

THE PATRIOT ACT AND THE CARIBBEAN

Have Aliens lost their Constitutional Rights?

The **PATRIOT ACT** has led to both scholarly and political controversy in the United States of America.

1. Our world will never be the same after September 11, 2001. The United States is at War with the Taliban Government of Afghanistan and its Al Qaeda faction. A massive coalition of nations have come forward to denounce terrorism and to band together to fight terrorism wherever it exists and in whatever form.

In his State of the Union Address, President Bush reiterated the determination of the United States to take proactive steps, at whatever cost, to remove the specter of terrorism from the face of the earth. He went as far as to name three states as "evil" states that export terrorism.

2. A terrorist attack of the magnitude of 9-11 would normally call for some spectacular reaction from the victim State. The fighting in the Middle East is one example of continued terrorist attacks, which have been met by repeated Israeli reprisals. In the United States the immediate reaction of the Government was that the homeland was under attack and was vulnerable from within. The 19 identified hijackers of the four aircrafts on September 11 were aliens. All these aliens were in the United States in violation of their entry Visas.
3. In protection of the homeland, the US Congress has enacted Legislation in the Patriot's Act and has established procedures for the stated purpose of protecting the homeland. Today I wish to comment on some of the legal issues that have been spawned in the aftermath of 9-11 and their possible effects on the Caribbean Basin.
4. Let me say at once, that although I will be speaking specifically of the **PATRIOT ACT** of the United States, I am aware of Resolution 1373(2001) adopted unanimously by the United Nations Security Council on September 28, 2001 that condemned terrorism, (albeit, without defining the term), and literally directed member states of the United Nations to take positive and far-reaching steps to combat terrorism. I am also mindful of the UK Anti-Terrorism, Crime and Securities Act, which at the Bill stage mirrored the Patriot Act of the United States.
5. One aspect of the **PATRIOT ACT** that has caused great general concern relate to the suspension of habeas corpus.
6. We all grew up under the shadow of Magna Carta. We echoed the shouts of the French in their Revolution for "Life and Liberty" and having regard to the Bill of Rights in the first fifteen amendments of the Constitution of the United States, we were assured of the fundamental rights of Life, Liberty and Property. Personal liberty that we enjoy today is the direct result of the passionate negotiations between the noblemen of England and King John in 1215. The concept of Life, Liberty and Property is directly traceable to Chapter 29 of the Magna Carta.

7. The essential guarantee of due process is that the government may not imprison or otherwise physically restrain a person except in accordance with fair procedures. As we know it, the most important liberty of the human being is the right of personal freedom or immunity from wrongful detention or confinement. Any infringement is protected by the issuance of the writ of Habeas Corpus. When issued, the Judge will immediately call upon the person or authority that is custodian of the individual to produce him/her in Court and to explain the reason for the detention. If there is no lawful reason for the detention the person must be set free immediately. It is a very swift and effective process.
8. Section 236A - is entitled "Detention of Terrorist Aliens". That section of the Patriot Act falls under the Banner General heading "**MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW**". Pursuant to this Section the Attorney General may Certify any alien who is engaged in any activity that endangers the national security of the United States or has committed any one of a series of Immigration offenses. The Attorney General may place such an alien in removal proceedings or may charge the alien with a criminal offense not later than 7 days after the detention. The Attorney may review the detention of such an alien every six (6) months. However, although there is provision for judicial review of the decision of the Attorney General by the Supreme Court, a Judge of the Supreme Court, a Judge of the Court of Appeal of the District of Columbia and any Circuit Judge, the right to Petition for Habeas Corpus by such detainees has been revoked - abolished.
9. The Statute provides that at the end of six months, the Attorney General shall make a report to the House Judiciary Committee and the Senate Judiciary Committee of the number of persons detained, the grounds for detention, the countries from which they have come and the length of detention of each such person.
10. The suspension of habeas corpus for suspected terrorists is a very significant departure from the entrenched, fundamental criminal justice system of the United States. Some critics complain that depriving Americans of this 200-year-old right is a fitting memorial only to the "tragic triumph of politics over substance" as the US Republic enters its third century.
11. The British Parliament adopted most of the provisions in their Anti-Terrorism Act, but stopped short of suspending habeas corpus. It is to be recalled that during World War 11, President Roosevelt issued Executive Order 9066, on February 19, 1942, by virtue of which 120,000 persons of Japanese ancestry were forced into internment without any due process hearings and without provision for appeals. The Patriot Act provisions in relation to habeas corpus have not gone as far as Executive Order 9066. However, Tom Brokaw, in his Book "The Greatest Generation" has called Executive Order 9066 "One of the most shameful documents in American history". History will be the judge as to the "rank" of Section 236A of the Patriot Act on Brokaw's scale of shame.

12. I am concerned that the treatment of aliens in the Patriot's Act may be contrary to the Constitution of the United States. The modern trend of cases decided in the Supreme Court is that the Constitution is "color-blind" and therefore classifications based on race will be invalid unless narrowly tailored to achieve compelling state interest. Legislation directed at aliens fall in a category classified as a "Suspect Class" by the Supreme Court and are subject to strict scrutiny by the Court. A statute that entrenches the notion of "racial profiling" falls in that suspect class and is subject to strict scrutiny by the Supreme Court. In my view, the Patriot Act is such a statute and when it comes before the Supreme Court for interpretation, the provisions relating to the suspension of Habeas Corpus for Aliens will be subject to the most strict scrutiny.
13. I have no indication that any Caribbean nation has suspended the writ of habeas corpus as a direct consequence of September 11. I can readily appreciate the reasons for this. The Caribbean States have written Constitutions with Human Rights provisions, which cannot normally be abrogated by ordinary legislation.
14. It is regrettable that the United States Congress interfered with the hallowed writ of habeas corpus. The objective could be achieved by providing a reasonable time for the processing of a suspected illegal alien, with a provision for a Court Order for additional detention in particular cases.
15. There are in excess of 300,000 persons of Jamaican descent residing in Florida and probably a similar number from the other West Indian Islands, excluding Cuba and Haiti. It is to be recalled that 35 years ago, Jim Crow laws applied in Florida under which Blacks and East Indians could not drink from the same Fountains as Whites in Ft. Lauderdale. I have a reliable report that 2 weeks ago Miramar Police Officers threatened a US born RASTAFARIAN motorist with mandatory internal search. 35 years ago Ft. Lauderdale Police regularly referred to OLDER BLACK MALES as "**BOYS**". I have reliable reports that in the wake of the Patriot's Act, harassment of older Black Male Drivers has commenced again in the same area of Florida. If these stories are true, they reflect the environment that has been created by the Patriot's Act.
16. 80 years ago, Marcus Garvey, now Jamaica's First National Hero, was deported from the US on false accusations. Many Caribbean people are facing similar problems today. Caribbean People are not Terrorists and they should not be treated in this manner. It is common knowledge that many Trinidadians, Guyanese and Jamaicans with "Moslem" names such as "Khan", "Jabbar" and "Muhammad" are being harassed at U.S. International airports since September 11. One is therefore left to ask the question, Is Racial Profiling Back?
17. It must be recalled, too, that many Aliens who have suffered harassment at the hands of US Officials will not come forward and report the same because of their fear of further harassment and detention by the Border Patrol Intelligence Wing.

18. The Taliban and the Taliban government of Afghanistan have been declared terrorist entities alongside Syria, Cuba and North Korea, to name a few. If a country is designated a terrorist state, then anyone can implead that country in the United States Court and the doctrine of sovereign immunity would not apply.
19. Aliens who do not fall in the category of "terrorist aliens" find themselves subject to new procedures in the State of Florida. The example, most prevalently brought to the attention of the Consulates is that of obtaining Florida Driver's Licenses or Florida Identity Cards. Many aliens from the Caribbean have reported that when they applied for renewal of their Florida Driver's Licenses they are extensively interrogated and are required to prove lawful immigration status in the United States prior to the extension of such Licenses. This practice did not exist prior to September 11, 2001 up to which time extension of one's Driver's License, or one's I.D. Card was a formality. The procedural change has no statutory or regulatory authority but has been introduced by the local authorities in an arbitrary manner.

The strong anti-alien flavor of the Patriot's Act has filtered all the way down to the local authorities around the country. In the cities of Broward County, including Lauderdale and Miramar, which have a concentration of aliens and in the entire Miami area, there are numerous complaints of Police Stops of motorists and of extensive interrogation to establish the individual's immigration status in the United States. For many it is a harrowing experience.

20. Caribbean Consuls General have the responsibility to protect the nationals of their country who reside or come into the United States. The United States is a party to the Vienna Convention on Consular Relations, ("VCCR") and all the Consuls accredited to the United States are from countries that are parties to the VCCR. There is one specific area in which Consuls play an important role and that is in respect to their nationals who have been arrested, charged with a criminal offense and incarcerated. A **special Consular Notification Procedure** has been evolved in Florida for Consular Notification and John Atkins as Consul General of Jamaica was involved in the negotiations with the Florida Department of State relating to the enforcement and logistics of the Consular Notification Statutes.

Several Caribbean states have entered into **Bilateral Mandatory Consular Notification Agreements** with the United States. These include, Antigua and Barbuda; The Bahamas; Barbados; Belize; Dominica; Grenada, Guyana, Jamaica; St. Kitts/Nevis; St. Lucia; St. Vincent and the Grenadines; and Trinidad and Tobago.

21. I will say a word about this **Consular Notification Process**. When a foreign national is arrested or detained, he must be advised by the arresting officer or his supervisor, of the right to have his consular officer notified. In some cases, the arresting officer will notify the consular representative, regardless of the wishes of the arrested person's wishes. One example is if the arrested person is a Juvenile. When notified, the consular officer is entitled to have access to the national in detention and to provide him with consular assistance. This may take the form of advising relatives, contacting the home government or putting him in touch with Attorneys who may be able to provide legal assistance.

22. Apart from the notifications that come about on the arrest of a national, if a government official becomes aware of the death of a foreign national, he has an obligation to notify the consular representative of that national. In protection of minors or incompetents, if a guardianship or a trusteeship is being considered with respect to such a foreign national, the consular representative must be notified. Then there is the traditional notification by which all wrecks of ships or crashes of aircraft must be notified to the consular representative.
23. A Consul General is a diplomatic officer under the VCCR and consequently in the course of his official duties he can make representations to City Officials on behalf of nationals of his country. West Indians should therefore feel free to make complaints to their Consulates in specific terms so that these complaints can be taken up at the appropriate local level as soon as convenient.
24. In relation to money laundering, the Patriot Act has done two specific things. American financial institutions are mandated to obtain the identities of the beneficial owners of accounts that they hold as correspondent Banks for financial institutions situated outside of the United States. These offshore Banks must have a Registered Agent in the United States who has authority to accept service of process from US law enforcement agencies and the Secretary of the Treasury. (Section 5318(A)(k)).
25. Under the Long Arm provisions of the Patriot Act - Section 317 - and the Venue Jurisdiction, any district Court in the United States where the Correspondent Bank is located has jurisdiction over a foreign Bank for money laundering offenses. Let me be clear as to how this applies. The foreign bank with a Correspondent Bank in the United States must have a Registered Agent resident in the United States who can accept service of process on behalf of the foreign bank. Therefore, the US authorities do not have to serve process in the foreign country and can commence proceedings against the foreign bank at the place where the Registered Agent is served with the process.
26. I will now move from the specific provisions of the Patriot Act to some of the direct effect of September 11 on the nations of the Caribbean Basin. There is no doubt that in the movement of persons who wished to visit the United States from the Caribbean there has been a slowing down. It is reported that Visa applications are taking twice as long for processing and that persons of East Indian descent are being particularly scrutinized. The reports so far, have been of individual cases, and it will therefore take time to determine if there is a distinct trend in that direction.
27. The tourist industry has been devastated in some of the Islands. I have reliable reports that several hotels in Jamaica closed their doors and sent off staff without pay for 10-12 weeks and only reopened for the Christmas holidays. The hotels that managed to remain open had to offer prices so reduced as to be a give away. Overall, the Islands that depend on North American tourists suffered significant losses.

28. The Caribbean Islands have significant trade intra-region but the bulk of their trade is with the United States. These Islands have been doubly hit. The Airlines have had to expend substantial costs to increase security in both mechanical and human resource and at the same time have seen a down turn in the passenger arrivals. All ships entering the United States have to provide a list of passengers, including crew, 96 hours before the time of entry into US waters. This has caused severe dislocations for some Ships that have a steaming time of less than 4 days to travel to the United States; for example, Ships from Jamaica.
29. There has been the significant Security Resolution 1373(2001) under which the Caribbean countries must enact legislation to prevent and suppress the financing of terrorist activities, including freezing funds and other financial resources of persons suspected of terrorist acts. These countries are invited to actively cooperate with the United States in the war against terrorism including prosecuting to conviction, persons suspected of terrorist activities.
30. What is the way forward? Individuals affected should be encouraged to write to their Congressmen and ventilate their complaints. In this area it does not matter what is the political affiliation of the Congressman. Another strategy is for the alien to make contact with his/her Consulate and to provide a credible account of the incidents. In the most severe cases, there may be sufficient evidence to support a Federal lawsuit pursuant to 42 U.S.C. Section 1983. This suit is available to persons who consider one or more of his constitutionally protected rights have been violated by a law enforcement officer.
31. While we strongly support the security of our homeland, we must never lose sight of individual rights.

The **PATRIOT ACT** may have been an over-reaction with dire constitutional implications.

*Lecture delivered at the University of Miami School of Law Symposium
– “The Caribbean and 9/11” by Professor David P. Rowe.*

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