

Is the Patriot Act a Necessary Protection Against Terrorism Or a Threat to Our Civil Liberties?

The Patriot Act Is a Necessary Protection Against Terrorism

Advocate: Andrew C. McCarthy, consultant at the Investigative Project; he was the lead prosecutor in the case against Sheikh Omar Abdel Rahman and 11 others charged with the 1993 World Trade Center bombing.

Source: "The Patriot Act Without Tears," *National Review* (June 14, 2004): 32-35.

The Patriot Act Is a Threat to Our Civil Liberties

Advocate: Stephen J. Schulhofer, Robert B. McKay Professor of Law at New York University Law School; author of several books, including *The Enemy Within: Intelligence Gathering, Law Enforcement and Civil Liberties in the Wake of September 11*.

Source: "The Patriot Act and the Surveillance Society," in Richard C. Leone and Greg Anrig, Jr., editors, *Liberty Under Attack: Reclaiming Our Freedoms in an Age of Terror* (New York: Public Affairs, 2007).

The Patriot Act passed through the U.S. Congress in an almost hysterical rush and with little dissent (only one senator voted against it) following the infamous 9/11 attacks. The complex and wide-ranging act, 342 pages long, was passed without either a conference or a committee report. Few who voted to approve

the bill had any comprehensive understanding of what they had passed; indeed very few had even read it.

There is little question that the Patriot Act places significant limitations on civil liberties; the debate is whether such limitations are actually useful in combating terrorism, and whether the limitations on our liberties have gone too far. This is an issue that cuts directly across traditional controversies between "liberals" and "conservatives." Obviously many conservatives supported the Patriot Act, as did many more liberal legislators. On the other side, the "Goldwater conservatives"—who fear enlarging and expanding the power of government over individuals—opposed many of the provisions of the act: Conservative Republican Larry Craig stated in a Judiciary Committee hearing, "I find it very difficult to believe that the federal government can enter my home, strip my hard drive, go through my records and then exit out the back door without telling me they were there." And they were joined in their opposition by such "liberal" groups as the American Civil Liberties Union. So in drawing your own conclusions concerning the Patriot Act, you cannot rely on easy "conservative" or "liberal" labels.

There are several very controversial elements of the Patriot Act. One is section 215, the "business records" provision, which grants the government power to obtain a court order (without requiring a search warrant or probable cause) to obtain your library, bookstore, medical, university, Internet, and various other records; and it prohibits the business or organization releasing the records from informing you that your records were released. A second controversial provision gives the government the right to deport any alien (including those legally in residence who are seeking citizenship) for associational activity with organizations listed as Terrorist Organizations by the Secretary of State—including associations that occurred before the organization was so designated. If an alien from Ireland supported a hunger relief fund for children in Northern Ireland, and the organization administering the relief program was later found to have some ties to the Irish Republican Army and was ultimately declared a terrorist organization, then that Irish immigrant could be detained indefinitely and deported—with no hearings and no appeal. A third controversial section is section 802, which criminalizes a very broad and rather vague category of "domestic terrorism," which includes dangerous acts that violate the criminal law and "appear to be intended . . . to influence the policy of a government by intimidation or coercion." This might be interpreted to include any vigorous protest in which the protesters are charged with failure to disperse or resist arrest. Fourth, section 411 denies U.S. entry to any member of a political or social group "whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to recruit or eliminate terrorist activities." Had a similar law been in effect in England in 1775, anyone voicing support for the Boston Tea Party (an illegal act that destroyed property) would have been denied entry into Great Britain. Finally, the Patriot Act endorses "sneak and peek" searches, in which govern-

... either during or after the search and without establishing probable cause to justify the search.

Andrew C. McCarthy concentrates on defending two elements of the Patriot Act that are widely accepted and rarely attacked: the provision to allow national security organizations and local criminal investigators to share information; and the provision to allow court-supervised subpoenas, with the establishment of reasonable grounds, for e-mail records (in a manner similar to the process for getting court-approved access to telephone lines). On more controversial issues (which McCarthy classifies as "red herrings"), he claims that section 215 (which allows federal investigators to check library, Internet, and university records, with little or no oversight) is rarely used; that the restrictions on funding for humanitarian purposes (and potential criminal charges based on such contributions) are beneficial; and that the "sneak and peek" search procedures simply give systematic organization to a practice that has long been in place. Stephen J. Schulhofer acknowledges that the Patriot Act has some positive sections, but contends that the Patriot Act broadens surveillance powers far beyond what is necessary for national security, and severely erodes oversight of surveillance practices and thus leaves them open to governmental abuse.

111 Points to Ponder

- Andrew McCarthy claims that the issue of government examination of library records—without the knowledge of library patrons, and without showing sufficient cause—is a "red herring" or a distorted issue. His key support for that claim is that library records "are not even mentioned in the statute." Does the fact that library records are not explicitly mentioned in the statute show that government surveillance of library records is a "nonissue"?
- McCarthy notes that the Patriot Act "provides that the attorney general must, twice a year, 'fully inform' Congress" of national security investigations into the reading habits and Internet usage of U.S. citizens. Schulhofer considers such a report an inadequate level of supervision, and no substitute for judicial oversight. Is the required attorney general's congressional report an adequate safeguard against governmental abuse of surveillance?
- You are not a terrorist, and you have no fear of criminal prosecution as a result of surveillance of your Internet usage. Would you nonetheless be troubled to discover that government agents had been monitoring your e-mails and Internet usage over the past year? Schulhofer suggests that excessive surveillance of immigrants to the United States may be counterproductive in combating terrorism; what grounds or justification could be given for that claim?

The Patriot Act Without Tears

Understanding a Mythologized Law

Andrew C. McCarthy

It was mid-August 2001, the last desperate days before the 9/11 terrorist attacks. Desperate, that is, for an alert agent of the FBI's Foreign Counterintelligence Division (FCI); much of the rest of America, and certainly much of the rest of its government, blithely carried on, content to assume, despite the number and increasing ferocity of terrorist attacks dating back nearly nine years, that national security was little more than an everyday criminal-justice issue.

Since 1995, a "wall" had been erected, presumptively barring communications between FCI agents and their counterparts in law enforcement—the FBI's criminal agents and the assistant U.S. attorneys who collectively, after a string of successful prosecutions through the 1990s, had become the government's best resource for information about the threat of militant Islam. This wall was not required by law; it was imposed as policy. Justice Department lawyers, elevating litigation risk over national security, designed it to forestall accusations that the federal government had used its intelligence-eavesdropping authority to build criminal cases.

This FCI agent collided, head-on, with the wall; and strewn in the wreckage was the last, best hope of stopping 9/11. Putting disconnected clues

together, the agent had deduced two Qaeda operatives, Khalid al-Midhar and Nawaf al-Hazmi, had probably gotten into the U.S. Alarmed, he pleaded with the FBI's criminal division to let him hunt down the terrorists—but he refused: For agents to fuse their information and efforts would be a transgression against the wall. The present agent rued that, one day soon, he would die in the face of this paralyzing roadblock. Al-Midhar and al-Hazmi remained undetected until they plunged Flight 77 into the Pentagon on 9/11.

Facing Reality

By October 2001, the world had changed—and the USA Patriot Act was passed. So patent was the need for this law that it racked up massive support: 357-66 in the House, 98-1 in the Senate. In the nearly three years since, however, it has been distorted beyond recognition by a coalition of anti-Bush leftists and libertarian extremists, such that it is now perhaps the most broadly maligned—and misunderstood—piece of meaningful legislation in U.S. history. If our nation is serious about national security, the Patriot Act must be made permanent; instead, it will soon be gone—and the disastrous "intelligence wall" rebuilt.

Andrew C. McCarthy, "The Patriot Act Without Tears," *National Review*, June 14, 2004; 32-34. Reprinted with permission.

Patriot is not an assault on the Bill of Rights. It is, basically, an overhaul of the government's antiquated counter-terror arsenal, which had been haplessly fighting a 21st-century war with 20th-century weapons. Indeed, Patriot's only obvious flaw is its cloying acronym, short for "The Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001." But once you get past the title, Patriot is all substance, and crucial to national security.

The most essential improvement wrought by Patriot has been the dismantling of the intelligence wall. The bill expressly amended the government's national-security eavesdropping-and-search authority (under the Foreign Intelligence Surveillance Act or FISA) to clarify that intelligence agents, criminal investigators, and prosecutors not only may but should be pooling information and connecting dots. This is common sense: Along the way toward mass murder, terrorists inevitably commit numerous ordinary crimes, everything from identity theft to immigration fraud to bombing. One could not surveil them as agents of a foreign power (as FISA permits) without necessarily uncovering such crimes, and this, far from being a problem, is a bonus since these are the groundwork for prosecutions that can both stop terrorists before they strike and pressure them to turn over their evidence.

Yet, as has been detailed in a decisive 2002 opinion by the Foreign Intelligence Surveillance Court of Review, FISA had for decades been interpreted by the government and the courts, which, owing to their passion over the "rights" of enemy

operatives, erroneously presumed that national-security intelligence was somehow separate and severable from criminal evidence. This false dichotomy culminated in the wall built by the Clinton Justice Department (and substantially maintained by Bush's DOJ), with awful consequences.

Tearing down the wall—as well as repealing legislation that had barred criminal investigators from sharing with intelligence agents the fruits of grand-jury proceedings and criminal wiretaps—has paid instant dividends. For example, while the wall once caused intelligence and criminal agents in Buffalo to believe they could not be in the same room together during briefings to discuss their parallel investigations of an apparent sleeper cell in Lackawanna, N.Y., the Patriot Act allowed the criminal investigators to learn that a theretofore anonymous letter to one of their subjects had, as intelligence agents knew, been penned by a Qaeda operative. This and other fact-sharing broke an investigative logjam, revealing a history of paramilitary training at al-Qaeda's Afghan proving grounds, and directly resulted in guilty pleas and lengthy sentences for six men who had provided material support to the terror network.

In a similar way, in 2002 law-enforcement agents in Oregon learned through an informant that Jeffrey Battle was actively scoping out Jewish schools and synagogues for a terrorist attack. It later emerged that Battle was among a group that set out to train with al-Qaeda in Afghanistan (they never made it). Battle was plainly a time bomb, but his confederates had not yet been fully revealed—and there naturally was fear that if Battle were arrested and removed from the scene

the investigators would lose their best hope of identifying other terrorists. Because the wall was down, the criminal investigators had the confidence to delay the arrest and continue the investigation, knowing the intelligence agents using FISA were now free to share what they were learning. As a result, not only Battle but six others, collectively known as the "Portland 7," were identified, convicted on terrorism-support charges, and sentenced to between three and 18 years in prison.

Thanks to Patriot's removal of the blinders, action—sometimes long overdue—has been taken against many other accused and convicted terrorists. Criminal investigators won access to a historic trove of intelligence demonstrating that Prof. Sami al-Arian had been using his University of South Florida redoubt as an annex of the deadly Palestinian Islamic Jihad group responsible for over 100 murders, including that of Alisa Flatow, a young American woman killed in an Israeli bus bombing. The sharing provisions also ensured the convictions of nine other defendants in Virginia, on charges ranging from support of the Qaeda-affiliated Lashkar-e-Taiba to conspiracy to levy war against the U.S.; the conviction in Chicago of bin Laden intimate Enaam Amaout for using his Benevolence International Foundation as a conduit to fund terrorist cells in Bosnia and Chechnya, and of Khaled Abdel-Latif Dumeisi for working in the U.S. for Saddam Hussein's brutal Iraqi Intelligence Service; the indictment of a University of Idaho graduate student, Sami Omar al-Hussayen, for using his computer skills to support the recruiting and fundraising of Hamas and Chechnyan terror groups; the

indictment in Brooklyn of two Yemeni nationals who bragged about having raised millions of dollars for bin Laden; and the smashing of a drug-for-weapons plot in San Diego that solicited Stinger anti-aircraft missiles for the Taliban in exchange for heroin and hashish. Moreover, while much information provided by criminal investigators to the intelligence community must remain classified, the Justice Department also credits the sharing provisions with the revocation of visas for suspected terrorists, tracking and choking off of terrorist funding channels, and identifying of terrorists operating overseas.

21st-Century Tactics

Besides paving the way for agents to pool critical information, Patriot has been invaluable in modernizing investigative tools to ensure that more information is actually captured. While critics' persistent caviling misleadingly suggests that these tools are a not-so-subtle assault on privacy rights, for the most part they merely extend to national security intelligence investigations the same methods that have long been available to law-enforcement agencies: probing the vast array of federal crimes, including those as comparatively innocuous as health-care fraud.

Among the best examples is the so-called "roving" (or multipoint) wiretap. As the telephony revolution unfolded, criminals naturally took advantage, avoiding wiretap surveillance by the simple tactic of constantly switching phones—which became especially easy to do once cellphones became ubiquitous. Congress responded nearly 20 years ago with a law

...taps that, rather than aim at a specific telephone, targeted *persons*, thus allowing monitoring to continue without significant delay as criminals ditched one phone for the next. Inexplicably, this same authority was not available to intelligence agents investigating terrorists under FISA. Patriot rectifies this anomaly.

On the law-enforcement side, Patriot expands the substance of the wiretap statute to account for the realities of terrorism. Most Americans would probably be surprised to learn that while the relatively trivial offense of gambling, for example, was a lawful predicate for a criminal wiretap investigation, chemical-weapons offenses, the use of weapons of mass destruction, the killing of Americans abroad, terrorist financing, and computer fraud were not. Thanks to Patriot, that is no longer the case.

Analogously, Patriot revamped other telecommunications-related techniques. Prior law, for example, had been written in the bygone era when cable service meant television programming. Owing to privacy concerns about viewing habits, which the government rarely has a legitimate reason to probe, federal law made access to cable-usage records practically impossible—creating in service providers a fear of being sued by customers if they complied with government information requests. Now, of course, millions of cable subscribers—including no small number of terrorists—use the service not only for entertainment viewing but for e-mail services.

While e-mail-usage records from dial-up providers have long been available by subpoena, court order, or

... (depending on the sensitivity of the information sought), cable providers for years delayed complying with such processes, arguing that their services fell under the restrictive umbrella of prior cable law. This was not only a potentially disastrous state of affairs in terrorism cases, where delay can cost lives, but in many other contexts as well—including one reported case in which a cable company declined to comply with an order to disclose the name of a suspected pedophile who was distributing child pornography on the Internet even as he bragged online about sexually abusing a young girl. (Investigators, forced to pursue other leads, needed two extra weeks to identify and apprehend the suspect.) Recognizing that it made no sense to have radically different standards for acquiring the same information, Patriot made cable e-mail available on the same terms as dial-up.

Patriot also closed other gaping e-mail loopholes. Under prior law, for example, investigators trying to identify the source of incriminating e-mail were severely handicapped in that their readiest tool, the grand-jury subpoena, could be used only to compel the service provider to produce customers' names, addresses, and lengths of service—information often of little value in ferreting out wrongdoers who routinely use false names and temporary e-mail addresses. Patriot solved this problem by empowering grand juries to compel payment information, which can be used to trace the bank and credit-card records by which investigators ultimately establish identity. This not only makes it possible to identify potential terrorists far more quickly—and thus, it is hoped, before

they can strike—but also to thwart other criminals who must be apprehended with all due speed. Such subpoenas, for example, have been employed repeatedly to identify and arrest molesters who were actively abusing children. The Justice Department reports that, only a few weeks ago, the new authority prevented a Columbine-like attack by allowing agents to identify a suspect, and obtain his confession, before the attack could take place.

Further, Patriot clarified such investigative matters as the methods for lawful access by investigators to stored e-mail held by third parties (such as AOL and other service providers). And it cured the incongruity that allowed agents to access voice messages stored in a suspect's own home answering machine by a simple search warrant but anomalously forced them to obtain a far more cumbersome wiretap order if the messages were in the form of voicemail stored with a third-party provider.

A Library of Red Herrings

One Patriot reform that has been irresponsibly maligned is Section 215 of the act, which merely extends to national-security investigations conducted under FISA the same authority to subpoena business records that criminal investigators have exercised unremarkably for years. Indeed, even under Section 215, intelligence agents remain at a comparative disadvantage since they must get the approval of a FISA court before compelling records production while prosecutors in criminal cases simply issue grand-jury

subpoenas. Nonetheless, this common sense provision came under blistering disingenuous assault last year when the ACLU and others raised the red herring of library records—which was not even mentioned in the statute. In 2002, for example, the *Hartford Courant* was compelled to retract a full story that falsely accused the FBI of installing software on computers at the Hartford Public Library to monitor the public's use of the Internet. In fact, the FBI had obtained a court-ordered search warrant to copy the hard drive of a single computer that had been used criminally to hack into a business computer system in California.)

In 2003, the ACLU issued a warning that Section 215 would allow federal "thought police" to "target us for what we choose to read or what Websites we visit." In reality, Section 215 (unlike criminal-grand-jury subpoena authority) expressly contains safeguards protecting First Amendment rights. It further provides that the attorney general must, twice a year, "fully inform Congress about how the provision has been implemented. As of September 2003, the provision had not been used a single time—neither for library records, nor, indeed, for records of any kind.

Unlike reading habits, financing the lifeblood of terrorist networks actually is a Patriot target. The act significantly crimped the ability of overseas terrorists to use foreign banks and nominees to avoid seizures of their funds; it cracked down on the so-called "hawalas" (that is, unlicensed money transmitting businesses) that have been used to funnel millions of dollars to terrorist groups; it extended the reach of money-laundering penalties—which

in transactions involving the proceeds of crime. And it further choked the funding channels by making currency smuggling itself (rather than the mere failure to file a report about the movement of currency) a crime, an initiative that bolsters the legal basis for seizing all, rather than a portion, of the smuggled funds. These and other Patriot finance provisions have enabled the government to obtain over 20 convictions to date and freeze over \$130 million in assets worldwide.

Mention should also be made of another Patriot improvement that has been speciously challenged: the codification of uniform procedures for so-called sneak-and-peek warrants, which allow agents to conduct a search without seizing items, and delay notification to the person whose premises have been searched—thus ensuring that an investigation can proceed and agents can continue identifying other conspirators. Such warrants have been used for many years, and delayed notification has been a commonplace—just as it is in other areas, such as wiretap law, where alerting the subject would prematurely end the investigation.

Sneak-and-peek delayed notification, however, evolved through federal case law rather than by statute, and consequently there was a jumble of varying requirements depending on which federal circuit the investigation happened to be in. All Patriot did in this regard was impose a uniform national standard that permits delay if notification could cause endangerment to life, facilitation of flight, destruction of evidence, intimidation

jeopardizing of investigations. Yet critics drummed up outrage by portraying sneak-and-peek as if it were a novel encroachment on privacy rather than a well-established tool that requires prior court approval. So effective was this campaign that the House of Representatives responded by voting to deny funding for the delayed-notification warrants. Inability to delay notification, of course, would defeat the purpose of using sneak-and-peek in the first place. The Senate has not seemed inclined to follow suit, but that so prudent a provision could become the subject of controversy illustrates how effectively the opposition has discredited the Patriot Act.

Palpably, the Patriot Act, far from imperiling the Constitution, went a long way toward shoring up the perilous state of national security that existed on the morning of 9/11. That is why it is so excruciating to note that, despite all we have been through, we will be transported right back to that precarious state if Congress fails to reauthorize Patriot. Because of intense lobbying by civil-liberties groups instinctively hostile to anything that makes government stronger—even in the arena of national defense, where we need it to be strong if we are to have liberties at all—Patriot's sponsors had to agree, to secure passage, that the act would effectively be experimental. That is, the information sharing, improved investigative techniques, and several other provisions were not permanently enacted into law but are scheduled to "sunset" on December 31, 2005. Dismayingly, far from grasping the eminent sense in making these improvements permanent, the alliance of Democratic Bush-bashers and