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The PATRIOT Act: Liberty Afire

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The PATRIOT Act: Liberty Afire

Abstract

The USA PATRIOT Act was written and passed into law in the United States within weeks of the devastating 9/11 terrorist attack. Its purpose was to strengthen and realign U.S. policy to allow greater judicial power to better protect the U.S. from further acts of terrorism. However, as the legal tenets of the Act became more transparent, public concern mounted over the wide latitude given to the governmental agencies that seemed to threaten academic and intellectual freedom and overall civil liberties. The problems inherent in the USA PATRIOT Act are described, and potential amendments and improvements have been suggested.

Keywords

PATRIOT Act, governmentd

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Abstract

The USA PATRIOT Act was written and passed into law in the United States within weeks of the devastating 9/11 terrorist attack. Its purpose was to strengthen and realign U.S. policy to allow greater judicial power to better protect the U.S. from further acts of terrorism. However, as the legal tenets of the Act became more transparent, public concern mounted over the wide latitude given to the governmental agencies that seemed to threaten academic and intellectual freedom and overall civil liberties. The problems inherent in the USA PATRIOT Act are described, and potential amendments and improvements have been suggested.

“Those who would give up essential Liberty, to purchase a little temporary safety, deserve neither Liberty nor safety.”

– Ben Franklin

Introduction

Amid the panic and confusion of the September 11th terrorist attacks, a new era of American homeland security was born. Galvanized by the American state of fear, then-President George W. Bush enacted a sweeping legislative overhaul to governmental investigative power on October 26, 2001. This

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legislation became known as the USA PATRIOT Act, an acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”, and removed several longstanding judicial obstacles to privacy intrusion. Among the most notable provisions of the PATRIOT Act were: searches and seizures without “probable cause”, interception of private communication, indefinite extrajudicial detention of non-citizens, and eased restrictions on the acquisition of financial, medical, and court documentation (Matz, 2008).

Originally designed to dissuade further occurrences of terrorist activity, the PATRIOT Act was promptly approved as a necessary legal construct by the House of Representatives, the Senate, and ultimately president George W. Bush (Flint, 2004). The policy, however, was based on the theoretical assumption that the public perception of additional safety was proper justification for the compromise of key civil liberties that are fundamental to a democratic society (Thur, 2009). As the legal tenets of the policy became more transparent, public concern began to mount from several fronts. The American Librarian Association (ALA) shifted from their former cooperative stance with the government, identifying the Act as an attack on academic and intellectual freedom (Ebenger, 2007). Journalistic scrutiny, coupled with the dissension of the ALA, formed a political climate that began to challenge the probative value of such an intrusive policy. There will be longstanding consequences of governmental overreach if appropriate amendments to the PATRIOT Act are not enacted to restore the sanctity of American civil liberty. This paper will highlight the divergence of the USA PATRIOT Act with the U.S Constitution and will provide recommendations for developing an amended

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policy better suited for suppressing terrorism, while upholding American citizens' civil liberties.

Description of PATRIOT Act

The PATRIOT Act is an active regulatory policy that amended several pre-existing domestic and foreign security statutes. According to the Congressional Digest Corporation (2004), the Act can be divided into nine categories which provide for: enhancement of domestic security against terrorism, surveillance, anti-money-laundering practices to prevent terrorism, border security, removal of judicial obstacles to investigation, compensation for victims of terrorism, classification of terrorism as criminal activity, establishment of terrorism criminal law, and improved intelligence. Much of the PATRIOT Act's academic scrutiny has focused specifically on the surveillance provision. Within the surveillance provision, the Foreign Intelligence Surveillance Act (FISA) was amended to ease restrictions on the governmental burden to demonstrate purpose for conducting surveillance (Funk, 2007).

Problem Identified

The 9/11 terrorist attacks unveiled several vulnerabilities in American domestic security. Two of the hijackers, Khalid al-Mindhar and Nawaf al-Hazmi, were included on the FBI's terrorist-alert list as early as 1999, but failed to set off red flags during airport security screening on September 11, 2001 (McNeil, 2005). A subsequent report released by the Department of Homeland Security cited internal bureaucratic conflicts between the Central Intelligence Agency (CIA) and the National Security Agency (NSA) as the likely factor in strained inter-agency coordination with airport security.

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Aboard American Airlines (AA) Flight 77, passenger Barbara Olson called her husband stating that terrorists wielding knives and box cutters had hijacked the aircraft. Shortly afterwards, AA Flight 77 crashed into the Pentagon. This led to public scrutiny of the Federal Air Marshal program for not maintaining a sufficient national presence (Funk, 2007). It also led to criticism of airport security screening, which had been presumed sufficient at detecting contraband weaponry.

The tragedies that unfolded on September 11th catalyzed the security reform necessary to ensure such events would never occur again. All security vulnerabilities related to 9/11, however, were flaws in airport security screening. The PATRIOT Act provided for the enhanced security needed in several categories to protect against terrorism, but it also took the much larger step of overhauling federal investigative procedures. As a result, the PATRIOT Act has been criticized as an overly wide-cast legislative net that has threatened privacy interests of law-abiding citizens (Thur, 2009).

Development of the PATRIOT Act

In addition to the radical increase in prosecutorial power and decreased judicial oversight afforded by the PATRIOT Act, the short time taken to propose and sign it into law suggests there could have been less than optimal forethought given.

Rushed Legislation

Although the PATRIOT Act was signed into law mere weeks after the September 11th terrorist attacks, the initial policy proposal was completed within eight days (McNeil, 2005). The policy was a direct response by the Bush Administration and

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Attorney General, John Ashcroft, to the devastation caused by the September 11th terrorist attacks.

Shadow of the Past

The PATRIOT Act echoed legislative ideas implemented six decades prior during America's preoccupation with Communist concerns (Thur, 2009). The Smith Act of 1940, also known as the Alien Registration Act, established criminal penalties for advocating the overthrow of U.S. government, as well as the requirement for non-citizens to register with the government (Thur, 2009). The Smith Act established the judicial requirement for the establishment of "probable cause" in order to obtain a search warrant. The Bush Administration, citing the importance of investigative expedience, removed the requirement of "probable cause" within Title V of the PATRIOT Act (McNeil, 2005).

INS Power Augmented

In conjunction with the initial proposal of the PATRIOT Act, on September 17, 2001, the Bush Administration amended 8 C.F.R § 287.3(d), permitting the Immigration and Naturalization Service (INS) to "detain individuals indefinitely following a warrantless arrest without bringing any charges against them" during times of "emergency or extraordinary circumstance" (McNeil, 2005, p. 114). Even in the calamitous atmosphere following the events of September 11th, the rapid-fire legislative maneuvers of the Bush Administration reflected mounting irrationality and paranoia. These factors contributed to the hastened passage of the PATRIOT Act and the virtual nonexistence of initial congressional opposition.

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Evaluation of the PATRIOT Act

Though the provisions of the PATRIOT Act are now widely known to the scholastic community, their effects remain cloaked in secrecy. According to Matz (2008), academic scrutiny of the PATRIOT Act has focused on Section 215(d) and Section 213.

Section 215(d) of the PATRIOT Act has suppressed the release of information pertaining to governmental investigative activity through the issuance of mandatory gag orders (Jaeger, McClure, Bertot, & Snead, 2004). Also referred to as the “secrecy clause,” Section 215(d) has widely curtailed scholastic attempts to research investigative activity promulgated by the federal government under the authority of the PATRIOT Act. In addition to silencing the subjects of governmental investigation, Section 215(d) granted the FBI the authority to forcibly remove public access to any information deemed necessary within a library database – another key obstacle to researchers in their pursuit of empirical analysis (Matz, 2008). While empirical studies have been seemingly nonexistent, awareness of information suppression by the FBI has reaffirmed scholarly concerns that the PATRIOT Act was not legislated solely as a legal maneuver to obstruct terrorism; it provided the FBI with judicial justification to function as a “cloak-and-dagger” group, subverting American civil liberties in order to advance their own investigative agenda (Thur, 2009).

If the exploitation of judicial power is any indication of the Patriot Act’s failure to uproot terrorism, there is perhaps no better example than Section 213. Section 213 provided the federal government with the authority to execute “sneak and peek” searches and seizures, without the judicial requirement of “probable cause,” information disclosure to the subject of

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investigation, or indemnification of seized property (Mac Donald & Dempsey, 2005). In 2005, the Electronic Privacy Information Center (EPIC) filed a Freedom of Information Act disclosure request to the Department of Justice demanding information related to “sneak and peek” activity (EPIC v. Department of Justice, 2005). The disclosure uncovered that the overwhelming majority of “sneak and peek” searches and seizures had been utilized to investigate ordinary criminal activity, such as drug trafficking, white-collar crime, and computer hacking. This was another clear indication that the federal government had actively exploited the PATRIOT Act to investigate American citizens engaged in ordinary criminal behavior, under the guise of thwarting terrorism.

Sunset Clause

The sunset clause originally embedded within the literature of the PATRIOT Act had been assumed an effective legislative mechanism to restrict the most controversial provisions to a specific time frame (Trinkaus-Randall, 2005). In 2006, the controversial provisions that had expired under the sunset clause were congressionally reauthorized with minimal difficulty. Funk (2007) argued that the sunset clause never posed a true threat to legislative reauthorization and was likely used as a political ploy to elicit wider bipartisan support for the initial passage of the USA PATRIOT Act.

Consequences

McNeil (2005) points out the existence of an academic consensus that the PATRIOT Act has devalued the American ideal of civil liberty in an attempt to tighten the noose around terrorism. Instead of bolstering and unifying America into

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patriotic solidarity, it has resulted in political backlash, societal stratification, and created a rift within the academic community. Not only does the PATRIOT Act demonstrate a blatant disregard for ethics and cultural values of the American society, it has done little to eradicate terrorism on a global scale. The extreme anti-Arab sentiment in the post-9/11 era has in fact amplified sectarian strife in the Middle East and escalated U.S military involvement. Subsequent societal backlash caused by the PATRIOT Act exemplifies the consequences that follow legislation brought forth by fear.

Recommendations

Transformation of the PATRIOT Act into an improved policy written under non-hastened conditions and a bipartisan atmosphere would strengthen its intended purpose. What was clearly known about the 9/11 terrorist attacks was that the 19 hijackers involved in the attack failed to set off red flags during airport security screenings. The revised legislation should therefore provide distinct security enhancements at airports, continued installment of on-board air marshals, and heightened scrutiny of tourist visas. These measures would directly address the security flaws that the hijackers were able to exploit, while maintaining the integrity of American civil liberty and privacy.

Domestic oversight would continue to be conducted by law enforcement and governmental agencies; however, procedural safeguards would be restored to ensure power is not abused to spy on law-abiding citizens. The FBI would be required to demonstrate due diligence and probable cause of a suspect's affiliation with terrorism in the appropriate jurisdictions in order to receive a warrant to wiretap private communications, perform searches and seizures, or detain

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suspects. The corresponding requirement for improved inter-agency communication could be enhanced by implementing a private network interface, accessible by a designated panel at each governmental agency – ensuring a swifter response to emergency situations.

Financial Leverage and Scholastic Research

The financial means to implement the aforementioned policy changes would not pose a challenge. Easing back on several existing policies centered on domestic spying would lessen the current financial strain and therefore allow for more efficient allocation of resources. Furthermore, with governmental restoration of academic and intellectual freedom to their former sanctity, the scholarly community would feel less alienated. This would be an important prerequisite for the enlistment of scholastic assistance regarding economic advice, and instrumental towards a smooth policy transition. Rather than taking a suppressive stance towards policy effects and research, the government would encourage information exchange with the academic community. This would enable empirical research, meta-analyses, higher governmental transparency, and ultimately promote faith in the policy itself. Willingness of the U.S government to concede to and correct flaws or errors exposed by scholastic studies would be essential to policy revision, and grant the legislative fluidity necessary for adaptation in an ever-evolving political climate.

Jurisdictional Boundaries

By restoring judicial oversight and due process to the prosecutorial practices, legal proceedings governed by the PATRIOT Act would provide for additional protection for non-

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citizens. This would, in turn, enhance diplomatic relations with foreign embassies and encourage heightened international cooperation in extradition efforts as well as intelligence gathering – a critical requirement for dismantling terrorism on a global scale.

Feasibility for Change

Ultimately, the power of change rests with the American people. The likelihood of the proposed remedy to current policy is highly contingent upon the collective political furor and tactical prowess of American citizens. There must be a cohesive, calculated plan to install political representatives that mirror the desire to amend the PATRIOT Act into Congress. Although the process may be slow, it would likely be catalyzed by the introduction of new faces, new opinions, and new challenges into the political limelight.

Conclusion

The PATRIOT Act confounded the problems it sought to solve due to political discord and misguided aims. With American civil liberties no longer the forefront of governmental concern, the PATRIOT Act highlighted the civic need for checks and balances between the executive and legislative branches of government. Government must conform to the liberties, ideals, and constitutional protections afforded by the U.S Constitution if faith in government is to be maintained.

Initially praised for rapid domestic security enhancement, the USA PATRIOT Act has evolved into a political weapon of myopic focus. By removing judicial oversight from the prosecutorial arena, the executive branch of the U.S government has effectively appointed itself judge, jury, and executioner in

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matters pertaining to national security. In doing so, the judicial safeguards designed to protect the rights of American citizens have become compromised, and the distinction between enemy of the state and ordinary citizen has been blurred. The government must balance the zeal of combating terrorism with the commitment to uphold the due process of law-abiding citizens.

Libraries and other information resource centers have lost the sovereignty to self-govern. The library provision of the PATRIOT Act has forced librarians into compliance with governmental requests to divulge private patron activity. The ensuing backlash of the American Librarian Association (ALA) has complicated U.S efforts to facilitate increased information exchange and coordination with domestic libraries, long considered to be the conduit bridging academia with the political arena. The alienation of the ALA highlights the failure of the PATRIOT Act to enhance information sharing, a stated intent of the policy within Title IX (Matz, 2008). By realigning America's policy towards domestic security with the constitutional liberties upon which America was founded, a rather dark chapter of legislative history can be closed and strained relations mended. A categorical shift from governmental intrusiveness to democratic concern is sure to win back the hearts and minds of the American public, and realign Washington's commitment to uproot terrorism with constitutional protections for law-abiding citizens. Absent these changes, America will not win its "War on Terror," and the color of law is sure to fade.

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