

Legal Briefs

News You Can Use from the City of Oakland Office of the City Attorney

Legal Briefs is a series of essays by City Attorney John Russo to update the community on key projects, major initiatives and important legal developments in the Office of the City Attorney.

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"Patriot Act" — Forgoing Liberty for Safety?

"Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety."

—Benjamin Franklin

In his State of the Union address, President Bush reminded Americans that portions of the controversial Patriot Act will expire next year and warned that "the terrorist threat will not expire on that schedule." That federal and local law enforcement personnel need modern and appropriate tools to defend us from terrorism is irrefutable. But what tools, and at what cost? Some sections of the Patriot Act are worse than useless: they are an assault upon the foundation of American freedom.

A Delicate Balance Between Security and Liberty

This is an era of rapidly changing communication technology. American intelligence-gathering had to be brought into the 21st Century. Yet, no legislation can ever guarantee freedom from terrorist assault. Safety comes at a cost. No one would ever die in a plane crash, perish in an automobile accident, or be injured on a vacation if everyone simply refused to fly, drive or take vacations. Freedom entails risk.

Controversial Provisions

Before we renew the existing Patriot Act or enact Attorney General John Ashcroft's proposed successor, we must evaluate its effectiveness and its impact on our civil liberties. The Patriot Act extends the government's foreign intelligence surveillance powers, for the first time, over potential "domestic" terrorists, including American citizens. Several of its more pernicious provisions attack Americans' most cherished and Constitutionally guaranteed rights and civil liberties:

- Federal agents may conduct surveillance and searches against U.S. citizens without having to show they have "probable cause" to suspect criminal activity. The targeted person is not notified, nor given a chance to challenge the action (Section 218).
- Agents can conduct "sneak-and-peek" secret searches without prior notice in common domestic crime investigations (Section 213). This provision prevents

anyone from challenging a potentially wrongful search. Prior to the Patriot Act, Courts have required law enforcement to “knock and announce” themselves before conducting searches.

- The government now has broad access to any person’s business or personal records, including library records; book-buying habits; medical, marital counseling or psychiatric files; business records; web surfing habits, credit reports and even a person’s genetic makeup (Section 215).
- The government does not have to give notice, obtain a warrant or a subpoena, or show there is probable cause that a crime has been committed. Persons turning over the personal data (such as librarians, doctors, co-workers, or neighbors) are prohibited, under threat of federal criminal prosecution, from ever telling anyone.

Were a totalitarian government to be imposed upon us, its inception would look strikingly like these provisions. History teaches us that such evils almost always begin justified by concerns for public safety and amid general panic regarding foreign threats.

Without judicial safeguards, federal agents could abuse their newly authorized tools in situations neither Congress nor the American public contemplated. Abuses have happened before in this country. And not so long ago.

Rare Bi-partisan Consensus

Watching the State of the Union address, one would think that the renewal and expansion of the Patriot Act was a partisan issue. Not so. In a rare accord, both “conservative” organizations such as the Eagle Foundation and the NRA, and “liberal” organizations such as the ACLU agree that our country’s founders would be aghast at the Patriot Act’s obliteration of the Separation of Powers doctrine. The virtual lack of Congressional or judicial oversight over the Patriot Act has unnecessarily compromised the system of governmental checks and balances.

More than 210 cities, the states of Alaska, Hawaii, and Vermont, and the National League of Cities have expressed deep unease about the Patriot Act. Many local and state law enforcement officials have voluntarily imposed stricter limits on surveillance methods than allowed by the Patriot Act. Increasingly, members of both major political parties question whether the Patriot Act effectively keeps us safe without threatening our individual liberties.

Support Immediate Amendment of Privacy Threat

We should support the bi-partisan effort of Senators Larry Craig (Republican-Idaho) and Richard Durbin (Democrat-Illinois) to repeal the most problematic Patriot Act provisions by introducing the "Security and Freedom Ensured (SAFE) Act of 2002" (S 1709), and Senator Feingold's proposed "Library, Bookseller, and Personal Records Privacy Act" (S 1507) that would limit the Patriot Act's use against libraries and booksellers.

Evaluate Patriot Act Before Expanding Powers

The Bush administration has drafted, but not yet introduced, a new law dubbed "Patriot II" that further expands governmental intelligence powers enabling the government to issue "administrative" subpoenas, without **any** court oversight, to obtain library and other intimate personal records. Enactment of Patriot II or further unexamined expansion of Patriot Act I are clear and present dangers to American liberty, far beyond what any foreign enemies could inflict.

Congress prudently required the Patriot Act's most controversial provisions to "sunset". With bi-partisan support, we should carefully assess the Patriot Act, keep what we need, and scale back its more Orwellian provisions. What a shame if American freedom were to be shackled while Osama bin Laden and his allies still walk free.

Oakland City Attorney John A. Russo is the immediate past President of the League of California Cities and serves on the Board of Directors of the National League of Cities, the oldest and largest national organization representing over 18,000 municipal governments throughout the United States.