

How the USA Patriot Act Defends Democracy

A White Paper
by
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Executive Summary

The USA Patriot Act has proven to be one of the most important, and controversial, pieces of legislation passed in recent years. A broad array of critics across the political spectrum has come out against the act. An equally politically diverse coalition supports the Act and the renewal of its main provisions when they expire at the end of 2005. A key criticism is that the Act unreasonably broadens the government's powers of surveillance, violating the First and Fourth amendments of the Constitution. In fact, the Act has assisted counterterrorism by enabling considerable gains in prevention capability through only incremental legal changes. Critics have ignored safeguards against government abuse of surveillance. The Patriot Act strikes the correct balance between liberty and security.

Introduction: Law Enforcement and Law Enhancement

Passed soon after the terrorist attacks of 9/11, the USA Patriot Act¹ is one of the most important legislative measures in American history. The Act enables the government to fight what will undoubtedly be a long and difficult war against international terrorism. At the same time, the Act constrains the government, preventing any government attempt to unjustifiably extend its powers.

Yet the Patriot Act, despite its near-unanimous passage through Congress,² has also become one of the most vilified pieces of legislation in living memory. Critics charge that the Act allows for extensive domestic surveillance of US citizens engaged in peaceful, law-abiding activities, that the Act could potentially turn the US into a police

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state. While some of the rhetoric deployed against the Patriot Act is hyperbolic, the concerns expressed about official surveillance of US citizens are reasonable and should be addressed. The vehemence of many of those who oppose the Patriot Act is a reflection of their attachment to our Constitution, even if, as this paper will argue, many of their fears about government surveillance are unfounded.

Rather than reply to the crescendo of complaints and exaggerated claims in kind, what is needed is a constructive conversation about security and liberty, about the success of our terrorism prevention efforts and the need to protect and defend American freedom. We need to assess the experience of past years to ensure both that officials have the tools necessary to protect us and that there are safeguards to check against misuse of those tools. The national debate will be constructive if we can lower the heat and turn up the light.

The fundamental question facing Americans today is not the false trade-off between security and liberty,³ but rather how we can use security to protect liberty. Any debate over security and liberty must start with the recognition that the primary threat to American freedom comes from al-Qaeda and other groups that seek to kill Americans, not from the men and women of law enforcement agencies who protect them from that danger. That the American homeland has not suffered another terrorist attack since September 11, 2001, is

a testament to the remarkable efforts of law enforcement, intelligence, and homeland security personnel. Their hard work, dedication and increased coordination have been greatly aided by the tools, resources and guidance that Congress provided in the Patriot Act.

To appreciate the difficulty of counterterrorism and the remarkable success of our officials, one need only recount the IRA's statement in 1984 after it had tried unsuccessfully to assassinate British prime minister Margaret Thatcher: "Today we were unlucky, but remember we only have to be lucky once. You will have to be lucky always."⁴

Our counterterrorism measures have not been solely defensive. We have taken the offensive. According to the Department of Justice, the US government has disrupted over 100 terrorist cells and incapacitated over 3,000 al-Qaida operatives worldwide. The Department of Justice has indicted on criminal charges 305 persons linked to terrorism, of whom 176 have entered guilty pleas or been convicted. In addition, the US government has initiated 70 investigations into terrorism financing, freezing \$133 million in terrorist assets, and has obtained 23 convictions or guilty pleas.⁵

Counterterrorism has not just been about law enforcement but also law enhancement. Many of the successes of the police and FBI would not have been possible without the Patriot Act. The Department of Justice wrote to the House of Representatives' Judiciary

Committee on May 13, 2003, that the government's success in preventing another catastrophic attack on the American homeland "would have been much more difficult, if not impossibly so, without the Patriot Act."

Uncle Sam is Not Watching You

What is odd about the current debate over the Patriot Act and its surveillance provisions is that this legislation resulted from considerable informed debate. Contrary to popular myth, the Patriot Act was not rushed onto the statute books. During the six weeks of deliberations that led to the passage of the Act, the drafters heard from, and heeded the advice of, a coalition of concerned voices urging caution and care in crafting the blueprint for America's security. That discussion was productive and the Act benefited from these expressions of concern.

More recently, however, the quality of the debate has deteriorated. The shouting voices are ignoring questions that are critical to both security and liberty. Lost among the understandable fears about what the government could be doing are the facts about what the government actually is doing. Overheated rhetoric over minor legal alterations has overshadowed profoundly important questions about fundamental changes in law and policy.

There has been widespread condemnation of Section 215 of the Patriot Act, the so-called "library records" provision. The debate over Section 215 illustrates how awry the direction of

the debate has gone. Critics have railed against the provision as allowing a return to J. Edgar Hoover's monitoring of private citizens' reading habits. The American Civil Liberties Union (ACLU) has sued the government, claiming that the provision, through its mere existence, foments a chilling fear among Muslim organizations and activists.⁶ Others, more fancifully, have claimed that Section 215 allows the government to act as Big Brother, snooping on innocent citizens in a manner reminiscent of George Orwell's "1984."

These fears are sincere. They are also historically and legally unfounded. Not only does the Patriot Act end the anomaly that allows such records to be routinely seen by investigators in criminal cases while preventing their access by counter-terrorism officials, the legislation provides more protections than usually occurs when records are subject to subpoena. For years, Grand Juries have issued subpoenas to businesses to hand over records relevant to criminal inquiries. Section 215 of the Patriot Act gives courts, for national security investigations, the same power to issue similar orders to businesses, from chemical makers to explosives dealers. Section 215 is not aimed at bookstores or libraries. Like its criminal grand jury equivalent, Section 215 orders are written with business records in mind but could, if necessary, be applied to reading materials acquired by a terrorist suspect.

Contrary to what the critics claim, Section 215 is narrow in scope. The FBI cannot use Section 215 to investigate

garden-variety crimes, nor even domestic terrorism. Instead, Section 215 can be used only to “obtain foreign intelligence information not concerning a United States person,” or to “protect against international terrorism or clandestine intelligence activities.” The records of average Americans, and even not-so-average criminals, are simply beyond the reach of Section 215.

The fact that Section 215 applies uniquely to national security investigations means that the orders are confidential. As such secrecy raises legitimate concerns, Congress embedded significant checks into the issuing Section 215 warrants. First, a federal judge alone can issue and supervise a Section 215 order. By contrast, Grand Jury subpoenas for records are routinely issued by the court clerk. Second, the government must report to Congress every six months the number of times, and the manner, of the provision’s use. On October 17, 2002, the House Judiciary Committee stated that its review of the information “has not given rise to any concern that the authority is being misused or abused.”⁷ Moreover, in September 2003, the Attorney General made public the previously classified information that Section 215 had not been used once since its passage.⁸

It may well be that the clamor over Section 215 reflects a different concern, closely related to the cherished American tradition of free speech. Some seem to fear the government can use ordinary criminal investigative tools to easily obtain records from purveyors of First Amendment activities, such as libraries

and bookstores. Again the fundamental concern is as understandable as the specific fear related to Section 215 is unjustified. The prohibition in Section 215 that investigations “not be conducted of a United States person solely upon the basis of activities protected by the first amendment of the Constitution of the United States” addresses this problem directly and makes the Patriot Act more protective of civil liberties than ordinary criminal procedure.

Arguably this limitation should be extended to other investigative tools. The Attorney General’s guidelines governing criminal and terrorist investigations already require that “such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States.”⁹ Congress might wish to consider codifying this requirement in law, but that is an entirely different debate to the alleged erosion of liberty by Section 215 and the utility of this restricted power.

A good example of how the Patriot Act incorporates protections is Section 213, which deals with notices for search warrants. The House of Representatives in July 2003 took the alarming decision to approve the Otter amendment,¹⁰ an appropriations rider that would have prohibited investigators from asking a court to delay notice to a suspect of a search warrant.¹¹ Had the Otter amendment become law, it would have been a momentous error that would have crippled federal investigations. The amendment would have taken away an

investigative tool that had existed before the Patriot Act, a tool that over the years has saved lives and preserved evidence.

Inherent in a federal judge's power to issue a search warrant is the authority to supervise the terms of its use. Judges can delay any notice of the execution of a search warrant for the obvious reason that some criminals, if notified early, will destroy evidence, kill witnesses or simply flee. This judicial authority is firmly established. The Supreme Court in 1979 labeled as "frivolous" an argument that notice of a search warrant had to be immediate.¹² Even the generally permissive Ninth Federal Circuit Court of Appeals has consistently recognized that notice of a warrant may be delayed for a reasonable period of time.

The problem has been that while a judge's right to delay the execution of a warrant is acknowledged, judges have exercised their discretion to delay warrant notice in very different ways. The result is a mix of inconsistent rules and practices across the US. Congress resolved this problem by adopting a uniform standard in Section 213 of the Patriot Act. The section allows a judge to delay notice for a reasonable period only if investigators show "reasonable cause," such as to prevent risk to human life or safety, flight from prosecution, evidence tampering, witness intimidation, or trial delay.

While the Patriot Act finally sets a uniform standard for delaying warrants, thereby evening out the idiosyncratic decisions of the judiciary, it continues to make these delays subject to judicial

approval. The uniform "reasonable cause" standard is similar to the Supreme Court's reasonableness test for deciding the circumstances surrounding the service of a warrant. For example, the Supreme Court in December 2003 unanimously approved as reasonable that police enter into a drug house 15 seconds after announcing their presence.¹³ Again, the criticism that the Patriot Act extends government powers is inconsistent with the facts of legal practice.

One of the most serious criticisms after 9/11 was that US security agencies failed to pool intelligence that could have prevented the attacks. The Patriot Act addressed this issue while being sensitive to concerns about the capabilities these agencies have for monitoring citizens. Section 218 of the Act amended the Foreign Intelligence Surveillance Act (FISA)¹⁴ to facilitate increased cooperation between agents gathering intelligence about foreign threats and investigators prosecuting foreign terrorists—liaison previously barred by administrative and judicial interpretations of FISA. Even the most strident of opponents of the Patriot Act would not want another terrorist attack to occur because a quarter of a century-old provision prevented the law enforcement and intelligence communities from talking to each other.

Section 218, essential as it is, raises important questions about law enforcement and domestic intelligence. The drafters of the Act grappled with questions such as whether the change is consistent with the Fourth Amendment

protection against unreasonable search and seizure, whether criminal prosecutors should initiate and direct intelligence operations and whether there is adequate process for defendants to seek exclusion of intelligence evidence from their trial. In the end, Congress decided that Section 218 complies with the Fourth Amendment and that defendants have sufficient recourse to exclude evidence gathered by intelligence agencies from their trials. Although the drafters felt that they had struck the correct balance, they recognized that lawyers are fallible and that the courts will ultimately decide. In November 2002, the Foreign Intelligence Surveillance Court of Review decided that the provision was fully consistent with the Constitution.¹⁵

Conclusion

The Patriot Act's surveillance provisions are not the executive grab for power and extension of government that many portray them to be. Rather the Act sensibly updates the law to keep pace with changing technology, tidies up confused legal interpretations and

standardizes powers while restraining them. The Act gives the government the tools it needs to fight terrorism while observing the cherished liberties of Americans. Counterterrorism is a dynamic process, and the Patriot Act is not written in stone. It will be scrutinized by the courts, debated by the citizenry and amended by Congress.

We have to recognize that our nation is navigating uncharted waters. We have been forced to fight an unprovoked conflict, a war declared against us by nihilistic terrorists, not by our traditional adversary, a nation-state. During these times, when the foundation of liberty is under attack, it is critical that we both reaffirm the ideals of our constitutional democracy and also discern the techniques necessary to secure those ideals against the threat of terrorism. As Karl Llewellyn, the renowned law professor, once observed: "Ideals without technique are a mess. But technique without ideals is a menace."¹⁶ The Patriot Act, by combining ideals and technique, is the domestic shield of American democracy, a protection deserving of renewal by our Congress.

References

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- ² The House of Representatives passed the Patriot Act on October 24, 2001, by a vote of 357 to 66, with 9 members not voting. 147 Cong. Rec. H7224 (daily ed. Oct. 24, 2001) (roll call vote 398). The Senate followed suit shortly thereafter, passing the act on October 25, 2001, by a vote of 98 to 1, with 1 senator not voting. 147 Cong. Rec. S11,059-60 (daily ed. Oct. 25, 2001) (roll call vote 313).
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- ⁵ Figures are available at http://lifeandliberty.gov/subs/a_terr.htm (last viewed May 21, 2004).
- ⁶ UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION, COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. MUSLIM COMMUNITY ASSOCIATION OF ANN ARBOR et al v. ASHCROFT and MUELLER. Filed by American Civil Liberties Union Foundation and American Civil Liberties Union Fund of Michigan (July 30, 2003) available at <http://news.findlaw.com/cnn/docs/aclu/mcaa2ash73003cmp.pdf> (last viewed May 21, 2004).
- ⁷ Press Release, U.S. House of Representatives, Committee on the Judiciary, Sensenbrenner Statement and Release of Justice Department's Answers to USA-PATRIOT Act Oversight Questions (October 17, 2002), available at <http://www.house.gov/judiciary/news101702.htm> (last viewed May 21, 2004).
- ⁸ See, for example, Dan Eggen, Patriot Monitoring Claims Dismissed; Government Has Not Tracked Bookstore or Library Activity, Ashcroft Says, *The Washington Post*, September 19, 2003.
- ⁹ THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS 7 (2002), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last viewed May 21, 2004).
- ¹⁰ See 149 Cong. Rec. H7299 (daily ed. July 22, 2003) (roll call vote 408).
- ¹¹ 149 Cong. Rec. H7289 (daily ed. July 22, 2003). Specifically, the amendment provided: "None of the funds made available in this act may be used to seek a delay under Section 3103a(b) of title 18 United States Code." *Id.*
- ¹² *Dalia v. United States*, 441 U.S. 238, 247 (1979).
- ¹³ *United States v. Banks*, 124 S. Ct. 521 (2003).
- ¹⁴ Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 et seq. (2004)), available at <http://www4.law.cornell.edu/uscode/50/ch36.html> (last viewed May 21, 2004).
- ¹⁵ See *In re Sealed Case*, 310 F.3d 717 (FISCR 2002).
- ¹⁶ Karl Llewellyn, On What Is Wrong With So-Called Legal Education, 35 *COLUM. L. REV.* 651, 662 (1935).

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