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A Constitution Analysis of the Fourth, Fifth, First, Amendment Implications of the USA Patriot Act

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A constitutional Analysis of the 4th, 5th, 1st Amendment Implications of the USA Patriot Act

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Forward:

"Nip the shoots of arbitrary power in the bud, is the only maxim which can ever preserve the liberties of any people." - John Adams

On September 11, 2001, two commercial airliners crashed into the Twin Towers of the World Trade Center in New York City. The result was enormous fires, widespread panic, and evacuees taking their own lives by jumping out of fire-engulfed windows. Life appeared to stand still, as millions of awe-stricken Americans huddled around their television sets and watched in disbelief as the Towers plummeted to the ground. Along with them, plummeted any sense of security previously taken for granted by the inhabitants of what has been called the most powerful nation in the world. On September 11, 2001 that nation was brought to its knees.

The aftermath that followed was no less dramatic, as images of the incident replayed continuously on every media outlet in the country. The country mourned for the most extensive loss of life as a result of a terrorist act in history. The newly elected, and arguably, much criticized President Bush vowed to take action and restore to all Americans their treasured way of life. "We will not allow this enemy to win the war by changing our way of life or restricting our freedoms," he proclaimed (Rutherford Insitute). However, the means he proposed to that end seemed to contradict his promise, and raised questions about the effect of measures the Bush administration deemed as necessary on our civil liberties (Rutherford Institute).

One of these measures, became the Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act, more

commonly known as the USA PATRIOT Act. The Act, passed on October 26, 2001, was the Bush administration's response to the attacks on September 11th, 2001. Drafted to be a tool in the newly embarked upon war on terrorism, the law, which includes 342 pages of new regulations extends the government's surveillance powers. Its intention was to give the government broader powers to monitor suspected terrorists inside the country, but the broad scope of the legislation may implicate the rights of all citizens, from unemployed single mothers to top executives of the nation's largest and wealthiest corporations. One of the areas where the PATRIOT Act causes especially grave concern is in the realm of higher education, where mediums and forums for open and unobstructed communication are essential.

This project will first examine the First, Fourth and Fifth Amendment implications for all members of society. It will then discuss and analyze specific rights that may or have been threatened in the context of higher education and academia. The analysis will proceed by examining the apparent conflict between the implementation of a practical plan for national security and the preservation of individual civil liberties. I will provide resolutions to the problem proposed by various groups and individuals. The project will conclude by analyzing the consequences for civil liberties in the United States in the wake of September 11th and other terrorist attacks.

History of the USA PATRIOT Act:

Since the terrorist attacks of September 11, 2001 the federal government has taken several measures aimed at preventing future attacks on American soil. The Bush administration created the Department of Homeland Security to "prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and

minimize the damage from potential attacks and natural disasters" (DHS). The Department of Justice, which, in cooperation with the FBI and CIA, is charged with monitoring, capturing and prosecuting potential terrorists within the territorial United States requested that lawmakers loosen some of the procedural restraints that the Department argued have handicapped the process. What emerged, was the USA PATRIOT Act – a comprehensive piece of legislation which minimally alters key provisions of existing laws to provide federal authorities with tools required to "detect and prevent" terrorism (DOJ).

In the wake of the terror attacks, government was under severe pressure to restore a sense of security to the nation. The emergence of counterterrorism bills in the days and months following the attacks can be attributed to the determination of government officials to instill in citizens an assuredness that the United States would be victorious in the war against global terrorism (Davis, 3). The Department of Justice asserts that the USA PATRIOT Act finally gave law enforcement the necessary tools to combat terrorism (DOJ). Evidence suggests that law enforcement officials has sought these tools for years, but were overtly denied by Congress. Concerns that the measures sought were "overly intrusive and possibly unconstitutional" were cited as the reason for the denial (Davis, 8). After September 11, the Department of Justice repeated the request, noting that extreme measures were likely to be necessary to contain the spread of terrorism and prevent future attacks. Attorney General Ashcroft made the statement that "we're going to do what we need to do to protect the American people" (Davis, 5). Assuring Congress that an expansion of governmental power would be necessary to effectively combat terrorism, the Bush administration pushed the USA PATRIOT Act

through both houses at record speed. The three hundred forty two page Act passed by a vote of 98-1 in the Senate and 357-66 in the House just forty-five days after the attacks on the Twin Towers and the Pentagon (Davis, 5).

According to the Department of Justice website dedicated solely to the USA PATRIOT Act, the legislation benefits government in its counterterrorism efforts in several ways. It enables law enforcement officials, in the course of a terror investigation, to make use of tools that were previously limited to investigations involving organized crime and drug trafficking. It allows agents to use a wider range of surveillance tools in their effort to combat terrorism. Delay of notice regarding such surveillance prevents terror suspects from being aware of an ongoing investigation against them. The DOJ further contends that the Act promotes a more comprehensive system of information sharing and cooperation between agencies taking part in the war against terror (DOJ). Yet many liberal and conservative groups alike contend that while the legislative intention is noble, the USA PATRIOT Act facilitates an abuse of power that can and will lead to the erosion of rights and civil liberties at the core of American democracy (ACLU). The Department of Justice goes to great lengths to dispel what it calls "myths" about the PATRIOT Act. It assures the American people once again that the tools and powers given to law enforcement officials are not only necessary to defeat terrorism, but are also a codification of already existing legal custom and precedent. The DOJ insists that it is not interested in the phone conversations or library habits of law-abiding American citizens. Rather, it seeks to use its newly-acquired surveillance powers to track, monitor and prosecute those individuals whose terrorist ties pose a great danger to America (DOJ).

Expansion of governmental powers during time of war is not a concept that is new to America. In fact, legislation very similar to the PATRIOT Act, passed during the Cold War era resulted in what is now considered some of the most blatant civil liberties abuses in recent American history. For example, the First Amendment right to association was severely undercut during the early part of the twentieth century. Political association, particularly that which was based on the tenets of communism, was routinely prosecuted by the justice system. Despite the constitutional right to choose one's political association, many United States citizens and permanent residents were jailed for their adherence to radical communism and socialism. As late as 1961, the Supreme Court upheld a conviction of a U.S. citizen who was prosecuted under Section 2 of the Smith Act (*Scales v. United States).*. The act made it illegal to be a member of the Communist Party. In order to maintain the constitutionality of the Act, the Court had to read it narrowly, interpreting it to mean that membership would only be illegal if there was specific intent to bring about violent revolution against the US government. The four dissenters, Black Douglas, Warren and Brennan charged that the majority opinion had, in effect, legalized guilt by association (Stephens, 460).

In the 1919 landmark case of *Schenck v. United States,* regarding rights of free speech and association, the Supreme Court upheld a conviction of a member of the Socialist party who circulated leaflets encouraging recipients of those leaflets to boycott the military draft for World War I. The leaflet asserted that a mandatory draft was a direct violation of the Thirteenth Amendment. Although Schenk was blatantly critical of the war, he advocated peaceful measures, such as the circulation of a petition, to encourage legislators to appeal the draft. Despite this non-violent approach, Schenck's

action was interpreted as posing a "clear and present danger" to national security (Stephens, 433). The High Court unanimously upheld Schenck's conviction. Justice Wendell Holmes observed that, "when a nation is at war many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured as long as men fight, and that no court could regard them as constitutional" (Stephens, 433).

It is important to note the context of the *Schenck* decision. The ruling came down during a time when "there was widespread concern about the specter of international communism" (Stephens, 433). The Court rejected an absolutist view and interpretation of the free speech guarantee of the First Amendment, citing that there are situations in which speech that normally falls within the scope of protection may be abridged by the government. In a phrase that rings through the decades, Justice Holmes reasoned that, " the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, causing panic" (Stephens, 432). Within the Schenck decision, the High Court articulated the *clear and present danger* test, citing that "the question in every case is whether the words used are in such a circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent" (Stephens, 432). The government, with powers granted by the Constitution indeed has the right and obligation to take measures necessary to ensure national security. While considerations of individual's freedoms are important, there are instances in which government may make the case that there is legitimate reason to believe that, in a particular instance, the government's duty to ensure domestic security outweighs an individual's right to

communicate a message that may be counterproductive to the government's efforts. In such cases, government, employing the *strict scrutiny* standard, has the right to limit speech or punish a speaker whose message has already been communicated.

Striking a balance between civil liberties and national security is a task assigned to the courts. Traditionally, in reaching a decision regarding the constitutionality of a provision that attempts to limit the freedom of association, courts weigh the interests of the individual against the interests of national security. Generally, in order to abridge the freedom of association, or any other constitutionally recognized right, government must prove that is has a compelling justification for the limitation (Stephens, 462).

According to critics of the legislation, the USA PATRIOT Act raises a number of constitutional questions that would not survive the scrutiny of the balancing test employed by the courts. Its broad-sweeping scope, while intended to monitor and counter terrorist activity, implicates a number of constitutionally protected rights for Americans in all realms of society. While the extensive law provokes numerous questions and criticisms, I shall limit my observation to what have been considered to be some of the more controversial constitutional questions. These include sections of the act which raise First, Fourth, and Fifth Amendment questions.

First, Fourth and Fifth Amendment Imlications:

The First Amendment to the United States Constitution guarantees the rights to freedom of religion, speech, assembly/association, and the press. The PATRIOT Act, directly and indirectly threatens a number of these freedoms. The following analysis will focus primarily on the constitutional implications for the First Amendment freedoms of association and petition.

The USA PATRIOT Act, according to its critics, may limit or at least redefine the freedom of association by redefining what acts constitute domestic and international terrorism. Section 411 (the specific provisions of which shall be discussed in more detail later in the analysis), broadly expands the definition of terrorism to include activities that "involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended to intimidate a civilian population; to influence to policy of the government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States" (Rutherford Institute, 4). Section 808 goes further to include virtually any activity that "results in any federal crime of violence" (PATRIOT Act). The ACLU, the Rutherford Institute, and other groups concerned with the protection of civil liberties find this definition to be broad enough to implicate non-terrorist groups that take part in civil disobedience or protests. The ACLU reports that in Minnesota a local sheriff declared that student groups like "Students Against War," "Anti-Racist Action," and "Arise!" are potential terrorist threats (ACLU). Such designations, the ACLU argues, not only erode the right of association guaranteed by the First Amendment, but are also an indication of the governmental abuse of power authorized by the PATRIOT Act.

The power to designate groups as "terrorist" is assigned to the Attorney General. He may make such designations on the basis of classified evidence, therefore, the public and the group implicated may never learn why the organization was so labeled. The Attorney General defends the lack of public disclosure, citing that the release of such information may jeopardize national security (Davis, 6).

The methodology used to label groups has been scrutinized by many civil liberties groups and journals. According to the *Journal of Church and State,* the concept of engaging in terrorist activity has been unnecessarily expanded to include:

> "...the provision of material support or solicitation of membership for an organization designated as terrorist even though it also engages in a legitimate political and humanitarian purposes and the activities in question are targeted to those "legitimate" ends. In other words, a person could quite innocently contribute to a non-profit organization's relief effort without knowing that another subgroup of that organization is plotting or has already perpetrated an act defined within the government's expanded category of "terrorist activities" (Davis, 6)."

The *Journal* further asserts that the newly expanded definition could be used to impose guilt by association. For example, if two members of a church, without the knowledge of the remainder of the congregation, carry out a bombing on an abortion clinic, in which a federal agent is killed, the entire church could be labeled as a terrorist organization within the parameters of the new definition (Davis, 7). The possibility of such prosecutions causes concern on the part religious communities:

> "The provision of the Patriot Act that expands the government's surveillance powers, along with the Attorney General's stated disregard for religious boundaries formed by the First Amendment, creates a situation in which the government has acted preemtly to eliminate constitutional barriers that might limit

it reach in future investigations. Religious institutions might well be the target of some of those investigations (Davis, 7)."

A person accused of contributing to terrorist activities in such a manner has the burden of proof. He must demonstrate that he was not aware of the terrorist activities or that he should not have reasonably known that the act would further terrorist activity. This provision is more likely to be applied to non-citizens as well as in cases where it may be argued that the suspension of due process is necessary to ensure national security (Davis, 6).

Under provisions of the act, the government expands its power to allow the monitoring of religious gatherings and activities that the government deems suspicious. This expansion has the most serious implications for people of Arabic decent who adhere to the practices and teachings of Islam, as they are the most likely groups to attract allegations concerning ties to terrorist activities.

Further eroding civil liberties held by many citizens as the cornerstone of American democracy, the implementation of numerous provisions of the Patriot Act threatens to brand those who speak openly against government policy as un-patriotic and un-American, thus discouraging citizens from exercising their right to petition government for a redress of grievances. The legislative history of the Act indicates that Congressional members may have been pressured by the Department of Justice to approve the most controversial portions of the Act, despite their concerns of infringing on civil liberties (Insatiable Appetite, 10). During his testimony in front of the Senate Judiciary Committee on December 6, 2001, Attorney General Ashcroft outraged civil liberties groups with his "if you are not with us, you are against us" rhetoric:

> "Those who scare peace loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends (Insatiable Appetite, 10)."

Although Attorney General Ashcroft may have intended to silence his critics, interest in issues concerning the constitutionality of post-September 11th legislation intended to provide the federal government with proper tools to ensure national security has only risen (Insatiable Appetite, 11). Some have even drawn parallels between such legislation and the Smith Act passed in connection with the Red Scare (UT Lecture).

The PATRIOT Act also raises a number of Fourth Amendment concerns. Perhaps the most controversial provisions of the act are those that are associated with Fourth Amendment issues of search and seizure. The act delegated to the CIA and FBI powers which enable it to conduct "sneak and peek" searches, without obtaining a warrant prior to the administration of the search. These federal agencies also received clearance to acquire personal information about individuals, often without their prior consent or knowledge. With recent advances in technology, mediums of communication have expanded rapidly. The PATRIOT Act allows government to monitor these channels by authorizing access by the federal government to citizens' internet activities, voicemail contents, and telecommunications information (Search and Seizure).

The Fifth Amendment guarantees citizens the right to a trial by a jury of their peers. Under the Federal Rules of Criminal Procedure, those juries' deliberations are to remain secret. The PATRIOT Act amends this provision to mandate disclosure of

information that relates to foreign intelligence and national security. The act further calls for the establishment of military tribunals for citizens and non-citizens accused of "terrorism." The provision essentially eliminates individuals' rights to indictment by a grand jury (Rutherford Institute, 15).

One of the Fifth Amendments most important and cherished protections is the right to due process of law. This protection is also minimized by certain portions of the PATRIOT Act. Section 412, for example, allows, with the approval of the Attorney General, for the indefinite detention of non-citizens that he has "reasonable grounds to believe" may be "engaged in any activity that endangers the national security of the United States." With no legal remedies available to them, those detainees accused of immigration violations may be held indefinitely (Rutherford Institute, 23).

Further eroding rights associated with criminal procedure, the PATRIOT Act eliminates the long standing custom of almost absolute confidentiality between an attorney and his client. This rule was added by Attorney General Ashcroft, bypassing the traditional notice and public comment provisions mandated by the Administrative Procedures Act. While most other provisions were said to target "terrorism," this portion of the act actually allows monitoring of attorney-client conversations and correspondence in all cases where the Attorney General may suspects that the detained individual may commit or facilitate "acts of violence." The broad definition of "acts of violence" has led critics to believe that the monitoring may extend to a large percentage of federal prisoners. Even the American Bar Association has critiqued this as a blatant violation of the right to counsel provided by the Sixth Amendment. According to research by the Rutherford Institute, the nearly one thousand detainees accused of

connections with the September 11th attacks have been discouraged from seeking legal representation of have had that right simply denied to them (Rutherford Institute, 4).

USA PATRIOT Act and the Constitutional Right to Privacy:

While much of the concern about the PATRIOT Act for non-citizens deals with procedural due process, an area of grave concern for citizens is the retention of the right of privacy. Although the Constitution of the United States makes no direct mention of the right of privacy, it is indeed a right that is held by many as an intrinsic component of American political culture. Because the word "privacy" is not mentioned in the Bill of Rights, courts were left with the task of inferring such a right from the framework of rights that is specifically addressed in the Constitution. The right of privacy is generally associated with the search and seizure provisions of the Fourth Amendment, it falls under the penumbra of the right of association found in the First Amendment, the prohibition against quartering soldiers in private homes found in the Third Amendment, the Fourth Amendment's right to be secure in one's person, house, papers and effects, as well as the Fifth Amendment's protection against self-incrimination. These "zones of privacy" were coined by Justice Douglas, who wrote for the Court in the landmark case of *Griswold v. Connecticut* (Legal Information Institute).

Groups like the American Civil Liberties Union believe that the passage of the USA Patriot Act in the wake of the September 11th terrorist attacks, poses a significant threat to the traditional legal interpretation of the right of privacy. They assert that the expansion of government discretion and power with regard to its counter-terrorism efforts undermines the "zones of privacy" asserted in *Griswold.* Specifically, many civil liberties groups are concerned with the effects of the new legislation on an

individual's ability to execute their First Amendment right of association and embrace Fourth Amendment protection against anwarranted search and seizure. The ACLU employs the slippery slope rhetoric to suggest that any infringement on the aforementioned rights sets a dangerous precedent for the future of civil liberties. It calls for a balance between the needs of law enforcement in terror investigations and the security of civil liberties for ordinary citizens. Purporting that the USA Patriot Act fails to achieve such a balance, the group insists that before the government takes measures to suspend or limit rights it must conduct an analysis of the costs to individual liberty and the benefit attainted by such costs:

> "Before it may scrutinize such personally sensitive materials as medical records, school records, banking records, or individuals' internet use, the government should demonstrate in a particularized fashion that such scrutiny is necessary to achieve safety. That balance, of course, is embodied in the Fourth Amendment, which prohibits "unreasonable" searches and seizures and authorizes the government to intrude on privacy only upon a finding of probable cause by a neutral judge" (Insatiable Appetite, 12).

Disclosure of Private Records:

Student records, which may include sensitive information such as a student's health and financial histories, are generally deemed private. Universities are limited to being able to release only directory information about individual students. Directory

information includes a student's address and phone number. With the increased use of the internet as a mode of communication, email addresses for students are often regarded as directory information and are released when a request is made (Department of Education).

As a safeguard against potential psychological damage inflicted upon students whose private records may have been released without proper authorization, Congress passed the Family Educational Rights and Privacy Act of 1974, commonly known by the acronym FERPA. Under FERPA, student records could be released to federal authorities. The Act required, however, that the authorities requesting the release provide proof of probable cause, as well as an affidavit asserting that the requested records contain information relevant to an ongoing criminal investigation (Rutherford Institute, 26).

Section 507 of the USA Patriot Act amends these requirements, lowering the requirements to be met before information is released. Under Patriot, student records are to be automatically released to federal authorities. The authorities need only provide an ex parte court order certifying that the information requested *may* be relevant to an ongoing investigation of domestic or international terrorism. Substantially lowering the bar for justification of cause, the USA Patriot Act further enables federal authorities to conduct database sweeps, collecting information on large groups of students all at once. Non-residents and students visiting the United States on student visas tend to be the most common targets of such sweeps. The Act, however, does not prohibit the government from conducting such sweeps in search of records belonging to United States citizens and permanent residents (Rutherford Institute, 26).

Section 215 of the USA PATRIOT Act is perhaps the best known of the controversial sections dealing with the release of records due to significant media attention it has recently received. Under this provision, the government's power to obtain information previously deemed private under various acts has increased to unprecedented levels. Suspicion of criminal activity is no longer necessary to secure permission to obtain such information. In fact, there need only be reasonable grounds to assume that the information may aid in an investigation pertaining to terrorist activity (Guide, Part 1). The individual implicated, therefore, may have no direct link to terrorism. The type of records that may be seized is limitless and may include church, financial, travel and library records. It was the Section's alleged application to library records that placed it under media scrutiny. Attorney General Ashcroft denied that this portion of the PATRIOT Act was used to secure information regarding the reading habits of library patrons, but a number of surveys produced evidence that such records had, in fact, been requested by the federal government. Because the new legislation mandates compliance, it is likely that the requests were honored. Inquiries by patrons regarding whether their records were released are, under the threat of prison time for those releasing the information, to be denied (Guide, Part 1).

Laws prior to the passage of the PATRIOT Act offered far more protection for individuals who may not wish for sensitive personal information to be released without their consent or knowledge. The government was obligated to provide at least a warrant and probable cause before such information would be released. These protections were confirmed by the Fourth Amendment, case law, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. These protections were at least partially eroded

with the passage of the Foreign Intelligence Surveillance Act in 1978. This act enabled the federal government to conduct warrantless surveillance only if the primary purpose was to collect information relating to foreign intelligence. Although by establishing that the information sought was "for the purposes of conducting foreign intelligence" and the target was "linked to foreign espionage" as well as an "agent of foreign power" enabled the government to access it, there remained a significant presence of judicial oversight (Guide, Part 1). The FISA judges remain in place even under the new legislation, but the role of their oversight has been significantly decreased with the revisions. The government is no longer required to establish probable cause or present evidence. Even the target of the investigation need not be a terror suspect himself, as long as the government certifies to the judge that it is engaging in an "authorized investigation to protect against international terrorism." Furthermore, the judges have no legal authority to reject the application, and judicial approval becomes more of a formality than a check on governmental surveillance powers (Guide, Part 1).

Due to the secret nature of reports concerning Section 215, it is uncertain how many times it has been implemented and in what manner. The Attorney General is required to provide Congress with a semi-annual report, but the PATRIOT Act only mandates the disclosure of the number of applications sought and granted. He is not required to divulge any additional information pertaining to the manner in which the information was used or the convictions resulting from the records obtained. In response to Congressional inquiries regarding the use of Section 215 to secure records from bookstores, newspapers and public libraries, the Department of Justice indicated that it would send classified answers to the House Permanent Select Committee on

Intelligence, citing national security concerns. This renders information regarding the application of 215 inaccessible to the public. Private citizens cannot know if the Section 215 has been used to obtain their personal records. A study conducted by the University of Illinois, however, purports that at least 545 libraries were asked by law enforcement to release records in the year following the terror attacks of September 11th (ACLU).

There has been significant retaliation against this portion of the PATRIOT Act. The American Civil Liberties Union has filed a suit on behalf of several plaintiffs of Arabic dissent. They allege that the revisions render the Section unconstitutional due to vast expansion of governmental authority to obtain records and "other tangible things of people not suspected of criminal activity." Although this portion of the Act is set to sunset in 2005, it has raised concern among Congressional members. Numerous bills, including the Freedom to Read Protection Act, Protecting the Rights of Individuals Act, and the Library, Bookseller and Personal Records Act, have been introduced to combat the controversial aspects of Section 215 (Guide, Part 1).

Section 505 of the USA Patriot Act deals is similar to Section 215 in that it also deals with the release of personal records by third parties to the federal government. Section 505, however, reaches further in scope, allowing the federal government to compel holders of personal records to release records, providing the holders with nothing more than a "national security" letter. Unlike Section 215, it does not require any probable cause or judicial oversight. Even a rubber-stamped order is no longer required. Furthermore, 505 enables FBI field officers rather than senior officials to

issue the required records. In order to silence the record holders from potentially releasing information regarding the request, a gag order is issued.

Records that may be obtained include "telephone logs, e-mail logs, certain financial and bank records, and credit reports" (Guide, Part 4). The "national security" letter need only certify that the information being sought is relevant to an ongoing terrorism investigation. Records, however, cannot be requested in connection with a criminal investigation.

The only information regarding the application of Section 505 can be found in government records. The federal government refuses to release that information, citing national security reasons. The ACLU, relying largely on the Freedom of Information Act, has initiated a lawsuit against the government, requesting the immediate release of records pertaining to the application of 505. Pages in logs containing the records have been blacked out, and the government has declined to provide further information regarding the request and release of records (Guide, Part 4).

The authority granted to investigative officials to request sensitive personal information not only violates the FERPA, but also disregards students' expectations of privacy with regard to such information. Generally, students assume that their college or university can release only directory information, therefore, the release of medical, financial and academic records is a direct violation of their expectation of privacy. Further, students are denied the right to know whether records containing their personal information have been released. Such a provision opens the door for fowl play; records could unintentionally be released to individuals not qualified to receive them.

Definition of Terrorism and the Right of Association:

In addition to authorizing the request of private records, the USA PATRIOT Act extends the definition of terrorism to one that is vague enough to implicate student activist groups that have no ties to terror whatsoever. Under the heading "Subtitle B – Enhanced Immigration Provisions," Section 411 of the USA PATRIOT Act (refer to appendix) outlines several new and amends preexisting definitions relating to terrorism. The majority of the amendments expand the scope of the Immigration and Nationality Act. For example, in a section of the Immigration and Nationality Act dealing with the designation of organizations as terrorist groups, the PATRIOT Act increases the discretion of the Secretary of State in making such determinations. Under the revision, the Secretary of State may designate any "political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines the United States efforts to reduce or eliminate terrorist activities..." Section 411's revision of the Immigration and Nationality Act also permits the prosecution of individuals who may have unknowingly aided terrorist efforts, by allowing retention of those who "should have known" about the alleged terrorist activity, whether that activity had transpired or was in the planning stages (Rutherford Institute, 4).

Section 802 of the PATRIOT Act deals specifically with the definition of domestic terrorism. It amends the definition provided by Section 2331 of Title 18 of the United States Code to read that an act of domestic terrorism is an act that is

"dangerous to human life that is a violation of the criminal laws of the United States or of any State." The definition is further expanded to include any activity that "appears to be intended" to "incite or coerce a civilian population,...to influence the policy of government by intimidation or coercion," etc. and takes place primarily within the "territorial jurisdiction of the United States" (Rutherford Institute, 4).

These extensions of the definition of terrorism raise numerous questions, specifically in the areas of student privacy, academic freedom and civil disobedience. The new definitions significantly expand the scope of governmental power to monitor student activities and collect information students traditionally expect to be kept confidential. The new definition of terrorism takes within its scope generally lawful activities in which students engage on a regular basis.

Civil disobedience and other forms of protest have been commonplace on university campuses for decades. Student participation in such activities is high and frequent. Many find protest to be one of the most effective methods of communicating a political message. Such communication is essential to the functions of numerous student organizations and groups. Future participation in many types of protest and civil disobedience may be uncertain, due to the criminalization of these activities by the USA Patriot Act. The newly expanded definition of terrorism may be applied to some of the more radical forms of protest in which student organizations engage. According to the American Civil Liberties Union, it is possible, if not certain, that Sections 411 and 802 of the Act may be used to prosecute unsuspecting students who take part in peaceful protests. In fact, the organization cites one instance in which an anti-war

group in Minnesota was described as a potential terrorist threat, under the guidelines of PATRIOT (ACLU.)

If similar prosecutions continue to take place, a chilling effect on student speech could ensue. The federal government, could, in effect, threaten the First Amendment rights of potential student protestors as well as discourage activism within the university community. The effect would be detrimental to the academic, social and political culture of institutions of higher learning. Without ample opportunity to voice their political views through participation in organizations or through the use of protest and civil disobedience, students are likely to become either politically intimidated or politically apathetic. Political apathy among the youngest and brightest minds in the country paints a dismal picture of the future of political participation in the U.S.

Surveillance Powers:

Section 213 of the USA PATRIOT Act deals with yet another controversial topic, the so-called "sneak-and-peak" searches. This portion of the legislation suspends the usual protocol, requiring the government to notify citizens in advance if their property is subject to search. The government may now, acting under authority granted by the PATRIOT Act, search first and notify those implicated at a later time. The change is a result of a revision to the Foreign Intelligence Surveillance Act, which allowed warrantless searches in a small number of cases. Significantly expanding the number of cases that may be subject to probable cause and warrant exceptions, the Act extends the government's authority to conduct "sneak-and-peak" searches from cases pertaining to the collection of foreign intelligence to any criminal search. Without a

warrant or any cause to suspect criminal activity, the government may search homes, without giving prior notification to the homeowner (Rutherford Institute, 14).

Originally, the government was required to "knock and announce" prior to entering citizens' homes for the purpose of conducting a search. The Foreign Intelligence Surveillance Act amended the requirement, by allowing sneak-and-peak searches when an individual was suspected of terrorist. The PATRIOT Act, citing situations in which prior notification may have "an adverse result," extends the exception to any and all criminal investigations and searches. Ex post facto notification must take place within a reasonable time after the execution of the warrant, but an indefinite extension may be granted by a court, provided that "good cause" is demonstrated (Rutherford Institute 14).

Despite the Section's relatively young age, the Department of Justice had reported to the House Judiciary Committee that by May 2003 its provisions had been invoked forty-seven times to delay notification of a search that had already taken place. Each of those requests had been granted by various judicial bodies. Additionally, courts have approved more than a dozen requests to seize tangible property, rejecting only one, suggesting that photographs of the items in question would be sufficient (Guide, Part 4).

Although citizens would eventually be notified of the search of their property, the notification could be delayed indefinitely. Evidence suggests that some periods have lasted 90 days or longer. The provision, unlike many other portions of the PATRIOT Act, will not sunset in 2005 (Guide, Part 4).

Section 214 of the USA PATRIOT Act continues the theme of monitoring and surveillance. It deals with pen registers, which maintain record or phone numbers

dialed from a suspect's telephone. Also addressed by this section of the Act are trap and trace devices that enable the government to ascertain the source of all incoming calls. Although neither method of surveillance reveals the content of the communication, the Patriot Act allows to government to obtain such information without a warrant, as long as it certifies that the information they seek to obtain is "relevant to an ongoing investigation against international terrorism" (Guide, Part 3).

Two standards for surveillance existed prior to the implementation of the Patriot Act. The first of these was Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which, with proof of probable cause, allowed the federal government to use traditional wiretaps. Limitations were significant; warrants were valid only for a period of 30 days and reports back to the court ensured proper judicial supervision. The Foreign Intelligence Surveillance Act, passed a decade later, eroded much of the oversight and lessened the requirements the federal government was to meet before proceeding with a wiretap. The new standard provided that the federal government was no longer required to demonstrate probable cause, but needed to certify that the information sought would aid an ongoing criminal investigation. This standard remains in effect even with the passage of 214. The section only broadens the scope of federal power by extending it to foreign intelligence as well as to criminal investigations. Judicial oversight was almost entirely extracted; "courts may not inquire into the truthfulness" of an allegation before giving authorization (Guide, Part 3).

The number of times Section 214 has been used to authorize wiretaps and pen registers remains uncertain. Attorney General Ashcroft informed the House Judiciary Committee in July of 2002 that this information is classified and would only be released

to intelligence committees. The office of the Attorney General, however, released a statement indicating that the implementation of Section 214 of the USA Patriot Act has made wiretaps and pen registers more accessible as tools in ongoing investigations conducted by the federal government (Guide, Part 3)

The authority of Section 214 is further strengthened by Section 210, which allows federal authorities to request that internet service providers turn over records that include "customer names, addresses, telephone connection records, including time duration, length of service, and source of payment, including credit card or bank account numbers" (Rutherford Institute, 13).

Section 214 is scheduled to sunset in 2005, but fearing the introduction of an even more liberal standard with the anticipated passage of Patriot 2, Senators Lisa Murkowski and Ron Wyden introduced a bill that would significantly tighten controls on the federal government in the use of monitoring as a part of an investigation. The bill called for specific descriptions of the proposed targets and more judicial oversight throughout the process (Guide, Part 3)

In sum, the introduction of Section 214 of the Patriot Act lowers pre-existing standards for obtaining authorization to use wiretaps and pen registers. The Act significantly broadens the scope of governmental power by requiring that the information sought is merely "relevant" to an ongoing investigation (Guide, Part3).

Section 216 expands the jurisdiction of Section 214 authority to "anywhere in the United States" (Rutherford Institute, 11). Formerly orders were limited to jurisdictions specifically designated by the court. To the extent that Sections 214 and 216 apply to internet, the expanded powers allow for the seizure of more types of

information. Whereas, previously, disclosure was limited to standard telephone numbers dialed during a given session, the government may now seek the disclosure of data transmission and URL's (Guide, Part 3).

Judicial oversight is once again limited to rubber-stamp approvals and ex post facto requests for authorization. The Supreme Court has condemned the practice, declaring that it runs counter to the principles of the Fourth Amendment, even in cases involving "domestic threats to national security" (Rutherford Institute, 12). Under the high Court's interpretation of the Fourth Amendment, notification prior to seizure is necessary. Under Patriot Act authority, information is often seized without any notification to the target whatsoever (Rutherford Institute, 12).

Section 206 is closely related to section 214. It deals with wiretaps that do not target just one phone or computer, but all phones and computers that a suspect is believed to use. This type of surveillance can affect numerous individuals not suspected of crimes, if, for example the federal government taps a public computer. This portion of the USA Patriot Act also expands standards previously set up by the Foreign Intelligence Surveillance Act of 1978. Section 206 extends the surveillance to communication "made to or by an intelligence target without specifying the particular phone line or computer to be monitored.(Guide, Part 3)."

Under FISA the federal government was required to specify which phone lines and computers would be tapped. Section 206 lifts that requirement and allows the tapping of any phones or computers that the target may use to communicate. Further, the federal government now has the power to compel anyone to assist it in wiretapping efforts, whereas under FISA it was limited to the help of landlords, common carriers

and other persons specified by the Act (Guide, Part 3). The section may be used to compel internet service providers to release names of those subscribing to their services (Ramasastry, 1).

Section 206 taps are authorized by judges who may permit national wiretaps, rather than taps limited to their jurisdiction. This significantly decreases the role of judicial oversight, as it is difficult for judges to ensure that the taps are being conducted appropriately (Guide, Part 3). The Patriot Act also extends the time period for wiretaps from 90 to 120 days. Attorney General John Ashcroft has cited the following as justification for the extension of governmental power:

> "Our proposal would allow a federal court to issue a single order that would apply to all providers in a communication chain, including those outside the region where the court is located. We need speed in identifying and tracking down terrorists. Time is of the essence. The ability of law enforcement agents to trace communication into different jurisdictions without obtaining an additional court order may be the difference between life and death for American citizens" (Rutherford Institute, 11).

This new measure however, eliminates an important check on the government. It allows law enforcement to present parties with "blank warrants," which do not list the names of the party required to respond on the face of the document. This change in procedure essentially forces the party being presented with the warrant to comply without having proof of its validity.

The Office of the Attorney General has indicated that information relating to the number of times Section 206 has been applied since its passage is classified. Individuals are not likely to know if they have been the target of such surveillance unless the information is used to in court to prosecute them on specific charges. The section, is however, scheduled to sunset in 2005 (Guide, Part 3).

Surveillance powers authorized by the USA PATRIOT Act are blatantly at odds with social custom and legal precedent. United States citizens and residents have a heightened expectation of privacy within their home. They expect the government policy to conform to this expectation. Therefore, when violating that expectation, federal authorities must provide reason for the infringement, as well as notice of the action that authorities will take that will counter this social construct of privacy.

Many American customs and conventions are reflected in the decision-making process of the United States legal system. The right to privacy is no exception. Judicial opinions issued on the matter tend to be in line with the prevailing cultural notions of privacy. There is a lesser expectation of privacy in one's car, for example, than in one's residence. Supreme Court opinions regarding the right of privacy in connection with search and seizure provisions of the Fourth Amendment confirm this fact (Stephens, 575).

Although surveillance of telecommunication was not always considered to be a violation of the Fourth Amendment (*Olmstead v. United States)*, recent developments in technology have judges to recognize that citizens do have an expectation of privacy when they employ electronic means of communication. *Olmstead* upheld the conviction of a bootlegger whose telephone lines had been wiretapped by federal authorities. The

majority cited a diminished expectation of privacy when communicating with someone located outside the citizen's home as the justification for its ruling. In one of the most "forward-looking" dissenting opinions of the last century, Justice Louis Brandies predicted that privacy in telecommunication would, in fact, become a viable Fourth Amendment concern:

> " The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Was may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home...Can it be that the Constitution affords no protection against such invasions of individual security? (Stephens, 574)"

The technological developments, to which Justice Brandeis alluded in his dissent, did in fact transpire. A case during the High Court's 2000 term reaffirmed the Justice's concerns. *Kyllo v. United States* involved the use of thermal devices to determine whether the suspect was growing marijuana in his home. The majority opinion stated "...surveillance is a search and is presumptively unreasonable without a warrant" (Stephens, 575).

The surveillance provisions of the USA PATRIOT Act that enable the government to conduct a search prior to notifying the suspect are in direct opposition to the Court's declaration. Students, whose activities may be monitored under the new surveillance powers granted to the federal government,

are entitled to be notified via a court issued search warrant of a potential search of their residence prior to the commencement of that search. Such a search warrant, according to the Constitution and the Supreme Court, cannot be issued without probable cause. Although some exceptions exists to this warrant requirement, the Supreme Court has generally viewed the probable cause precondition as indispensable (Stephens, 575).

The USA PATRIOT Act blatantly disregards the probable cause and warrant standards mandated by the Constitution and legal precedent, allowing secret courts to issue ex post facto warrants as long as authorities making the search request certify that what is sought to be recovered may be relevant to an ongoing investigation. While time of war concerns about national security may justify a temporary and minimal extension of the scope of governmental power into the realm of individual's civil liberties, the extent to which the surveillance powers delegated to the federal government by the USA PATRIOT Act encroach on civil liberties and constitutional rights is unacceptable.

College students are at an especially high risk of being the targets of surveillance. Regularly participating in civil disobedience, maintaining membership in a politically radical group, doing research on controversial issues, or simply being a national of a country that the Bush Administration considers to have extensive terrorist ties are just a number of things that may place students on a governmental watch list. Because most university students fall within at least one of the aforementioned categories, it is difficult to imagine how any student can avoid being labeled as suspicious and being placed on a list

of individuals who partake in questionable activities. Perhaps maintaining the status quo by supporting all government policy without question, by not participating in any groups with what may be construed to be a subversive political agenda, and not researching politically unpopular subjects is one of the few ways students today can avoid the possibility of having their homes searched, their activities monitored and their constitutional rights suspended indefinitely and without question.

Rights of Non-Citizens:

According to civil liberties groups, some of the most severe infringements on civil liberties authorized by the USA PATRIOT Act deal with the rights of non-citizens and immigrants. Multiple sections of the Act enable the government to deny to non-residents and non-citizens right which the United States Constitution guarantees. The federal government justifies the suspension of these individuals' rights with the need to be vigilant in order to ensure national security (DOJ).

The USA PATRIOT Act jeopardizes the rights of non-citizens and non-residents by making unwarranted distinctions between the procedural due process of members of those groups and American citizens. At one point, since September 11, more than one thousand non-citizens were jailed indefinitely in connection with the attacks (Insatiable Appetite, 12). The detainees had no guarantee that charges would be filed against them or that, if no charges were brought, they would be released within a reasonable length of time (Davis, 5). Those individuals retained by authorities in connection with recent terror attacks have been denied numerous rights traditionally given to citizens, including the right to indictment, right to legal counsel, and the right to a trial by jury (Rutherford

Institute, 17). This suspension of rights in this manner compromises the protections afforded to all persons within United States territory by the Equal Protection Clause of the Fourteenth Amendment (Insatiable Appetite, 12). Stuart Taylor, a conservative columnist who has supported many anti-terror measures taken by the Bush Administration, criticized the Act's treatment on non-citizen terror suspects:

> "Not since the World War II internment of Japanese-Americans have we locked up so many people for so long with so little explanation. It [is] imperative to ensure that these people are treated with consideration and respect, that they have every opportunity to establish their innocence and win release, that they do not disappear for weeks or months into our vast prison-jail complex without explanation" (Davis, 12).

National Security vs. Civil Liberties: A Balancing Act

Taylor, in his critique, is making reference to the detention of Japanese-Americans following the attack on Pearl Harbor. The detention was challenged in the case of *Korematsu v. United States*, and while the High Court sustained the suspicionless relocation of thousands of individuals of Japanese decent to temporary camp facilities, the decision is known as one of the greatest errors in American judicial history. "It is now established that the forced relocation of thousands of Japanese-Americans was not justified on grounds of military necessity and was motivated chiefly by racial animus (Stephens, 190)."

Based on the *Korematsu* case, it is clear that racial and ethnic considerations in the process of determining guilt are not newly-invented, although grossly problematic. "The broad premise for the distinction [between citizens and non-citizens] is that non-citizens pose a threat that American citizens do not" (Davis, 13). That assumption, however, neglects to consider the cases of American Taliban solider John Walker Lindh and domestic terrorist Timothy McVeigh. Further, it can be inferred that while "some citizens are terrorists, the overwhelming majority of non-citizens are not terrorists" (Davis, 13). Citizenship, therefore, does not serve as an accurate and meaningful predictor of one's involvement in terrorist activities.

While it is now the opinion of an overwhelming majority of legal scholars, judges and citizens that *Korematsu* was an unnecessary and gross infringement on civil liberties, current government measures warrant concern with regard to racial and ethnic profiling. A recent study indicates that federal authorities requesting information and records on students of Middle Eastern decent have contacted more than 200 college or university campuses. Some of the students implicated were subject to "voluntary" interviews that were administered without prior notice to the individual (Davis, 13).

The implications, for university students, of the use of determinants such as race, ethnicity and nationality in the process of terror investigations conducted by the federal government are numerous. Because such determinants are not an accurate indicator of participation in activities that may aid terror groups, it is likely that hundreds, if not thousands, of students will become

targets of investigation based simply on either their race/ethnicity or citizenship status. Especially grave concerns exist for students of Middle Eastern origin and/or those who practice Islam, as these appear to be groups frequently targeted by authorities in terror investigations.

The examination of parallels between current treatment of foreign nationals suspected of terrorism and *Korematsu* leads to the pressing question of the role and extent of governmental power during times of war. Do concerns of national security override interests regarding the protection of individual civil liberties? Legislative and judicial history has provided mixed answers. The legislature, citing national security concerns, has on numerous occasions produced laws that were later recognized as having a detrimental effect on civil liberties. The courts, while upholding legislation of that nature during times of war, emphatically deny constitutional protection to such measures during peacetime, charging that individual rights were unnecessarily compromised.

Many provisions of the USA PATRIOT Act are reminiscent of the exclusion order that was challenged in *Korematsu,* the association provisions of the Smith Act, and many other legislative acts and presidential orders that called into question the government's ability to balance adequately providing a sense of national security with the protection of individual rights. The two considerations have proven to be difficult to reconcile, with judicial favor almost always falling toward national security (Stephens, 191).

Current and Future Applications of PATRIOT:

Recent media attention to the practical application of some of the provisions of the USA PATRIOT Act has caused extensive public scrutiny. Many library patrons were outraged when they learned that authorities can and do monitor the reading habits and preferences of thousands of individuals, without proof that these individuals are in any way linked to a terror group or effort (ACLU). While stopping to frequent libraries and arguably erase your name from the list of targets with suspicious reading tendencies may be relatively simple, removing one's name from the so-called "no-fly" list poses a bit more of a challenge. Compiled by TSA, based on undisclosed criteria, the list is a compilation of names of individuals who are deemed a threat to aviation safety. Those who are listed are subject to additional scrutiny and searches at the airport, causing humiliation and delays. Individuals whose names have been placed on the list suspect that it may be due to their "ethnicity, religion, or political activity" (ACLU). At least one of the names appearing on the "no-fly" list belongs to a twenty-two year old college student (ACLU).

Heightened concerns about national security have lead to the passage of a number of provisions that threaten the rights of college students. The PATRIOT Act, which authorizes the suspension or revision of student rights is a clear threat to the continuation of the traditions of democracy and learning prevalent in the culture of almost every institution of higher learning in the United States. Some of the grossest violations of student right come in the form of provisions whose constitutionality has been questioned within the scope of the First, Fourth, and Fifth Amendments to the Constitution.

The PATRIOT Act's authorization to allow the monitoring of students' associational tendencies, paired with the Attorney General's attack on political viewpoints that are not in agreement with current government policy, seriously impair the ability of students to organize, protest and question political agendas freely, without fear of retribution. Compromising the legally recognized right to privacy and violating legal precedent requiring warrants and probable cause, the Act erases a sense of security all people expect in their homes. That sense is further eroded with the release of highly personal information and suspicionless monitoring of telecommunication. While the rights of citizens are arguably limited, the rights afforded through the Constitution to everyone accused of crime on United States soil, may be indefinitely suspended in cases where the suspect is a non-citizen.

The PATRIOT Act imposes such severe measures that students may feel like any action they take may place them in the undesirable position of the target of a terror investigation. Essentially, a fear may arise that "Big Brother" is always watching. Such a fear among students is not only damaging to the political and social culture of university campuses, but also society at large. After all, freedoms of expression and association are integral parts of the unique fabric of American democracy.

Conclusion:

The passage of the USA PATRIOT Act, less than two months after the terror attacks of September 11, was met with overwhelming supports from the Department of Justice and the newly-created Department of Homeland Security. Attorney General Ashcroft and Defense Secretary Rumsfeld have heralded the Act as

one of the greatest steps in the progress of ensuring safety from future terror attacks. Civil liberties groups, such as the American Civil Liberties Union, however, bitterly oppose the legislation, citing concerns that the Act places an unprecedented burden on individual civil liberties. They contend that the USA PATRIOT Act violates a number of Constitutional provisions, including, but not limited to, those found in the First, Fourth and Fifth Amendments.

The PATRIOT Act, through expanding the definition of terrorism, threatens the First Amendment rights of association and petition. Because the more broad definition can be used to implicate citizens engaged in lawful activity or citizens who unknowingly aid terror efforts through association or charitable contribution, the Act limits the protection for freedom of association granted by the Constitution. Further limiting traditional First Amendment protections, the Justice Department's efforts to garner support for the legislation have proven a threat to the right to choose and practice one's political views without government interference.

An examination of the Fourth Amendment implication of the USA PATRIOT Act leads to controversy, specifically with regard to sections dealing with search and seizure, surveillance, and disclosure of personal records. The tools and expanded powers designated to government officials through these portions of the Act are considered by some to be unconstitutional. For example, the American Civil Liberties Union and the Rutherford Institute suggest that the Act's authorization of "sneak and peek" searches are a blatant violation of the Fourth Amendment's protections against arbitrary and warrantless search and seizure. Questions of constitutionality are also raised in regard to the surveillance powers allocated by PATRIOT to law enforcement

officials. While Attorney General Ashcroft insists that the surveillance tools are essential to the prevention of future terror attacks on United States soil, there has been extensive criticism of such an expansion in governmental power.

Implicating the Fifth Amendment right to due process, the PATRIOT Act virtually strips non-citizens of the rights normally given to individuals in legal proceedings against them. Invoking the Act, federal authorities have detained thousands of non-citizens and incarcerated them in temporary holding camps. The detainees, most of whom are held without being charged, have been denied rights to legal counsel, a jury trial, and *habeas corpus*.

A thorough examination of the constitutional implications of provisions of the PATRIOT Act dealing with the First, Fourth and Fifth Amendments leads to the conclusion that the suspension or limitation of individual rights and civil liberties is too costly to the structure of American democracy. As history indicates, infringement on the rights of American citizenry, even in times of war, is often seen as a grave mistake.

The war on terrorism is the traditional conceptualization of war. It is a war that the majority of the time is fought without actual battles. The enemy, like that in the war on communism, is a radical political theory rather than an easily identifiable group of individuals or countries. This situation makes gathering intelligence difficult, and knowing when to expect attacks is almost impossible, making it necessary for government to take extreme measures to ensure the protection of its people. However, the government also has a duty to protect the rights of its citizens and ensure that in these times of uncertainty innocent American citizens do not lose access to their constitutional rights.

Therefore, government ought to examine alternative methods to maintain national security. Narrowly tailoring the scope of legislation like the USA PATRIOT Act to ensure that innocent American citizens would not implicated and could not be denied their Constitutional rights, would strike the necessary balance. Law enforcement officials would have the tools necessary to fight terrorism, while citizens who expect the protection of the United States Constitution would not be denied access to that protection.