

The Domestic Security Enhancement Act (DSEA)

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The U.S. Department of Justice has prepared draft legislation which goes even further than the 2001 PATRIOT Act did to dismantle civil rights protections and checks on executive branch powers provided under our Constitution. The draft bill, dated January 9, 2003 and entitled "Domestic Security Enhancement Act"(DSEA), appears to be in final form. The bill was leaked to the Center for Public Integrity in early February, 2003, and its complete text can be viewed from the Center's website, www.publicintegrity.org. Apparently, the Administration plans to wait to introduce the bill after the U.S. goes to war with Iraq, when there will be less chance of any reasoned debate in Congress or informed opposition by the American people.

While the "war on terrorism" has so far largely been directed at noncitizens, especially Arabs and Muslims, the DSEA makes clear the Administration's intent to target U.S. citizen dissidents as well. The DSEA eliminates or substantially weakens checks and balances that remained on government surveillance, wiretapping, detention and criminal prosecution even after the PATRIOT Act. ACLU Legislative Counsel Timothy Edgar has written a comprehensive analysis of the bill's provisions. The following attempts to condense that 28-page analysis, however, due to space concerns, not all of the provisions are explained in this document.

Title I of the DSEA and a Brief History of FISA

By amending federal statutes to remove checks on government intelligence and criminal surveillance powers, Title I of the bill diminishes personal privacy, reduces the accountability of government to the public by increasing government secrecy, further undermines fundamental constitutional rights of Americans under an already overbroad definition of "terrorism," and seriously erodes the right of all persons to due process of law.

Many of the amendments would be to the Foreign Intelligence Surveillance Act, or "FISA." Congress passed FISA in 1978 to address a history of abuse by government agents who placed wiretaps and other listening devices on political activists, journalists, rival political parties and candidates, and other innocent targets. These so-called "national security wiretaps" and other covert surveillance were undertaken without any court supervision and without even the slightest suspicion that the targets of such surveillance were involved in criminal activities or were acting on behalf of any foreign government or political organization. This pattern of abuse culminated in the crimes of Watergate, which led to substantial reforms and limits on spying for intelligence purposes.

FISA actually represented a compromise between civil libertarians, who wanted to ban "national security wiretaps" altogether, and those who claimed that such unchecked intelligence surveillance authority was inherent in the President's Article II power over foreign relations. The Congress chose to authorize intelligence wiretaps without evidence of crime, subject to a number

of key restraints. One of these restraints separated intelligence gathering from criminal investigations. That restraint has already been significantly weakened by the USA PATRIOT Act. This new bill goes even further, essentially undoing all the protections that had been put in place to preserve civil freedoms and prevent a repeat of the wiretapping abuses of the J. Edgar Hoover and Watergate eras.

For example: FISA required that, if the government couldn't show that their target was involved in criminal activity, then they had to show probable cause that the target was acting on behalf of a foreign government in order to wiretap. Section 101 of the draft bill eliminates this requirement for individuals, including U.S. citizens, suspected of engaging in "international terrorism." The bill actually redefines those individuals as "foreign powers," even if they are not acting on behalf of any foreign government or organization.

The DSEA would also permit surveillance of lawful activities of US citizens and lawful permanent residents if they are suspected of gathering information for a foreign power. This amendment would permit, for example, electronic surveillance of a local activist who was preparing a report on human rights for London-based Amnesty International, a "foreign political organization."

Section 106 shelters federal agents engaged in illegal surveillance without a court order from criminal prosecution if they are following orders of high Executive Branch officials.

Section 107 allows the government to use intelligence pen registers and trap and trace surveillance devices to obtain detailed information on American citizens and lawful permanent residents, including telephone numbers dialed, Internet addresses to which e-mail is sent or received, and the web addresses a person enters into a web browser, even in an investigation that is entirely unrelated to terrorism or counterintelligence. In so doing, this section erodes a limitation under USA PATRIOT Act on governmental surveillance authority.

Section 126 gives the government secret access to citizens' credit reports—without their consent or notice and without any judicial process. The government should not have access to sensitive personal information which has been collected for business purposes on the same basis as businesses, because the government's powers — for example, to compel questioning before a grand jury, arrest, deport, or incarcerate — are far greater than the powers of any business.

The overbroad, new definition of "terrorism" under both the PATRIOT Act and Sections 120 and 121 of the DSEA could cover tactics used by some protest groups, making members of those groups subject to criminal wiretapping and other surveillance. Since true crimes of terrorism are already predicates for surveillance under FISA, providing such expanded authority is not necessary to listen to the telephone conversations and monitor the e-mail traffic of terrorist groups. The vague new definition ("acts that are a violation of federal or state law, are committed with the intent of affecting government policy, and are potentially dangerous"), sweeps in the activities of a number of protest organizations that engage in civil disobedience, including People for the Ethical Treatment of Animals, EarthFirst and Greenpeace, and even

some of today's anti-globalization and anti-war activists.

Title II: increasing government secrecy, abolishing public accountability and due process

Section 201 authorizes secret arrests in immigration and other cases where there are no criminal charges. After September 11, 2001, well over a thousand persons whom the government said were connected to its terrorism investigation were detained on immigration charges or material witness warrants without the government revealing who they were or other basic information about their arrests that has always been available to the public and the press. Never before had the U.S. government sought to detain persons within the United States in secret. Indeed, a public process for depriving any individual of liberty is an essential component of the rule of law in a democratic society. As Alexander Hamilton made clear in the Federalist papers more than two centuries ago, a policy that allows "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten" is a "dangerous engine of arbitrary government." "The requirement that arrest books be open to the public is to prevent any "secret arrests," a concept odious to a democratic society . . ." Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969).

Section 202 severely restricts public access to crucial info about environmental health risks posed by facilities that use dangerous chemicals. Under the Clean Air Act [section 112(r), 47 U.S.C. §§ 7212(r)], corporations that use potentially dangerous chemicals must prepare an analysis of consequences of the release of such chemicals to surrounding communities. This information is absolutely critical for community activists and environmental organizations seeking to protect public health and safety, and the environment. Public access to the information also ensures compliance by private corporations with environmental and health standards and alerts local residents to the hazards to which they may be exposed.

The proposed amendment restricts such access to reading rooms in which copies could not be made and notes could not be taken, and excises from the reports such basic information as "the identity or location of any facility or any information from which the identity or location of the facility could be deduced." "Official users" are given greater access, but these users only include government officials, and government whistleblowers who reveal any information restricted under this section commit a criminal offense, even if their motivation was to protect the public from corporate wrongdoing or government neglect.

Section 204 limits an accused's ability to challenge the use of secret evidence by the government to convict him or her.

Section 206 prohibits grand jury witnesses in terrorism investigations from discussing their testimony with the media or the general public, thus preventing them from defending themselves against media speculation or false information about them leaked to the press.

Title III: Back to the McCarthy Era

Section 312 removes checks on local police spying-- checks which are designed to

prevent McCarthy-style governmental persecution based on political and religious activity. Prior to the institution of these checks in the late 1970s, police departments in many cities spied on innocent members of the public who were active in churches, community groups and political organizations. Federal courts, responding to civil rights lawsuits urging an end to such spying, issued decrees prohibiting this spying absent some reason to believe those individuals were involved in criminal or terrorist activity.

The DSEA ends these decrees using language patterned after the Prison Litigation Reform Act. Eliminating these sensible, court-approved limits on local police spying would chill dissent, making Americans afraid to join protest groups and activist organizations, attend rallies, or express their views on controversial policies such as abortion or the war in Iraq.

Furthermore, loosening sensible protections on police monitoring of political and religious activity will not make us safer from terrorism. During the years the FBI illegally spied on individuals exercising their rights under the First Amendment, including such civil rights leaders as Dr. Martin Luther King, Jr., resources were diverted and not a single instance of violence was prevented. Freeing local police to spy on innocent individuals is not likely to be any more productive. It only makes us less safe as resources are diverted from more productive investigations, and less free, as individuals find themselves entered into a police database for activities that are constitutionally protected.

Unfortunately, we already have current examples of police spying on political and religious activity. Recently, the public was made aware that the Denver Police Department had kept approximately 3,048 illegal files on peaceful protest groups including Amnesty International and the Nobel Peace Prize-winning American Friends Service Committee. The file on the American Friends Service Committee labeled them a “criminal extremist” group. These files pre-dated September 11, 2001, and were not collected as a response to the terrorist attacks.

Section 313 grants immunity to businesses that provide information to the government in terrorism investigations, even if their actions are taken with disregard for their customers’ privacy or other rights and show reckless disregard for the truth. This section resurrects many of the same problems with Operation TIPS that led Congress to ban that program last year.

Title III further includes provisions that: undermine genetic privacy by allowing for the sampling and cataloguing of innocent Americans’ genetic information without court order and without consent; remove checks on foreign-directed searches and arrests; and allow for the sharing of sensitive immigration information with local police, without requiring that such sharing of information be connected to anti-terrorism investigations.

In authorizing sharing of sensitive immigration files, DOJ is at odds with the views of many state and local police departments, who fear involvement in immigration enforcement matters may undermine their ability to establish the trust and confidence of immigrant communities. Absent such trust, many local and state police are concerned that members of immigrant communities will fear contacting the police if they are a victim of crime or a witness to crime.

Section 322 allows, on the determination of the Attorney General, a United States citizen or other person to be sent to a foreign country—including dictatorships-- to be prosecuted even if an American judge would find that the extradition request was made on account of his or her race, nationality or political opinions. It allows the government to send Americans and others abroad to face foreign criminal charges in foreign criminal courts for a host of charges without any of the protections that normally appear in Senate-approved extradition treaties, and strips any judge hearing an extradition request of the authority to consider the fairness of the requesting country’s judicial system or its human rights record.

Title IV: Guilt by Association

Title IV’s provisions further criminalize association — without any intent to commit specific terrorism crimes — by broadening the crime of providing material support to terrorism, even if support is not given to any organization listed as a terrorist organization by the government. Under section 402, a person who provides “material support” for “terrorism” as defined under the USA PATRIOT Act, could face a conviction and lengthy prison terms, even if they did not provide any support for an organization listed as a terrorist organization.

As discussed above, the new definition of terrorism is not linked to any specific crimes, but covers all dangerous acts that are a violation of any federal or state law and are committed to influence government policy. See 18 U.S.C. §§ 2331. Under current law, a person, including an American citizen, can only be prosecuted for providing material support for terrorism if the support is provided with the intent to further one of a list of terrorism crimes. A person can also be prosecuted for providing resources to a terrorist organization that is designated by the government under the much broader definition of terrorism that arguably covers some protest groups, but only if such an organization has been designated as an international terrorist organization by the Secretary of State. See 18 U.S.C. §§ 2339B.

In either case, the person effectively has some notice that what they are doing is prohibited: either the activity they support is a crime or the group whose lawful activities they would support has been publicly designated a terrorist organization. The amendment proposed by the DSEA takes away this notice by permitting prosecution for providing support for the activities of an undesignated organization. Keep in mind that the determination of whether to apply the terrorism definition to a particular protest group belongs to the prosecutor who chooses to invoke the new criminal definition.

Section 411 creates 15 new death penalties, including one under the new “terrorism” definition that could cover acts of protest such as those used by residents of Vieques Island, Puerto Rico who have been protesting use of their land as a US bombing range. For example, if protesters at Vieques Island cut a fence to trespass on the military’s bombing range, and a bomb killed one of the demonstrators, a prosecutor could charge the survivors with a eligible crime for which the sentence could be death.

Title V: Stripping Americans of Citizenship and Targeting Immigrants

Section 501 would permit the government to punish certain criminal activity by stripping even native-born Americans of U.S. citizenship, thereby depriving them of any nationality at all and potentially relegating them forever to imprisonment as undocumented immigrants in their own country. Among the activities that could be so punished are providing material support for an organization — including a domestic organization — labeled as a terrorist organization by the government, even if the support was only for the lawful activities of that organization.

It is important to note that the Constitution does not give Congress the power to take away from an American his or her status as a citizen—even for participating in crime in a time of war. Certain voluntary acts, such as serving in a foreign army, can be “expatriating acts” that serve to terminate citizenship. However, only if the citizen acts in such a way as to indicate her desire to relinquish American nationality can there exist some basis for a finding that an “expatriating act” has occurred. Moreover, it is the government’s burden to establish that the expatriating act was committed with the intent of relinquishing citizenship. See Vance v. Terrazas, 444 U.S. 252, 261-262 (1980). Section 501 seeks to bypass that burden.

Under the pretext of fighting terrorism, Sections 502 and 505 target undocumented workers with extended jail terms for common immigration offenses [which include unlawful entry (INA §§ 275(a)(1)), reentry after removal (INA §§ 276), and failing to register with the immigration authorities (INA §§ 264(e)] that have nothing to do with terrorism. The primary victims of these provisions will likely be undocumented workers.

Section 503 provides for summary deportations of non-citizens whom the Attorney General says are a threat to national security. Under this provision, any immigrant, including longtime lawful permanent residents, may be expelled from the United States on the unilateral determination of the Attorney General that they are a threat to “national security,” which is defined as “the national defense, foreign relations, or economic interests of the United States.” INA §§ 219(c)(2). A person facing removal under this section will be separated from his or her family and community without having committed any violation of law and without ever knowing the basis of the accusation against him or her. The provision would essentially authorize a repeat of the “Palmer raids,” a discredited episode in the 1920s that involved mass deportations and widespread abuse of the rights of law-abiding immigrants following the fire-bombing of Attorney General Mitchell Palmer’s home.

Immigrants and other non-citizens involved in terrorism are already deportable under current law, and suspected terrorists are subject to mandatory detention during any immigration or criminal proceedings. The purpose of the DSEA’s amendment is to eliminate due process entirely for immigrants, including lawful permanent residents, accused of crimes or terrorism by permitting their expulsion merely on the Attorney General’s fiat. The proposed amendment ignores the fact that the Supreme Court has repeatedly held that non-citizens in the United States have the right to fair treatment under the law. See Zadvydas v. Davis 533 U.S. 678, 693 (2001) (reiterating long-standing constitutional rule that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”).

The DOJ originally asked for this summary deportation power shortly after September 11 in its initial drafts of the USA PATRIOT Act. It was firmly rejected, on a bipartisan basis, by a Congress deeply concerned about the use of secret evidence and core due process in immigration proceedings. It should be rejected again.