists.

Myth: The “sneak-and-peek” provision is necessary to allow the FBI to conduct investigations “without tipping off terrorists.”

Reality: The FBI already had the power to conduct sneak-and-peek searches of terrorists.

Since 1978, the DOJ has had the authority under the Foreign Intelligence Surveillance Act to conduct sneak-and-peek searches of foreign powers and their agents. Foreign powers include groups engaged in terrorism.

The DOJ characterizes Section 213 of the Act as “[a]llow[ing] law enforcement to conduct investigations without tipping off terrorists.” In fact, the provision can be used in *any* criminal investigation. Nothing prevents the FBI from using the sneak-and-peek provision in connection with the most minor crimes.

Myth: Section 215 of the Act can only be used to obtain “business records.”

Reality: Section 215 is not limited to business records.

The DOJ's web site states that Section 215 of the PATRIOT Act "[a]llows federal agents to ask a court for an order to obtain business records in national security terrorism cases." The site suggests again and again that Section 215 concerns only "business records." In fact, Section 215 authorizes the FBI to order any organization to turn "any tangible thing" over to the government. The provision is much broader than the DOJ now admits.

The FBI could use Section 215 to demand:

- personal belongings, such as books, letters, journals, or computers
- a list of people who have visited a particular Web site
- medical records, including psychiatric records
- a list of people who have borrowed a particular book from a public library
- a membership list from an advocacy organization like Greenpeace, the Federalist Society, or the ACLU
- a list of people who worship at a particular church, mosque, temple, or synagogue
- a list of people who subscribe to a particular periodical

In fact, at a June 2003 hearing before the House Judiciary Committee, the Attorney General himself boasted that the FBI could use the law *even to obtain genetic information*. The DOJ misleads the public by repeatedly referring to the law as a "business records" provision.

Myth: Section 215 "specifically protects Americans' First Amendment rights."

Reality: Section 215 specifically authorizes the FBI to investigate Americans based in part on their First Amendment activity, and to investigate others based *solely* on their First Amendment activity.

The only thing that Section 215 says about First Amendment rights is that United States citizens and permanent residents can't be investigated under the provision based "solely" on their exercise of those rights. What this means in practice is that, if you're a United States citizen, the FBI can't obtain your library records or your medical records or your genetic information simply because you wrote a letter to the editor criticizing the war in Iraq. If the FBI wants to investigate you, they need to base the investigation on something else as well – something unrelated to the First Amendment. This doesn't mean that the FBI has to have probable cause, or that they need to have any evidence at all that you're engaged in criminal activity. The "something else" could be that you were born in the Middle East, or that you took a trip to Pakistan last year. In fact, the "something else" might even be what one or your friends or associates did, if the FBI thinks that records about you will shed light on that person's activities. As long as the "something else" isn't related to First Amendment activity, it can count as a basis for the investigation.

Those who aren't United States citizens or permanent residents don't get even this minimal protection. For example, Canadians in the United States on NAFTA visas can be investigated solely because of the books they borrowed from the library, the websites they visited, or the fact that they belong to the Federalist Society or ACLU.

All of the misrepresentations identified above concern the PATRIOT Act. But the DOJ's website also includes misrepresentations about other post-9/11 measures. One in particular stands out:

Myth: "Over 515 individuals linked to the September 11 investigation have been deported."

Reality: The DOJ imprisoned hundreds of immigrants who had not committed any crime, many of them for months on end, housed many of them with hardened criminals, often effectively denied them access to their families and to counsel, and refused to tell the public who had been imprisoned.

Shortly after the September 11 attacks, the DOJ launched a nationwide investigation that led to the arrest, detention, and deportation of hundreds of Muslim men of Middle Eastern, South Asian and Northern African descent. Almost all of those arrested and imprisoned were accused only of routine immigration violations. Of the hundreds swept up, fewer than a handful were charged with criminal offenses that could fairly be characterized as terrorism-related.

Those detained were often housed in conditions usually reserved for the most violent and dangerous criminals. Some were held in solitary confinement for weeks, even months. They were denied access to their families. They were denied access to counsel. Some were subjected to hate speech by prison guards. Others were physically beaten. According to a report *written by the DOJ's own Inspector General*,

- The DOJ "frequently . . . told people who inquired about a specific September 11 detainee that the detainee was not [imprisoned] when, in fact, the opposite was true."
- One detention facility's "restrictive and inconsistent policies on telephone access for detainees prevented them from obtaining legal counsel in a timely manner."
- "With regard to allegations of abuse, the evidence indicates a pattern of physical and verbal abuse by some correctional officers . . . against some September 11 detainees . . ."
- "[C]ertain conditions of confinement were unduly harsh, such as illuminating the detainees' cells for 24 hours a day."

Over the months that these hundreds of immigrants were imprisoned, the DOJ categorically refused to tell the public who had been imprisoned, or where they were held. To this day, the DOJ refuses to release the names of those who were imprisoned.

The DOJ's web site now lists the treatment of these detainees under the heading, "Anti-Terror Record of Accomplishments." One might ask: with accomplishments like these, who needs failures?