

THREATS TO CIVIL LIBERTIES

19. The Patriot Act

Congress should

- let all of the Patriot Act provisions that were originally designated to “sunset” expire on schedule in December 2005,
- repeal the “Delayed Notification” or “Sneak and Peek” provision of the Patriot Act, and
- repeal the money laundering provisions of the Patriot Act and the Bank Secrecy Act of 1970.

The Patriot Act: An Inglorious Birth

Congress normally holds hearings on legislative proposals in order to study their merits and demerits before bringing any measure to the floor for a vote. That deliberative process was scorned in the aftermath of the September 11, 2001, terrorist attacks. Within days of those attacks, President Bush and Attorney General John Ashcroft proposed an omnibus package of “anti-terrorism” measures for congressional approval. Attorney General Ashcroft demanded quick action by the legislative branch. The richest and most powerful government in world history was portrayed as a weakling vis-à-vis Al Qaeda terrorists. Until that legislative package was enacted, America was supposedly at a grave disadvantage.

When House Majority Leader Dick Arney (R-TX) called for separate votes on the various measures within the Ashcroft “package,” he was overruled by congressional leaders who did not want to be criticized by the attorney general in the newspapers. The Bush administration wanted a single vote on the entire package because it perceived a political advantage in framing the matter in terms of whether legislators were going to “support” President Bush’s attempt to “strengthen” America’s laws—or not. Congressional leaders labeled the package of proposals the USA

Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) to intimidate members who were skeptical about the law and how it would impact liberty and privacy in America. They went so far as to schedule a vote even before members of Congress could actually obtain copies of the proposal. Since few politicians wanted to be seen as opposing the “Patriot” act, the measure passed overwhelmingly. The entire episode was a parody of deliberative policymaking.

Since more terrorist attacks on the American homeland seem inevitable, it is vitally important that policymakers not repeat the unfortunate experience that led to the hasty enactment of the Patriot Act. Periodic policy adjustments make sense, but omnibus legislation vastly increases the chances of a bad proposal finding its way onto the federal law books. Thus, gigantic anti-terrorism legislative “packages” should be rejected outright in the future. If a proposal cannot find legislative and executive support on its own merits, it should not become the law of the land.

Patriot Act Misfires

Although the Patriot Act contains several controversial measures, it is also true that the law has been on the receiving end of misplaced criticism. That is because the Patriot Act has become something of a catchall phrase for a range of controversial, but distinct, policies of the Bush administration. Since reasoned debate over the proper parameters of the government’s police powers cannot proceed when there is widespread confusion with respect to what certain laws and policies actually do, it will be useful to briefly clarify what is—and what is not—covered by the Patriot Act. The following matters have garnered a fair amount of media attention over the past three years, but these measures are *not* related to the Patriot Act.

- The arrest, imprisonment, and treatment, of hundreds of individuals, mostly immigrants, in the months following the September 11 attacks.
- The policy of eavesdropping on attorney-client conversations.
- The Pentagon’s Total Information Awareness database.
- The creation of the Department of Homeland Security.
- The creation of the Transportation Security Administration and airport search procedures.
- The creation of a prison camp at Guantanamo Bay, Cuba.
- The policy of trials before military commissions.
- The imprisonment of American citizens (“enemy combatants”) in military brigades.

The merits of those policies are certainly debatable, but they should not be confused with the provisions of the Patriot Act.

The Patriot Act covers a range of subjects—from surveillance procedures to border procedures to money laundering to victim compensation funds. It is not a “free-standing” law but rather a jumble of provisions that amend and expand a host of preexisting federal laws. It is thus difficult to appreciate the impact of the Patriot Act by simply reading it. One must first understand how all of the preexisting federal laws are enforced, which can be very complicated.

The Coming Battle over the “Sunset” Provisions

Although it was impossible to stop, or even slow, the congressional passage of the Patriot Act in the weeks following the Al Qaeda attacks on the Pentagon and the World Trade Center, conscientious lawmakers were successful in attaching “sunset” provisions to most of the surveillance-related measures within the act. A sunset provision is basically a procedural mechanism that establishes an “expiration date” for certain laws. The sunset concept was perfectly suited for the Patriot Act. Members of Congress were hard-pressed to resist a plea from Attorney General Ashcroft for “necessary tools” that could avert imminent mass murder. But it was equally difficult for Ashcroft to resist the idea of a sunset date for his rushed proposals. After all, if those proposals really had merit, Congress could simply reenact them at a later date. During the temporary, “probationary” period Congress could study the new law carefully to determine whether the initial plea of “necessity” was genuine or exaggerated. The sunset provisions of the Patriot Act will take effect in December 2005. It is safe to say that a legislative battle over the reenactment of the Patriot Act will take place in the next Congress.

Congress should resist the lobbying efforts of the intelligence and law enforcement agencies. Particular proposals may have merit, but the best way to encourage deliberation and debate would be to let all the pertinent provisions expire on schedule. That would put the burden of persuasion on the executive branch, where it belongs. If discrete proposals really have merit, it is very likely that Congress will approve them in short order. As noted above, sweeping renewal “packages” ought to be rejected outright.

As the debate heats up, one should note that supporters of the Patriot Act tend to emphasize portions of the law that are not controversial. Over and over again, the public is told that the Patriot Act merely “updates”

the law so that new technologies are “covered.” Such claims are true, but they direct attention away from the measures that present real threats to civil liberties. In July 2004, for example, the Justice Department released a report that purported to show how the Patriot Act had furthered specific terrorism investigations. The report does not discuss the Patriot Act’s hotly contested provisions, and that is a telling indication that the Justice Department is anxious to avoid close scrutiny of the entire law.

What are the most controversial provisions of the Patriot Act? One of the most serious threats to liberty comes from Section 215. According to the Department of Justice, that section allows investigators to obtain “business records” for terrorism investigations pursuant to a federal “court order.” In fact, the provision is not limited to business records. Federal agents can use that section of the Patriot Act to seize any tangible item (correspondence, film, personal belongings) directly from a person’s home. The “court order” is nothing but a façade because the Patriot Act says the judge “shall” issue such orders whenever the executive branch claims it is conducting a terrorism investigation.

Most shocking of all, Section 215 makes it a crime for anyone to speak out about its use. Any person who speaks to a relative, a neighbor, or a reporter about the government’s demand can be jailed. Defenders of the Patriot Act demand specific examples of “abuses” of the law, but they fail to mention that the Section 215 gag provision keeps anyone affected from coming forward. That will obviously make it very difficult for Congress to assess how the orders are actually being used.

The second threat to civil liberties comes from Section 505 of the Patriot Act. Under that provision, federal agents can use so-called national security letters to seize transactional records, such as bank and rental car receipts. That Patriot Act provision bypasses the Constitution’s search warrant procedure by vesting a secret subpoena power directly within the executive branch. Instead of having to apply for judicially approved warrants, federal agents can unilaterally threaten businesspeople with jail if they do not surrender employee and customer records. This represents an enormous change in American law. Congress has steadfastly denied subpoena powers to the FBI and the CIA because it was deemed to be too much power for the executive branch. Now that both agencies have acquired the power, they will not surrender it easily. These subpoenas also contain “gag” provisions for Americans who receive them.

The third threat to liberty comes from the Patriot Act’s expansion of the Foreign Intelligence Surveillance Act (FISA)—a law that created a

special federal court to approve electronic surveillance of citizens and resident aliens alleged to be acting on behalf of a foreign power. Previously, the FISA court granted surveillance authority if foreign intelligence was the primary purpose of an investigation. But Section 218 of the Patriot Act allows the government to conduct surveillance if foreign intelligence is only a “significant” purpose of an investigation. That may seem like a trivial change, but it is not. Because the standard for FISA approval is lower than “probable cause,” and because FISA now applies to ordinary criminal matters if they are characterized as “national security” inquiries, the new rules offer federal agents another avenue to bypass the Constitution’s search warrant requirements. The result: rubber-stamp judicial consent to phone and Internet surveillance, even in regular criminal cases.

Limit Power, Restore Privacy

The sunset provisions do not apply to all of the Patriot Act’s problematic sections. This means that Congress must affirmatively act to repeal police power sections that threaten liberty in America. Three sections stand out above all the others.

The first section is the so-called sneak and peek power. Section 213 of the Patriot Act empowers agents to conduct covert entries into homes and businesses. Agents still apply for a judicial search warrant, but the homeowner does not know about the entry until days or weeks later. This section of the Patriot Act is defended as an important “tool to fight terrorism,” but it can be used for any federal criminal investigation. Such a power crept into the law with electronic surveillance devices. When a judge approves a bugging operation, it makes sense to allow agents to enter without notifying the subject. But the Patriot Act’s expansion of those secret searches to ordinary physical searches is a departure from constitutional norms that cannot be justified.

The second section concerns the sharing of grand jury information. Federal officials often exaggerate when they say that they were “unable to speak to one another” and that the Patriot Act “fixes” that. In fact, federal agents could share information discovered in a grand jury investigation with the CIA. But before they did so, they had to receive the permission of a federal judge. The Patriot Act removes the judge from that “gatekeeper” role and now permits information sharing without advanced judicial approval. The Patriot Act threatens to turn federal grand jurors into employees of the intelligence community. The next Congress should restore federal judges to their gatekeeper role.

The third section of the Patriot Act concerns the expansion of federal money laundering laws. The Bank Secrecy Act of 1970 required banks to spy on their customers and report suspicious transactions to federal law enforcement officials. The Patriot Act expands the surveillance network by requiring mortgage companies, pawnbrokers, used car dealerships, and many other businesses to keep tabs on customers and report activity to the federal government. Any business that shirks its law enforcement responsibilities will be bludgeoned with fines. In 2004, for example, Riggs Bank was fined \$25 million for insufficient assistance with money laundering probes. In a free society, the government would rely upon the voluntary cooperation of business institutions for investigative assistance. The Patriot Act, however, conscripts scores of new businesses into a regime of coercive mandates.

Conclusion

American institutions tend to look for “quick-fix” solutions to problems. American policymakers must recognize, however, that the danger posed by Al Qaeda is not a short-term crisis but a long-term security dilemma for the United States. If Congress rushes to enact anti-terrorism legislation in the aftermath of every attack, no one can deny that Americans will lose their liberty over the long term. Now that more than three years have passed since the shock and horror of September 11, Congress will have an opportunity to seriously deliberate the constitutional issues that were initially skirted. No one doubts that a legislative battle is looming with respect to whether the Patriot Act’s provisions will expire or be made permanent. Policymakers should not make the mistake of underestimating the American people. Of course, the electorate wants safety, but it wants the federal government to secure that safety by fighting the terrorists themselves, not by turning America into a surveillance state.

Suggested Readings

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- Lynch, Timothy. “Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism.” Cato Institute Policy Analysis no. 443, June 26, 2002.
- Schulhofer, Stephen. *The Enemy Within*. New York: Century Foundation Press, 2002.

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