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THE USA PATRIOT ACT: AN EGREGIOUS VIOLATION OF OUR RIGHTS OR NATIONAL NECESSITY?

Michael Stanker

On October 26, 2001 President Bush signed the *United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, or the *USA PATRIOT Act*.¹ The bill was passed by Congress in response to the horrific events of September 11th, 2001. President Bush, at the behest of the Attorney General and the Justice Department, expeditiously effectuated the approval of the legislation through the House and Senate in order to expand the powers of law enforcement for the purpose of protecting the American people from further terrorist activities.² The bill was immediately derided by the American Civil Liberties Union because it “gives the Attorney General and federal law enforcement unnecessary and permanent new power to violate civil liberties that go far beyond the stated goal of fighting terrorism.”³ Three of the most politically controversial aspects of the *PATRIOT Act* are the provisions that liberalize grand jury secrecy rules, enhance surveillance capabilities, and provide a new definition of “domestic terrorism.” Some aspects of the *PATRIOT Act* are necessary and completely reasonable, given advances in technology and the very real threat of terrorism. However, other facets of the act have a chilling effect on our most sacrosanct political liberties.

Grand Jury Secrecy

The grand jury in the federal criminal justice system wields a tremendous amount of power, and as a result has been accorded certain protections and rights in order to prevent abuse.⁴ A grand jury in its investigatory phase, is not subject to limitations other federal police agencies are, and as a result they can compel witnesses to testify, consider illegally seized evidence, and they do not have to cite probable cause for subpoenas.⁵ Since grand juries wield such awesome powers, their proceedings are all secret.⁶ This practice dates back to the 17th century, and has been considered of paramount importance to maintaining the integrity of the grand jury system.⁷

The effect of secrecy is twofold, “first, acting as a shield protecting the accused, and second as a sword wielded by the government to ferret out wrongdoing.”⁸ A grand jury investigation is to determine whether a trial should be held. If an individual is under investigation, but exonerated from wrongdoing, his reputation is not disparaged. If the proceedings of grand juries were not kept secret it would be too easy for information to leak to the press, and thus embarrass people who have done nothing wrong. Secrecy also aids the government as well. Witnesses are much more likely to give complete and truthful testimony if they know their words will not come back to haunt them. For example, a mob informant would feel safer testifying in front of a grand jury because he knows what he says is sealed, as opposed to testifying in a court where everything said is a matter of the public record. The secrecy of grand jury proceedings is of paramount importance to maintaining the system’s effectiveness, and of protecting those who fall under its gaze.

Under the provisions of the *PATRIOT Act*, foreign intelligence and counterintelligence information gathered by the grand jury can be shared with a host of other federal agencies.⁹ In the past, the only way to share information obtained by a grand jury was if it was to be used by those directly involved with federal law enforcement, or if a judge issued a court order, and often those were limited and specific. Now however, for the first time, “disclosures of grand jury material without a court order for the purposes unrelated to the enforcement of federal criminal law” have been permitted.¹⁰ The Justice Department’s desire to obtain grand jury information, without the supervision of a judge, can easily be understood. The Justice Department could use the grand jury as a tool to further its own investigations, and as long as the information relates to foreign intelligence in some way, it can be used indiscriminately by the rest of the federal government.¹¹

The definition of foreign intelligence is particularly broad in the *PATRIOT Act*. It refers to any “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons.”¹² Clearly, this is an overly broad definition of foreign intelligence, and the potential for abuse is great. While the need for some new disclosures certainly may exist, at the very least they should be subject to judicial oversight; that way the appropriate authorities expeditiously receive information pertaining to legitimate national security needs, and information pertaining primarily to criminal investigations is kept secret. The new expansive definitions of what types of materials can be shared, coupled with the complete lack of impartial oversight, fundamentally changes the nature of the grand jury system in the United States.

Furthermore, if Congress had seriously considered easing rules relating to the sharing of grand jury information then surely they would have found that requiring a judge’s approval was not too much to demand. A judge is impartial, and therefore is able to give an unbiased assessment whether or not the information the agencies are requesting actually pertains to foreign intelligence, or whether it is only valuable to criminal matters. If testimony is sought from an immigrant about a crime committed in his neighborhood that information could be shared under the guise of foreign intelligence, and since there is no oversight, no one can stop this from occurring. The problem with this is that the likeliness of their testimony leaking becomes more probable, not because other agencies would act with malice, but because the more information is passed around the less secure it becomes.

Over time the new information sharing rules of the *PATRIOT Act* have the potential to render the grand jury irrelevant in almost all matters. If people come to accept that a grand jury investigation is no different from any other investigation in practice it will suffer all of the ills regular federal law enforcement agencies do when trying to obtain relevant information. Also, since the grand jury has few restrictions it can be used to violate American’s constitutional rights in ways prohibited to the FBI and other federal agencies.

While the intent of sharing information pertinent to national security is certainly important, in reality the way this is carried out is flawed. It is highly unlikely Congress would have passed these new secrecy-sharing provisions if it confronted them directly, but since they were hidden in the *PATRIOT Act*, they sailed through our nation’s legislative branch with minimal scrutiny. The power grand

juries wield, combined with these new rules, poses a significant threat to American political liberties. A body once viewed with reverence now stands to be used by shortsighted government officials who are unconcerned with the Constitutional rights of Americans.

Government Surveillance

Other troubling provisions of the *PATRIOT Act* are those that expand government surveillance powers. Two of the main provisions are sections 206 and 218 of the act.¹³ Starting with President Franklin Roosevelt, executive surveillance related to foreign intelligence was long considered a right given to the executive.¹⁴ However, in the 1970's the "Senate Select Committee to Study Government Operations with Respect to Intelligence Activities," also known as the Church Committee, uncovered widespread abuses committed by the intelligence community.¹⁵ As a result of the committee's findings the *Foreign Intelligence Surveillance Act* (FISA) was born. Its function is to formalize the process by which presidents monitor individuals and groups for foreign intelligence purposes within the United States.¹⁶ Legitimate intelligence gathering was in no way hampered by the new requirements. However, FISA did lay down ground rules for judicial supervision of foreign surveillance. Now the executive branch has to go through a special court, the Foreign Intelligence Surveillance Court (FISC) in order to receive a warrant to electronically monitor an individual's residence or business.¹⁷ Despite the hope that this court would provide a check on possible executive abuses, in over twenty years of existence, the FISC has only denied one application for surveillance.¹⁸ Furthermore, the requirements that govern FISC electronic monitoring are not held to a strict level of judicial scrutiny.¹⁹ In order for the government to engage in electronic surveillance for criminal investigations, they must show probable cause that a crime was, or is about to, be committed. Also, the surveillance comes up for judicial review every thirty days.²⁰ This ensures that individual's Fourth Amendment rights are not violated by intrusive government surveillance. Foreign intelligence surveillance, on the other hand, is not held to standards nearly as stringent. After a warrant for surveillance is granted, it expires after ninety days, instead of thirty, but no judge keeps track of how long surveillance has been underway, so indefinite monitoring can easily occur.²¹ While some might claim that the old FISA was too liberal in granting the President electronic surveillance authority, it was an honest attempt to balance constitutional protections with national security interests.

The new *PATRIOT Act* provisions that change FISA give the government an unreasonable amount of power over electronic surveillance capability. FISA required that the primary purpose of surveillance was to gather foreign intelligence, but under *PATRIOT Act* amendments, only a significant purpose of the surveillance must be for foreign intelligence purposes.²² This is troublesome because it creates a legal loophole that could be exploited by the government to use the less stringent FISA surveillance standards to monitor criminal activity. This has the effect of making an end run around the Fourth Amendment, by hiding behind executive privilege, to monitor people and organizations if they pose a threat to national security. In *US District Court v. US* the Supreme Court found that Presidential right to surveillance does not extend to domestic threats, but only to foreign intelligence gathering.²³ While the events of September 11th would be classified as foreign intelligence (since Al Qaeda is a foreign organization bent on the destruction of the United States), mundane criminal cases do not. Should FISA be used for criminal purposes under the guise of intelligence investigations, it would pose a serious threat to our liberty because of the relatively few restrictions placed upon FISA surveillance.

Roving Wiretaps

A third troublesome expansion of government power is in their newfound ability to gain easy access to roving wiretaps. Section 206 of the *PATRIOT Act* allows the government to acquire roving wiretap authority “if the effect of the suspects phone switching prevents effective monitoring.”²⁴ Considering the ubiquitous nature of cellular telephones and other electronic communication, this provision can be justified given that the government must be able to carry out its duties regardless of technological advances. However, this law, when combined with another provision that allows for non-suspects to be monitored if they simply come into contact with a suspect, is frightening.²⁵ Since the federal police agency in question can now easily gain roving wiretaps, and can monitor other people, whoever the suspect comes into contact with may be placed under surveillance! If, for example, person A is being monitored by the FBI, and she make a phone call on person B’s phone, person B’s phone can now be wiretapped. Prior to adoption of the *PATRIOT Act*, it would have been almost impossible to prove probable cause in such a scenario. Also, since FISA surveillance has minimal judicial oversight, this monitoring could, in theory, go on indefinitely. The *PATRIOT Act* modifies FISA in ways that most civil libertarians find patently offensive.

Almost any investigation can hide under the guise of an intelligence investigation, and thus be exempt from constitutional restraints. While these enhancements might help monitor terrorists, the price for our liberties is too high.

Domestic Terrorism

Perhaps the most frightening aspect of the *PATRIOT Act* is its creation of a new kind of terrorism, *domestic terrorism*. Prior to President Bush signing the bill into law, there were three types of terrorism: international terrorism, terrorism transcending national borders, and federal terrorism.²⁶ The September 11th attack falls within these categories, as well as the Oklahoma City bombing, and the first World Trade Center attack. The types of activities that fall within the new domestic terrorism category can only be described adequately as violent acts committed by politically dissident domestic groups.

There is little debate in our society that violence is a major problem, but classifying violence as “terrorism” is not what an open society should do. In order for a group to be classified as a domestic terrorist organization, a violent act carried out in the name of the group is all that is necessary.²⁷ This causes dilemmas for two types of organizations: religious groups and politically dissident groups. While religion has always held a revered place in America, it has not been free from government interference and surveillance. In the 1980’s, several Protestant churches in the southwest were monitored because they were believed to be harboring illegal immigrants.²⁸ While this might bother some, the churches were engaged in illegal activity, and the authorities had shown probable cause in order to monitor them. Now however, if the FBI wanted to keep a mosque under electronic surveillance, it easily could do so without probable cause or effective judicial oversight. Even though a distinct majority of its members might be United State’s citizens, the government could claim members of the mosque had been engaged in acts of violence, and therefore the entire organization should kept under surveillance. Furthermore, since the *PATRIOT Act* also amended the rules dealing with surveillance, there would be almost no accountability.

Additionally, politically dissident groups can fall under the category of “domestic terrorists.” In a country as diverse as ours, differing political ideas flourish. Most members of these groups do not resort to violence to see their objectives reached. However, if a few members used violence to achieve political ends, the entire organization could be labeled as a domestic terrorist organization.²⁹ This has a chilling effect on free speech because any number of groups

might stop their protest activities due to fear of government retribution. There is no need for the government to have created this new type of “terrorism,” since its only purpose seems to be to restrict groups that hold unpopular views.

The effects of being labeled a *domestic terrorist* are even more frightening than the ease in which one can fall into that category. A person who is labeled a *domestic terrorist* is subject to more governmental surveillance and enhanced penalties.³⁰ Certainly, those who are terrorists must be punished severely, but people engaged in legitimate political protest might find themselves subject to these harsher penalties.

Conclusion

While lawmakers might have been under the impression that the *USA PATRIOT Act* gave law enforcement the necessary tools to fight terrorism, in reality it enhanced government power to investigate regular crime at the expense of our political liberties. Our notion of the grand jury has been steeped in the American psyche since the founding of our country. Now however, it has the potential to be little more than a tool used by the Justice Department as a means to work around our constitutional rights. Also, our privacy rights have been severely eroded. Electronic surveillance now can be used much more extensively, and without the probable cause safeguard so cherished by Americans. All the Justice Department needs to do is disguise its intent under the name of “foreign intelligence.” Finally, our rights of political association have been severely attacked. Members of politically dissident groups can easily be labeled as terrorists, and as a result face harsh punishments, and unreasonable scrutiny. Many members of Congress did not have a chance to review the bill before they voted on it, but that surely is no excuse for such egregious violations of our rights.³¹ The provisions of the Act go too far in their attempt to catch and monitor potential terrorists. While the new rules may aid the government in its “War on Terror,” the price we pay in the loss of protection of our civil liberties is too high. ☹

Endnotes

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