



Bill of Rights Defense Committee

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The Homeland Security Act: The Decline of Privacy; the Rise of Government Secrecy

by Nancy Talanian

This summary of the Homeland Security Act focuses on the following three disturbing trends:

- Reduced privacy
- Increased government secrecy and power
- Strengthened government protection of special interests

Reduced Privacy

Amendment IV of the Bill of Rights protects us from “unreasonable searches and seizures.” Warrants must not be issued without “probable cause” and must be specific, “particularly describing the place to be searched, and the persons or things to be searched.”

In May 2002, Attorney General Ashcroft released the FBI from the requirement that surveillance and collection of personal data be based on probable cause. The Homeland Security Act further tramples on privacy rights without judicial oversight, as the following excerpts show.

Note: The Total Information Awareness (TIA) run by John Poindexter is a Defense Department program that predates the Homeland Security Act. An appropriations bill passed by the Senate on January 23, 2003, cut funding for TIA, pending the Pentagon’s assessment of the program’s impact on civil liberties.

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Section	What It Says	Our Concerns
<p>§201: Directorate for Information Analysis and Infrastructure Protection, Subsection (d): Responsibilities of Under Secretary for Information Analysis and Infrastructure Protection</p>	<ul style="list-style-type: none"> • Collects and analyzes not only law enforcement and intelligence information but any “other information from ... private sector entities”; • Distributes the information to Federal, state, and local governments agencies and to the private sector for their use and analysis; • Establishes and uses an “information technology infrastructure, including data-mining and other advanced analytical tools” for collecting, analyzing, and disseminating information. 	<ul style="list-style-type: none"> • Information on all our purchases, banking, travel, and reading may be collected, analyzed, and distributed without a warrant or probable cause or judicial oversight. • The ability to disseminate information broadly, to various governments and to the private sector, raises concerns about privacy and the potential for misuse. • Fourth amendment protection does not apply to personal data in the hands of the private sector.
<p>§202: Access to Information</p>	<ul style="list-style-type: none"> • The Secretary of Homeland Security has access to information from any federal agency, including unevaluated intelligence and electronic databases. • No agency may refuse to turn over the information requested, even if it has not been analyzed. • The Secretary may give “Department officials ... access to it on a regular or routine basis.” 	<ul style="list-style-type: none"> • Increases the potential for broad dissemination of unsubstantiated, incorrect, or inappropriate information. • Increases potential for duplicating errors, making them difficult to correct, thereby causing injury to innocent people. • Gives the Secretary the ability to use any information for purposes other than those for which it was intended.
<p>§225(d): Cyber Security Enhancement Act of 2002 Emergency Disclosure Exception</p>	<p>Gives internet service providers (ISPs) the right to voluntarily turn over to a Federal, state, or local government entity the contents of email communications “if the provider, in good faith, believes that an emergency ... requires disclosure without delay.”</p>	<ul style="list-style-type: none"> • Some have interpreted the government’s assessment that the United States is under continuous risk of a terrorist attack to be sufficient rationale for requesting emails without a court order. • Although it is voluntary, ISPs may not be willing to ignore a government agent’s warning of danger. <i>(Cont’d next pg.)</i>

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<p>§225(d): Cyber Security Enhancement Act of 2002 Emergency Disclosure Exception (Continued)</p>		<ul style="list-style-type: none"> • Government agents may then use activists’ email messages and the “Attorney General’s Edict for Increased Surveillance of Religious and Political Organizations” to spy on them, harass them, or act as agent provocateurs at meetings or rallies. • The broad definition of “domestic terrorism” (“acts [that] appear to be intended . . . to influence the policy of a government by intimidation or coercion”) may be used to describe activists exercising their rights to assemble and to dissent. • There is no judicial oversight or necessity to show “probable cause.” • The provision for reporting disclosures to Congress does not include disclosing customer names.
<p>§225(i) Cyber Security Enhancement Act of 2002 Emergencies</p>	<p>Enables law enforcement to install pen register and trap and trace devices without a court order in the event of “an ongoing attack on a protected computer.”</p>	<p>A “protected computer” is defined as any computer that is involved in interstate commerce or communications, meaning any computer that is used for email or for shopping online.</p>
<p>Title VIII, Subtitle I: Homeland Security Information Sharing Act</p>	<p>Defines how federal intelligence information will be shared. Information includes:</p> <ul style="list-style-type: none"> • Grand Jury information • Information acquired via electronic surveillance 	<ul style="list-style-type: none"> • May give state and local governments security clearance for classified information. • Sharing may be triggered easily because of the overbroad definition of “terrorist” in the USA PATRIOT Act, §802, which may be applied to activists exercising their rights to assemble and to dissent.

Increased Government Secrecy and Power

“A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”

James Madison, 1822

“Democracy dies behind closed doors.”

US District Judge Robert Doumar, 2002

The framers of the United States Constitution set up a system of checks and balances to prevent the concentration of power in any one branch of government and to enable the people to hold their government accountable. In order to keep the government “honest,” the people must know what their government is doing. Accordingly, the **Freedom of Information Act of 1966** was passed to ensure that people had access to unclassified information about what their government was doing. Attorney General Ashcroft’s 2001 edict subverting Freedom of Information Act (FOIA) requests permits federal agencies to ignore many FOIA requests for unclassified information, such as the ACLU’s requests for the names of detainees held for long periods. The Homeland Security Act (HSA) of 2002 further hampers the public’s ability to obtain this vital information.

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<p>§212-§215: Critical Infrastructure Information (FOIA Exemption)</p>	<ul style="list-style-type: none"> • The President or the Secretary of Homeland Security may designate any infrastructure as critical and therefore protected. • Any information about such an infrastructure that a Federal agency may use to assess the security or vulnerabilities of such an infrastructure is exempt from FOIA. • Anyone in the government who discloses such information faces prosecution, including termination, fines, and imprisonment. 	<p>Senator Patrick Leahy has stated that the “overly broad FOIA exemption would...</p> <ul style="list-style-type: none"> • Reduce the incentive to fix the problems and • End up hurting rather than helping our national security. <p>“In the end,” according to Sen. Leahy, “more secrecy may undermine rather than foster security.”</p> <p>In criminalizing leaks of corporate information, the law makes these offenses more serious than leaks of defense information.</p>

Section	What It Says	Our Concerns
§304: Conduct of Certain Public Health-Related Activities; (d) Administration of Smallpox Countermeasures by Health Professionals	(2)(A) “The Secretary may issue a declaration...concluding that an actual or potential bioterrorist incident or other actual or potential public health emergency makes advisable the administration of a covered countermeasure to a category or categories of individuals,” what the countermeasures are, and the effective period.	<ul style="list-style-type: none"> • Gives the Secretary broad powers to require vaccinations to a select group or the entire population without exceptions. • No evidence is required; a hypothetical threat is sufficient.
§871. Advisory Committees (Exemption from Sunshine Act)	The Secretary may establish Advisory Committees and make them exempt from Public Law 92-463 (AKA Sunshine Act).	The Sunshine Act provides exemptions for issues of national security. This new exemption absolves the Secretary from having to provide a reason for keeping meetings secret from the people.

Strengthened Government Protection of Special Interests

Congress passed the **Sunshine Act of 1976** to enable the public to see how the government made decisions. It passed the **Federal Advisory Committee Act of 1972** to limit the influence of special interests on panels. These acts are threatened by several sections of the Homeland Security Act.

Section	What It Says	Our Concerns
§212-§215: Critical Infrastructure Information (FOIA Exemption)	<ul style="list-style-type: none"> • Any person or company that voluntarily submits “critical infrastructure information” to a Federal agency is assured confidentiality of the information and the source. • The supplier of the information cannot face prosecution based on vulnerabilities that the information reveals. 	<p>According to Senator Patrick Leahy, the FOIA exemption “would encourage government complicity with private firms to keep secret information about critical infrastructure vulnerabilities.” In so doing, it could “undermine rather than foster security.”</p> <p>Any corporation that knows of vulnerabilities in its systems, including the results of negligence, can use this law to ensure protection from lawsuits. No corrective action is required.</p>

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<p>§304: Conduct of Certain Public Health-Related Activities; (d) Administration of Smallpox Countermeasures by Health Professionals</p>	<p>(2)(A) “The Secretary may issue a declaration...concluding that an actual or potential bioterrorist incident or other actual or potential public health emergency makes advisable the administration of a covered countermeasure to a category or categories of individuals,” what the countermeasures are, and the effective period.</p>	<p>A requirement for widespread vaccinations may benefit pharmaceutical companies favored by the administration.</p>
<p>§1715 Clarification of Definition of Vaccine-Related Injury or Death</p>	<p>Adds language to indicate that any substance in a vaccine is not “an adulterant or contaminant” if it is “listed in a vaccine’s product license application or product label.”</p>	<p>This section exempts the manufacturer Eli Lilly from lawsuits resulting from injury and death caused by its vaccines, even if the company is negligent. This section is a blow to parents who fault the mercury-based additive thimerosal in injections administered to their infant children for their children’s autism.</p>
<p>§835: Prohibition on Contracts with Corporation Expatriates; (d) Waivers</p>	<p>(d) The Secretary shall waive subsection (a)¹ with respect to any specific contract if the Secretary determines that the waiver is required in the interest of homeland security, or to prevent the loss of any jobs in the United States or prevent the Government from incurring any additional costs that otherwise would not occur.”</p>	<p>The waiver gives the Secretary broad latitude to award contracts to U.S. corporations that have organized offshore to avoid paying U.S. taxes.</p> <p>For example, the Secretary could apply the waiver if such a company claims it would have to eliminate one or more jobs unless it got a certain contract.</p>
<p>§871. Advisory Committees (Exemption from Sunshine Act)</p>	<p>The Secretary may establish Advisory Committees and make them exempt from Public Law 92-463 (AKA Sunshine Act).</p>	<p>The Secretary’s involvement in setting up a task force, such as Vice President Cheney’s Energy Task Force, would avoid the requirement to reveal what the administration discussed with special interests and what it promised to them.</p>

¹ (a) "IN GENERAL - The Secretary may not enter into any contract with a foreign incorporated entity which is treated as an inverted domestic corporation."