

USA PATRIOT Act of 2001: We Deserve Less

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At what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that [the] legislation provides?
-Sandra Day O'Connor

On 26 October 2001 President George W. Bush signed into law the USA Patriot Act of 2001: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (hereinafter referred to as USA Patriot Act, Patriot Act, or the Act). This new piece of legislation was intended to give intelligence and law enforcement agencies at both the federal and state levels new legal powers to gather information on prospective “enemies of the state.” The Patriot Act was proposed and pushed through Congress just six weeks after the events of 11 September with the fear, anxiety, and panic of the time. Such an atmosphere allowed for an act that includes surveillance powers that have overstepped the boundaries of civil liberty protected by the U.S. Constitution.

The horrific events of September 11th left most Americans in a state of fear and shock. For most the questions immediately arose: Who is responsible for this? Why did they do it? How could this happen here? Next, after the assailants were identified (openly claimed responsibility), the questions came: Why had not the government seen this coming? Where was the lapse or misstep in intelligence? We knew these terrorist organizations were plotting against us, right? Why did not the government stop it from happening?

Many in the intelligence communities of our nation were glad to see and hear these questions being asked. There were many who had been waiting, and in a perverse way secretly hoping for, something like this to happen. They had answers to the questions people were asking of them. They could not see the attack coming because the legal authority granted to them to spy on U.S. citizens and foreign nationals, and monitor communications inside the country, was outdated and not extensive enough. They had a solution, and their solution was of course simple; expand the surveillance powers and give law enforcement the legal authority (they say) they need.

The intelligence community’s push for expanded legal surveillance powers began far before the events of 9/11; the true roots of the Patriot Act lay much further back. In their book *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, James X. Dempsey and David Cole state that the most

troubling provisions of the Patriot Act were originally proposed by the Reagan administration, presumably to be used to combat Communism, but were rejected by Congress as unconstitutional. When George H. W. Bush took office, his administration proposed legislation very similar to what Reagan had proposed and again it was rejected by lawmakers. Both proposals included some provisions that were troubling to civil libertarians. The most problematic demands proposed by Reagan and Bush

included the resurrection of guilt by association, association as grounds for exclusion or deportation, the use of secret evidence, and the empowerment of the Secretary of State to designate groups as terrorist organizations, without judicial or congressional review (Van Bergen 2005).

The problem faced by Bush Sr. and Reagan was that the threat was just not there when they proposed these modifications. History has shown that it takes the American public's fear to initiate a surrender of civil liberties.

The immediate "terrorist" precursor to spark fear and push legislation prior to 9/11 was the bombing of the Murrah building in Oklahoma City. The attack in Oklahoma City triggered the passage of the Anti-Terrorism Act of 1996. The full name of the Anti-Terrorism Act was the Antiterrorism and Effective Death Penalty Act of 1996. It was passed by the Republican-held Congress, and signed into law by Democratic President Bill Clinton. Jennifer Van Bergen (2005), writer for *truthout.com*, shares the opinion that the Oklahoma City bombing was used to justify the enactment of "the very provisions lawmakers had previously found most constitutionally troublesome." The Anti-Terrorism Act of 1996, among other things, imposed a limit for all appeals relating to the right to writ of habeas corpus in capital cases and reduced the length of the appeal process by sharply limiting the role of the federal courts (Antiterrorism and Effective Death Penalty Act of 1996). The prohibition against a person's ability to file successive habeas petitions was almost immediately challenged on constitutional grounds; the basis that the provisions violated Article I, Section 9 of the US Constitution. In *Felker v. Turpin* the Supreme Court unanimously decided that these limitations did not unconstitutionally suspend the writ (OYEZ). Other important sections of this act include Title III-International Terrorism Prohibitions and Title V-Alien Terrorist Removal Procedures. The process to repeal these sections of the Anti-Terrorism Act was beginning to be discussed in late 2000 and early 2001; this discussion would be stopped short by the events of 11 September.

September 11th rushed to the forefront the issues surrounding security and intelligence. The government and the American populace were sent reeling from the attacks, and the thought that another incident was imminent pervaded all decisions. Anthrax scares at government administration offices had closed and or

postponed many of the government's functions; and it was during this time of tumult that the USA Patriot Act was formed, proposed, and enacted.

The USA Patriot Act has several different "authors" who could be credited as contributing to the final product. Washington Post Staff Writer Robert O'Harrow Jr. (2005, 13) writes in *No Place to Hide*

For six weeks that fall, behind a veneer of national solidarity and bipartisanship, Washington leaders engaged in pitched, closed-door arguments over how much new power the government should have in the name of national security.

The divisions in Washington were sharp, with Patrick Leahy and a group of civil libertarians on one side and John Ashcroft and the Justice Department on the other.

As stated above, many people could be credited with contributing to the Patriot Act. Leaders in the Justice Department, including Attorney General John Ashcroft, were quick to propose new legislation to combat terror. Assistant Attorney General Viet Dinh was entrusted by Ashcroft to put together a "package of authorities" to combat the terrorists (O'Harrow 2005, 15). Almost immediately, Dinh held a meeting with policy advisors and lawyers to hash out a plan. Dinh told those attending this meeting that, "The charge [from Ashcroft] was very, very clear: 'all that is necessary for law enforcement, within the bounds of the Constitution, to discharge the obligation to fight this war against terror'" (O'Harrow 2005, 15). Dinh took this charge with fervor. His team (which included current Secretary of Homeland Security Michael Chertoff, who is credited as co-author) put together exactly what Ashcroft had asked for; a piece of legislation with broad, sweeping, and dramatic powers. The new powers asked for mostly involved the ability of law enforcement and intelligence agencies to legally conduct investigations into people's communications and activities, and to fund more investigative forces. The Justice Department now had their proposal to take to congress, but Patrick Leahy and his team were also working toward a proposal.

Like many other Democratic leaders in Congress, Senator Patrick Leahy knew there was going to be a call for more policing powers immediately following the attacks. Leahy, who chaired the Senate Judiciary Committee and was a long time ally of civil libertarians, also knew he would be near the center of the debate as to what those new powers would be (O'Harrow 2005, 13). Leahy and his team had just begun working on their plan, which they had entitled the Uniting and Strengthening America Act, when Attorney General Ashcroft gave a press conference calling for Congress to approve the Justice Department's legislation within a week's time (O'Harrow 2005, 22). Frustrated by the push from the Justice Department to act quickly, Leahy called for a meeting between representatives

from Congress, the White House, and the Justice Department.

The meeting that took place on September 19th; was a chance for the two sides to exchange their proposals and discuss the boundaries of the new legislation (O'Harrow 2005, 23). At this meeting Leahy, Orrin Hatch, House Majority Leader Richard Arney, and others represented congress; Alberto Gonzalez came to represent the White House; and Ashcroft, Dinh, and their entourage came to represent the Justice Department (O'Harrow 2005, 23). The two sides were surprised to find that their proposals were remarkably similar in some aspects: updates to the pen register and trap and trace laws, provisions strengthening money-laundering and wiretap laws, and features making it easier for authorities to get approval for wiretaps in spying and counterintelligence cases (O'Harrow 2005, 23). The trouble came with the Justice Department's push for sections that called for unfettered sharing of eavesdropping data and grand jury information throughout the government, and a small change in the wording of a section of the Foreign Intelligence and Surveillance Act [FISA]; the Justice Department wanted to make foreign intelligence "a significant purpose" of surveillance rather than "the purpose" (Van Bergen 2005).

The inclusions of these last sections concerned several of the lawmakers in attendance at the meeting. They had fears that the inclusion of these provisions would lead to abuses against American citizens. Dick Arney was already discussing the "sunset" of certain provisions of the Act; sunset would provide Congress the opportunity to revisit sections of the Act (O'Harrow 2005, 24). The Justice Department was hesitant and, at this time, would not agree to the sunset provisions concerning those most troubling sections (O'Harrow 2005, 24).

The version of the Act that came out of this meeting virtually mirrored the bill that was then sent directly to the Senate floor (with no discussion, debate, or hearings). There was pressure on the Senate, from the Justice Department and the White House, to act quickly and pass this bill; both were in a hurry to get the legislation through. White House and Justice Department spokespeople made another attack seem imminent and implied that those in Congress opposed to the Act would be to blame (Levy 2005). If Congress did not act immediately on the legislation further attacks would happen; that was the message given to the American people. Many members of the Senate complained that they had little chance to even read, let alone analyze, the Act before voting on October 11th ("Surveillance Under the USA Patriot Act"). Still, only Senator Russell Feingold of Wisconsin remained the lone dissenter in the Senate when the vote took place. Feingold made a speech on the Senate floor the evening of the vote in which he said,

There is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country where the police were allowed to

search your home at any time for any reason; if we lived in a country where the government was entitled to open your mail, eavesdrop on your phone conversations, or intercept your e-mail communications...the government would probably discover and arrest more terrorists, or would be terrorists....But that would not be a country in which we would want to live (O'Harrow 2005, 28).

Passage of the Act in the House was similar to the Senate. The House's version of the Act differed slightly from the Senate's though, in that it included some of the sunset and court oversight provisions Leahy was unable to get in the Senate. O'Harrow (2005, 29), "There was no longer any question that the Patriot Act would include some court oversight, but not as much as Leahy and Arney wanted." On the morning of October 12th, the House's version of the Patriot Act passed by a 357-66 margin (Levy 2005). Soon after, a meeting was held in House Speaker Dennis Hastert's office to work out the differences between the House and Senate versions (O'Harrow 2005, 29). The main question to be decided was how long the Patriot Act would stay in effect until it was revisited. The administration wanted no time limits but reluctantly agreed to sunset certain surveillance provisions for four years. These include:

- 1 §201. Authority to Intercept Wire, Oral, And Electronic Communications Relating to Terrorism.
- 2 §202. Authority to Intercept Wire, Oral, and Electronic Communications Relating To Computer Fraud and Abuse Offenses.
- 3 §206. Roving Surveillance Authority under the Foreign Intelligence Surveillance Act of 1978.
- 4 §207. Duration of FISA Surveillance of Non-United States Persons Who Are Agents of a Foreign Power.
- 5 §209. Seizure of Voice-Mail Messages Pursuant to Warrants.
- 6 §212. Emergency Disclosure of Electronic Communications to Protect Life and Limb.
- 7 §214. Pen Register and Trap and Trace Authority under FISA.
- 8 §215. Access to Records and Other Items under FISA.
- 9 §217. Interception of Computer Trespasser Communications.
- 10 §218. Foreign Intelligence Information. (Lowers standard of evidence for FISA warrants.)
- 11 §220. Nationwide Service of Search Warrants for Electronic Evidence.
- 12 §224. Sunset. (self-canceling)

Important permanent/non-expiring provisions that got into the Patriot Act are:

- 1 §203(a),(c). Authority to Share Criminal Investigative Information.
- 2 §210. Scope of Subpoenas for Records of Electronic Communications.
- 3 §211. Clarification of Scope (privacy provisions of Cable Act overridden for communication services offered by cable providers, but not for records relating to cable viewing.)
- 4 §213. Authority for Delaying Notice of The Execution of a Warrant—"Sneak and Peek"
- 5 §216. Modification of Authorities Relating to Use of Pen Registers and Trap and Trace Devices.
- 6 §219. Single-Jurisdiction Search Warrants for Terrorism.

These sections are a grave infringement on civil liberties, and the Patriot Act infringes on those civil liberties by increasing the government's surveillance powers in four main areas: records searches, secret searches, intelligence searches, and "trap and trace" searches ("Surveillance Under the USA Patriot Act"). These four areas can be linked to certain sections of the Patriot Act.

Section 213: Authority for delaying notice of the execution of a warrant, which does not sunset, expands the government's ability to search private property without the notification of the owner until a later time. This is the so called "sneak and peek" section of the Act. It was intended to prevent suspects from gaining knowledge of an ongoing investigation or hinder ongoing surveillance operations (Dowley 2002, 178). Notice is supposed to be given within a "reasonable period," which as of yet is undefined, and even this is subject to extension by a secret court when there is "good cause" to do so ("The USA Patriot Act").

This is a significant change to the legal requirements for searches prior to the Act. "The 'knock and announce' principle has long been recognized as a part of the Fourth Amendment to the Constitution" ("Surveillance Under the USA Patriot Act"). Notice provides for the person or persons subject to the search to point out discrepancies in the warrant and to make sure the search is limited to the scope of the warrant. All the government now has to show is that it has "reasonable cause to believe that providing notice 'may' seriously jeopardize an investigation" (Gerdes 2005, 179).

More importantly, this change applies to all investigations; links to terrorism or terrorist activity is absent in the wording of the bill. "The radical departure from the Fourth Amendment standards...could result in routine and surreptitious entries by law enforcement agents" ("The USA Patriot Act"). Former White House chief of staff John Podesta (2002) agrees that, "by virtue of its

ambiguity” Section 213 “creates the potential for abuse.”

Section 214: Pen register and trap and trace authority under FISA, which is sunset for 2005, basically expands the Foreign Intelligence and Surveillance Act where it applies to obtaining a warrant for surveillance on a line or device. Under FISA, the line or device in question has to be or has to have been at some point used by someone who is an agent of a “foreign power” and related to international terrorism or intelligence activities that may violate the laws of the United States (Plesser R., J. Halpert, M. Civitanes 2001). The new provision in the Patriot Act allows surveillance on lines or devices as long as the government provides “certification that the information obtained would be relevant to an ongoing investigation” (Plesser R., J. Halpert, M. Civitanes 2001). The Electronic Privacy Information Center warns that this amendment to FISA,

Significantly eviscerates the constitutional rationale for the relatively lax requirements that apply to foreign intelligence. That laxity is premised on the assumption that the executive branch, in pursuit of its national security responsibilities to monitor the activities of foreign powers and their agents, should not be unduly restrained by Congress and the courts. The removals of the ‘foreign power’ predicate for pen register/trap and trace surveillance upsets that delicate balance (“The USA Patriot Act”).

Section 216: Modification of authorities relating to use of pen register and trap and trace devices, which is exempt from sunset, also expands the “pen register” warrants by making them nationwide. Now a judge in Peoria can grant a warrant that is applied in Miami. This further marginalizes the judiciary because “a judge cannot meaningfully monitor the extent to which his or her order is being used” (“Surveillance Under the USA Patriot Act”). Additionally this provision essentially gives a “blank” warrant to the law enforcement agent to fill in the places to be searched; which further violates the Fourth Amendment’s explicit requirement that warrants be written “detailing the exact scope and specific circumstances that justify” requests (Dowley 2002, 167).

Section 220: Nationwide service of search warrants for electronic evidence. This section essentially does the same thing as Section 216 but for stored data such as e-mail or computer files, which may have been erased from a personal computer, but have been stored at an internet service provider anywhere across the country. Section 220 is set for sunset in 2005.

Section 215: Access to records and other items under the Foreign Intelligence Surveillance Act, which is sunset for 2005, expands the government’s ability to look at records of an individual’s activity that are held by third parties. This is a broad expansion of the types of items subject to FISA subpoena. Previously, only “common carriers, public accommodation facilities, physical

storage facilities, or car rental facilities” were subject to “FISA business record authority” (Plesser R., J. Halpert, M. Cividanes 2001). The Patriot Act essentially eliminates these categories of businesses and allows for a subpoena to be issued to anyone holding records of the person or persons being investigated. The ACLU fears that

Section 215 of the Patriot Act allows the FBI to force anyone at all – including doctors, libraries, bookstores, universities, and Internet service providers – to turn over records on their clients or customers (“Surveillance Under the USA Patriot Act”). Section 215 also makes it illegal for the recipients of the warrant, the bank or ISP, to notify the person being investigated that their records had been searched. This again brings rights guaranteed in the Fourth Amendment under attack by allowing essentially secret searches to be conducted.

Section 218: Foreign intelligence information requirement for FISA authority, which is sunset for 2005, relaxes the standard for FISA Surveillance. This provision changes the wording in FISA to require that the government certify merely that the search or surveillance that they want to conduct is “a significant purpose” not “the purpose” of the investigation (Plesser R., J. Halpert, M. Cividanes 2001). In 1978, FISA created an exception to the Fourth Amendment’s requirement for probable cause when the purpose of the wiretap or search was to gather foreign intelligence. It is argued that “the rationale was that since the search was not conducted for the purpose of gathering evidence to put someone on trial, the standards could be loosened” (“Surveillance Under the USA Patriot Act”). It was clear that the initial purpose of the FISA provisions was intelligence not prosecution. With the sharing of information made available through Section 203, Authority to Share Criminal Investigative Information, information gathered under the provisions of Section 218 can be shared with criminal prosecutors. As of yet, the secret court that oversees domestic intelligence spying, the “FISA Court,” has rejected attempts by federal prosecutors to share this information, but there is a fear that another attack may change the FISA Court’s decisions (“Surveillance Under the USA Patriot Act”). Section 203 is permanent law and not eligible for sunset provisions.

Objections to the sections discussed above, and the Patriot Act as a whole, have been continual since it was passed. In the past two years the resistance has grown and the Act has been contested in the courts. “Five states [Alaska, Arizona, Montana, Hawaii, and Vermont] and 372 counties, cities, villages and towns have passed resolutions, ordinances, or ballot initiatives condemning the law” (Nichols 2005). In *Humanitarian Law Project v. John Ashcroft* a California district court declared that the “expert advice and assistance” clause of the Patriot Act was overly broad and infringed on the First Amendment’s right of free speech (Feffer 2004). Numerous other court cases have attacked the Patriot Act’s constitutionality and law enforcement’s usage of the provisions. Speaking of the FBI’s push to use

the powers under the Patriot Act to investigate ordinary people, Senator Joseph Biden Jr. stated, "It appears to me that this is, if not abused, being close to abused" ("Senators Question Terrorism Inquiries"). ACLU legislative counsel Timothy Edgar argued, "it is clear that the problems of 9/11 were the result of not analyzing information we had already collected. Creating more hay to search through the haystack is not an effective way to find the needle" (Murray 2003). All of the objections and protests against the Act are getting the coverage they deserve now that the surveillance provisions have come up for renewal.

The government has tried to defend itself against the growing criticism surrounding the Act and the manner that it has been used. The administration has been insistent that the Act is needed and that the way it has been used has been legal. The following is a brief account of the government's responses when asked about their exercise of the Patriot Act provisions discussed above. The following compiled information comes from the Electronic Privacy Information Center:

Section 214: Though a Department of Justice web site makes clear that the FBI has used its authority under Section 214, the Department has refused to provide the House Judiciary Committee the number of times the FBI has used this expanded authority to obtain a pen register or trap and trace order, stating the answer is classified.

Section 215: In September 2003, the Department of Justice reported that it had never used Section 215 to seek business records. However, the Department now states that federal judges have granted 35 requests for Section 215 orders as of March 30, 2005. The orders were used to obtain driver's license records, public accommodation records, apartment lease records, credit card records, and telephone subscriber records for phone numbers captured under pen register and trap and trace authority.

Section 218: When asked by the House Judiciary Committee how many more FISA applications had been approved as a result of Section 218, the Department of Justice responded in July 2002, "[b]ecause we immediately began using the new 'significant purpose' standard after passage of the PATRIOT Act, we had no occasion to make contemporaneous assessments on whether our FISAs would also satisfy a 'primary purpose' standard. Therefore, we cannot respond to this question with specificity."

Section 220: When asked by the House Judiciary Committee how many search warrants have been served under Section 220 in jurisdictions other than that of the court issuing the warrant, the Department of Justice responded in July 2002, "[a]lthough the exact number of search warrants

for electronic evidence that have been executed outside the issuing district is unknown, the impact of Section 220 has plainly been significant."
(“USA Patriot Act Sunset”)

Sixteen of the 17 sections of the Patriot Act up for renewal were renewed by Congress in March of this year (14 of those 16 provisions made permanent and four-year sunset expirations were set on the other 2). The renewal came after a lengthy deliberation, two extensions, and the addition of a second bill-- affectively an amendment to version of the Act passed in 2001. Some believe that this is the type of debate and negotiation that should have taken place when the Act was originally passed. Others are upset and fearful because the most highly objectionable sections of the Act have remained intact; those objections came from all sides of the political spectrum-- Democrat, Republican, and Independent. The 280-138 vote in the House included 13 Republican dissenters and was just two votes over the two-thirds majority needed by House rules to pass legislation handled on an expedited basis (Kellman 2006).

The importance of the addition of the second bill to the eventual acceptance of the renewal cannot be overstated. It is plausible that the debate would have continued for quite some time had not the second bill been added. This second bill does give some weak protections to civil liberties; most importantly among them it would: give recipients of court-approved subpoenas for information in terrorist investigations the right to challenge a requirement that they refrain from telling anyone; eliminate a requirement that an individual provide the FBI with the name of a lawyer consulted about a National Security Letter; and clarify that most libraries are not subject to demands in those letters for information about suspected terrorists (Kellman 2006). Even with these additions, it is still important to note the gray area that remains for the administration and law enforcement to interpret the powers given under the renewal.

Putting the “politics of fear” and all of the political maneuvering aside, the question for every American to consider is this: How much and how many of your civil liberties are you willing to sacrifice to your fears over security? Benjamin Franklin famously said, “Any society that would give up a little liberty to gain a little security will deserve neither and lose both.” Many other objections to the restraints of civil liberty can be found when listening to the Founding Fathers. Jefferson, Madison, and Washington all spoke about preserving the liberty of the individual. One could argue that those great men could not have imagined or pictured the threats we face and the technology that is used today. But how can we claim to be a nation that values liberty while we strip it away from our citizens? What would the nation’s Founding Fathers think of the Patriot Act? Representative Ron Paul gave his opinion when asked in an interview: “Our forefathers would think it’s time for a revolution. This is why they revolted in the first place. They revolted against much

more mild oppression” (O’Meara 2001).

From the Alien and Sedition Act through the McCarthyism of the 1950s, it has been commonplace for the government to take, what could be considered drastic measures, to assure the physical and mental safety of the citizen body (Dowley 2002, 167). When most look back at those times they grimace at the measures taken: mass deportation, imprisonments, and open slander and black listing of thousands of people. We may be facing a time like this now. Never before has the infringement to civil liberties been on such a large scale. Never before has the legal sacrifice been so threatening to every American. And, most importantly, this is happening behind the veil of government secrecy. The American public has little knowledge of, or means to gain knowledge about, the true measures that are being carried out. The President has even insisted that the Constitution grants him certain powers beyond those outlined in the liberty stripping Patriot Act.

In closing, consider these words from Representative C.L. “Butch” Otter,

You cannot give up freedom, you cannot give up liberty, and be safe. When your freedom is lost it makes no difference who took it away from you. [The terrorists] have won. What did they want to do? Take away our freedom. They’ve won (“Conservative Voices Against the USA PATRIOT Act”).

Is that what we want to do, let the terrorists win? Do we want to let anyone take away our freedom? The Preamble to the Constitution states that one of the goals of forming this nation and writing that beloved document was to “secure the Blessings of Liberty to ourselves and our Posterity.” It should be asked, how is the Patriot Act securing those blessings for us? How is the Patriot Act going to secure those blessings to our posterity?

The erosion of freedom rarely comes as an all-out frontal assault; rather, it is a gradual, noxious creeping cloaked in secrecy and glossed over by reassurances of greater security.

--Senator Robert Byrd

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