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Susanna Farber  
*California Polytechnic State University - San Luis Obispo*

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## THE WAR AT HOME

*Susanna Farber*

*“I believe that there are more instances of the abridgment of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations.” –James Madison*

The September 11th terrorist attacks changed the American psyche on an unprecedented scale. In addition to physical damage and loss of life, tremendous changes in political policy and cultural attitudes followed. Americans were gripped with such fear and uncertainty that almost any means to security seemed feasible. During this time of uncertainty and fear, the *USA PATRIOT Act* was passed with a mere one and a half hour discussion by the Senate Judiciary Committee and a testimony, without questions, by Attorney General John Ashcroft. Opponents of the bill in the House didn't even get a chance to discuss the *PATRIOT Act*. Nevertheless, the bill was passed within a matter of weeks. Congressman Ron Paul (R-Tex) told the *Washington Times* that no member of Congress was allowed to read the first *PATRIOT Act* that was passed by the House on October 27, 2001.<sup>1</sup> Civil libertarians and Constitutional scholars from across the political spectrum universally decried the first *PATRIOT Act*. William Safire, while writing for the New York Times, described the first *PATRIOT Act's* powers by saying that President Bush, “[m]isadvised by a frustrated and panic-stricken attorney general . . . ha[d] just assumed what amounts to dictatorial power.”<sup>2</sup>

According to an American Civil Liberties Union study, national security has always been a threat to civil liberties. Scholars have established a clear historical precedent of this dynamic throughout United States history. “The *Alien and Sedition Acts of 1798*, criminal restrictions on speech during World War I, the internment of Japanese-Americans following the attack on Pearl Harbor, the black lists and the domestic spying of the Cold War are all instances in which the government was granted (or assumed) summary powers in a moment of crisis, to the inevitable regret of later generations.”<sup>3</sup> In each case, elements of fear and uncertainty ruled the day. Consequently, extenuating circumstances resulted in hasty policies. It was only through hindsight that effective criticism of the policies emerged.

A year and a half later, the broad new powers granted to the federal government from the first *PATRIOT Act* apparently are not enough. With the U.S. populace conveniently distracted by a war, the Bush administration is hard at work on another piece of legislation that would, again, seriously undermine the civil liberties of all Americans. Whereas the first *PATRIOT Act* only gutted the First, Third, Fourth, Fifth and Sixth Amendments, and seriously damaged the Seventh and the Tenth, the *Domestic Security Enhancement Act*, also referred to as the *PATRIOT Act II*, reorganizes the entire Federal government as well as many areas of state government under the control of the Justice Department and the Office of Homeland Security.

Georgetown University Law professor and author of “Terrorism and the Constitution,” Dr. David Cole, said the legislation, “raises a lot of serious concerns. It’s troubling that they (the Justice Department) have gotten this far along, and they’ve been telling people there is nothing in the works.” Cole warned that the *PATRIOT Act II* “would radically expand law enforcement and intelligence authorities, reduce or eliminate judicial oversight over surveillance, authorize secret arrests, create a DNA database based on unchecked executive suspicion, create new death penalties and even seek to take American citizenship away from persons who belong to or support disfavored political groups.”<sup>4</sup>

One of the tenets of this new legislation is the proposed Total Information Awareness Program. TIA, first proposed by Admiral Poindexter, would allow federal agents access to consumer credit reports solely by certifying that the information would be used “in connection with their duties to enforce federal law.” They would not need a court order, thereby undermining judicial checks on the executive branch. Further, they could access this information about persons who

were under no suspicion of any crime. The federal government could also assemble genetic information with the passage of the *PATRIOT Act II*, forcing persons suspected of terrorism to provide DNA for inclusion in the “Terrorist Identification Database,” without a court order, again undermining judicial oversight.

The *PATRIOT Act II* also allows for increased government secrecy resulting in decreased accountability. Section 201 authorizes secret arrests and detainments, even when the person detained is not criminally charged, section 204 limits defense attorneys from challenging the use of secret evidence in criminal cases, and section 202 restricts access to crucial information about environmental health risks posed by facilities that use dangerous chemicals. Sections 101-111 allow easier access to wiretapping and surveillance of U.S. citizens, and attack limits and meaningful judicial supervision over wiretapping and other intrusive electronic surveillance for intelligence purposes imposed by Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, 28 U.S.C. §§ 2510-22 and the *Foreign Intelligence Surveillance Act of 1978* (FISA), 50 U.S.C. §§ 1801-63. The Department of Justice’s response that the *PATRIOT Act II* merely tweaks existing surveillance laws to bring them “up to date” is a misrepresentation of the facts.

Section 501, perhaps the scariest section of the *PATRIOT Act II*, would strip “even native-born Americans of all of the rights of United States citizenship if they provide support to unpopular organizations labeled as terrorist by our government, even if they support only the lawful activities of such organizations, allowing them to be indefinitely imprisoned in their own country as undocumented aliens.” Other sections further undermine the rights of citizens by broadening the definitions of “terrorism” and “terrorist organization.” For example, section 322 permits the arrests and “extraditions of Americans to any foreign country - including those whose governments do not respect the rule of law or human rights - in the absence of a Senate-approved treaty and without allowing an American judge to consider the extraditing country’s legal system or human rights record.”<sup>5</sup>

Under the *PATRIOT Act II*, immigrants are unfairly targeted and can be deported or imprisoned without a fair trial or evidence of crime. Section 503 allows the deportation of even lawful permanent residents whom are, according to the Attorney General, a threat to national security. No evidence of a crime nor the intent to commit a crime is necessary. Section 504 “abolishes fair hearings for permanent residents convicted of even minor criminal offenses through a

retroactive 'expedited removal' procedure, and preventing any court from questioning the government's unlawful actions by explicitly exempting these cases from habeas corpus review. Congress has not exempted any person from *habeas corpus*—a protection guaranteed by the Constitution—since the Civil War..."<sup>6</sup>

This attack against immigrants following times of uncertainty and fear is not new: the internment of Japanese-Americans during World War II, the backlash against immigrants after the first World Trade Center bombing in 1993, and the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) passed in 1996 in response to the bombing of the Murrah Federal Building in Oklahoma City. Even though that attack was carried out by an American citizen, fearful Americans wanted to close borders and deport the immigrants already here.

This trend suggests that when people talk about their willingness to give up civil liberties, generally they are discussing the liberties of others. As Wendy Kaminer states, "it's likely that when people agree to cede liberty for the sake of order, they imagine ceding other people's liberties, not their own: If African Americans were an active political majority in this country, they would probably not be the victims of racial profiling. But many Americans have been willing to tolerate minor bureaucratic intrusions for the sake of feeling safer, even when the feeling is illusory."<sup>7</sup>

Although most Americans fear government encroachment of their most personal civil liberties, their apathetic response to other people's civil liberties losses is resulting in increased government ability to take away even more rights. Also, the "you're either with us or with the terrorists," mentality that the Bush administration is propagating has left few options for dissent. Americans are wary of expressing dissent because of the fear that they will seem unpatriotic. To many, all dissenting sentiments are considered the ultimate betrayal.<sup>8</sup>

One vital question in the aftermath of September 11th asked, "How could we have prevented such a tragedy?" Some theorized that cultural philosophies opened the door to evil elements. Did our attitudes regarding freedom and democracy help orchestrate the attacks? As people questioned personal beliefs, civil liberties became a quick target. Perhaps America had become too free and had "invited" the attacks. Maybe if the government enjoyed more access to citizens' personal lives, the terrorists could have been tracked. Some critics even argued that the terrorists fit a cultural and ethnic profile that should have been red-flagged. As Louisiana Representative John Cooksey said, "If I see someone come in that's got a diaper on his head and a fan belt [wrapped] around...that

guy needs to be pulled over and checked.”<sup>9</sup> This sentiment points to levels of fear and misunderstanding that directly influences public policy.

During this time of national concern and uncertainty, lawmakers must not succumb to hasty, uninformed policy decisions, especially with constitutional issues. United States case law has developed over several hundred years, with great care and discussion. Now is not the time to base law on emotion. The loss of civil liberties through rash legislation will not ensure the safety of Americans. With issues as nebulous and unattainable as complete national security, there are no quick solutions. Past efforts at improving security at the expense of civil rights have failed the test of hindsight. The events of September 11th have resulted in a series of laws that continue to take away civil liberties without securing safety. As Benjamin Franklin stated, “those who would give up essential liberty for temporary security deserve neither liberty nor security.” The task at hand is to honor the memory of those lost in the attacks with intelligent changes to American society, not to add to a long list of legislative failures. 

## Endnotes

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