

Chapter 1

INTRODUCTION

One of the most controversial and possibly one of the most misunderstood laws Congress ever enacted, the USA Patriot Act remains at the forefront of public debate about security and civil liberties in twenty-first-century America. For many Americans, it is synonymous with an egregious and unjustifiable suspension of the Bill of Rights. Others, troubled but more cautious, identify the Patriot Act with the grant of unprecedented powers that put civil liberties at some risk. Many who reject these concerns nonetheless accept their underlying assumption—that the Patriot Act does indeed give the federal government a package of powerful new search and surveillance tools. The 9/11 Commission unanimously agreed on a host of controversial assessments and proposals for reform, but the only conclusion it was able to reach on this subject was that “a full and informed debate on the Patriot Act would be healthy.”¹

That debate is now timely and imperative. The law’s hasty enactment, in an atmosphere of trauma and urgency, virtually guaranteed serious imperfections. The passage of three years has afforded space for reflection, along with actual experience living and working with its new powers. And because many of its provisions “sunset” automatically at the end of 2005, reexamination of the act is now unavoidable for both its opponents and its most ardent defenders.

To provide a context for that reexamination, this report explains the law’s most important provisions and reviews the best information currently available to gauge their usefulness and their effects in practice. This background can provide a basis for informed discussion,

free of the passions and preconceptions that mere mention of the act so often evokes on all sides.

Contrary to conventional wisdom, much of the Patriot Act was essential, and some of it, if not essential, was reasonably defensible. Nonetheless, many of the act's new powers are far too broad. And even where the case for broad powers is strong, they were typically conferred with little effort to assure transparency and accountability.

These flaws are serious. Although the act's provisions often seem technical, the issues are not. Secret "sneak-and-peek" searches, computer software that reads staggering volumes of e-mail, FBI scrutiny of college transcripts and library borrowing records without probable cause, electronic surveillance under the auspices of a secretive Foreign Intelligence Surveillance Court—these are all matters that everyone can understand. They can be sources of either anxiety or reassurance: many instinctively see them as threats to liberty, while for others they promise essential protection from foreign enemies who endanger our way of life. Sometimes both reactions are justified; sometimes neither is. All too often, the act's sweeping but ill-advised new powers undermine both freedom *and* security.

To keep these concerns in perspective, it is important to acknowledge the places where the Patriot Act deserves high marks. Whatever its defects, it is more complex and more protective of basic liberty than many of its detractors acknowledge. Despite its reputation as a landmark of heightened law enforcement power, it includes provisions—seldom noticed—that add new protection for certain civil liberties, extend new benefits to certain immigrant groups, and provide new remedies for violations of individual rights. In some instances, it actually *constrains* new government powers, hedging them with thoughtfully designed safeguards. And, responding to technological changes that had outstripped an aging legal framework, the act achieves many well-justified improvements in government's ability to gather previously inaccessible information.

The flaws, however, are basic. They threaten fundamental liberties, needlessly expand dangerous powers, and in practice interfere with effective measures to thwart terrorism. We can and must do better.

THE PATRIOT ACT IN A NUTSHELL

Less than a week after the September 11 attacks, lawyers in the Department of Justice produced a voluminous draft of the legislation that was destined to become the USA Patriot Act.² The draft

bill, running to several hundred pages, was introduced in the House of Representatives on September 19, and five days later Attorney General John Ashcroft appeared before the House Committee on the Judiciary to testify in support of it. After a truncated process of hearings in both houses and without the usual committee reports to explain it, the legislation passed by a lopsided vote in the House (357 to 66) on October 24 and by an even wider margin (98 to 1) in the Senate the next day.³ Less than seven weeks after the attacks, on October 26, 2001, President Bush signed the measure into law.

Officially entitled the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,”⁴ the USA Patriot Act is widely equated—for better or worse—with the grant of exceptionally potent search and surveillance powers. That near-universal view describes, at most, only a small part of the act. The legislation is a complex grab bag of provisions addressing dozens of issues. It covers sixteen broad topics, includes 161 separate sections (most with many subsections), and fills some 350 densely printed pages. Yet, for all that it encompasses, the act is *not* the source of many of the controversial law enforcement powers sometimes associated with it. The “Patriot Act” label has often been used as a catchall for perceived overreaching by Attorney General Ashcroft or the Bush administration, but the act is *not* the basis for the administration’s asserted power to hold alleged “enemy combatants” incommunicado, its assertion of the power to detain foreign nationals for long periods without filing immigration charges, or its insistence on imposing blanket orders of secrecy governing detention and hearings in immigration cases.

Among the subjects that the Patriot Act does cover, those addressed in its Title II (captioned “Enhanced Surveillance Procedures”) are the ones that come immediately to mind. But the statute also includes rarely mentioned provisions that actually reduce law enforcement power and enhance civil liberties. True, there are not many of these, but they should not be overlooked.

For example, the Patriot Act took effect at a time when the Department of Justice was in its sixth week of holding hundreds of foreign nationals in secret detention without charges or hearings. The act mandated that every alien detained as a terrorist suspect must be charged within seven days or, if not, “the Attorney General shall release the alien.”⁵ The Justice Department subsequently ignored that restrictive portion of the statute and claimed that its own regulations

gave it an independent basis on which to continue holding the suspects without charges.⁶

The Patriot Act also suspended ordinary immigration rules and granted special protection against deportation for surviving relatives of foreign nationals killed on September 11.⁷ Similarly, it granted a protected immigration status to foreign nationals who were facing deportation because they had lost their jobs as a result of the attacks.⁸

In addition to these rare liberty-enhancing provisions, the Patriot Act covers many uncontroversial matters that are important for law enforcement but have little or no impact on civil liberties. It provides enhanced funding for such needs as paying overtime to border guards, upgrading visa databases and FBI computer systems, hiring more translators, compensating the victims of September 11, and offering rewards for those who help locate wanted terrorists.⁹ It includes measures to improve training programs for intelligence officers, coordination between the CIA and the FBI, and collaboration among federal, state, and local law enforcement.¹⁰ Another provision governs the licensing of drivers who transport hazardous materials.¹¹ The act creates a new agency to study and reduce the vulnerability of “critical infrastructure,” such as ports, power plants, and chemical factories.¹²

More controversially, the legislation changes the definition of some terrorism offenses, and it increases the punishments applicable to those convicted of certain terrorist crimes.¹³ One section expands the scope of the offense of providing “material support” to a terrorist organization, in language that at least one federal court has held unconstitutionally vague.¹⁴

Some parts of the Patriot Act have only tenuous connections to fighting terrorism. One, for example, grants increased funding to train the Drug Enforcement Agency operatives who combat opium production in Central Asia.¹⁵

Among the provisions that do affect the fight against terrorism, many also are relevant to broader problems, including deportation, procedures for processing visa applications, and the monitoring of foreign nationals studying in the United States.¹⁶ Similarly, the extensive sections covering banking, financial regulations, and international money laundering¹⁷ have obvious value for monitoring terrorist activity and choking off its sources of funds, but these measures were designed to be available for other purposes as well. Indeed, many of them are primarily used to deal with criminal, administrative, and

regulatory matters not related to terrorism.¹⁸ In most of these areas, the enhanced governmental powers conferred by the Patriot Act pose significant problems—potential government overreaching, inefficiency, and abuse—even when they do not implicate core First Amendment freedoms and Fourth Amendment privacy rights.

Several important layers of related powers and restrictions flow from the Intelligence Reform Act of 2004.¹⁹ This statute is principally concerned with the reorganization of the intelligence community and the creation of a new “czar,” the director of national intelligence, to oversee the intelligence operations of the Central Intelligence Agency, the Pentagon, and other agencies. In addition, however, it modifies many of the laws and regulations identified with the Patriot Act. It expands the scope of foreign intelligence surveillance,²⁰ tightens the money-laundering laws,²¹ and strengthens the power to detain suspected terrorists prior to trial.²² It sets minimum federal standards for personal identity documents and attempts to bolster their security.²³ It clarifies (and enlarges) the crime of providing “material support” to a terrorist organization, but it also limits the scope of the offense to those who have actual knowledge of the organization’s terrorist character.²⁴ Finally, it creates a Privacy and Civil Liberties Oversight Board in the Executive Office of the President and sets up offices in the Department of Homeland Security charged with ensuring that the department’s policies and procedures adequately safeguard privacy, civil rights, and civil liberties.²⁵

In rethinking the Patriot Act, this report will make no effort to discuss all these subjects comprehensively. Instead, it focuses on the statutory sections with the most direct implications for civil liberties, specifically the provisions of Title II that bolster the government’s intelligence-gathering authority, along with closely related provisions scattered elsewhere throughout the Patriot Act and the 2004 Intelligence Reform Act.

Title II covers in several dozen sections and subsections a wide array of important and controversial topics. Though daunting in their detail and technical complexity, these measures fall into several broad groups. Of twenty-seven distinct provisions addressing search and surveillance matters, four deal exclusively with mechanics (translators, the number of judges, and compensation for expenses incurred by private communications firms).²⁶ Five expand search and surveillance powers applicable only to foreign intelligence and international terrorism investigations.²⁷ Another of the foreign intelligence provisions

concerns government access to previously private records, such as business documents, medical histories, and library borrowings.²⁸ The remaining seventeen provisions are all concerned with conventional law enforcement powers.²⁹ The new measures in this last group are available not only for international terrorism investigations but also for the investigation of purely domestic crimes, even those not in any way related to terrorism.

GRAVE DEFECTS

Although the Patriot Act achieves many needed improvements in government's intelligence-gathering capabilities, its defects are pervasive, tainting large numbers of otherwise disparate provisions.

First, it confers many surveillance powers that are broader than necessary. Some have only a remote connection to the battle against terrorism. Some have no relationship whatever to the terror threat. FBI and Treasury agents can use most of their new powers to investigate allegations of prostitution, gambling, insider trading, or any other offense.

Second, the new powers, even where justified, are seldom accompanied by guarantees of transparency or measures to preserve checks and balances. Of course, some secrecy and some degree of executive independence is a necessity in law enforcement, particularly when confronting an organization like al Qaeda. But throughout the act, accountability was diluted unnecessarily; in some instances accountability measures previously taken for granted were obliterated.

Third, the pervasive absence of adequate structures of accountability is no minor detail. This flaw is dangerous. It exacts a large price in lost liberty and heightens the risk of governmental abuse; that much is obvious. Less obvious, but for some citizens possibly more important, the absence of adequate accountability undermines the counterterrorism campaign itself.

Insufficient transparency and accountability inevitably produce waste and misdirected effort. What is far worse, government puts its own legitimacy at risk. As law enforcement and surveillance powers grow in times like the present, there is ever-increasing danger that suspicion of government—whether justified or not—will grow along with it, canceling many of the gains that Congress hoped the enhanced powers would achieve.

ESSENTIAL REMEDIES

In attempting to sort through a dense thicket of distinct problems to be solved, this report will suggest two deceptively simple but pervasively useful rules of thumb. First, in responding to extraordinary threats to our security, we must ensure that the extraordinary powers we grant are *narrowly tailored*. Second, we must take care to guarantee *maximum feasible accountability*.

NARROW TAILORING

Many of the new Patriot Act powers are exceptionally wide-ranging. Most Americans already understand that and are not particularly alarmed. What would be alarming for many people would be for the government *not* to err in the direction of deploying strong law enforcement powers.

Nonetheless, a close, critical look at these measures is imperative, and not only for the familiar reason that civil liberties are too easily devalued. Talk of a “trade-off” between liberty and security implies that decreases in liberty produce at least some increase in security, but too often overbroad law enforcement powers backfire. Since September 11, that dynamic has led us to sacrifice important liberties unnecessarily while at the same time undermining our security.

ACCOUNTABILITY

Whatever the urgency, following September 11, to reposition the line between law enforcement power and individual rights, this imperative does not in itself imply a need to suspend the mechanisms of accountability that traditionally frame executive power, even in wartime. If anything, there is need, as investigative powers expand, for stronger and more effective oversight. As the 9/11 Commission’s unanimous report noted:³⁰ “The American public has vested enormous authority in the U.S. government. . . . This shift of power and authority to the government calls for an *enhanced* system of checks and balances to protect the precious liberties that are vital to our way of life.”

Secrecy and the absence of accountability are troublesome, and not just because they risk unnecessary invasions of liberty and privacy. They also are a recipe for wasted effort, misdirected resources, and misuse of legitimately acquired information for illegitimate purposes.

This is not a partisan concern. Its force does not depend on whether the nation's attorney general is Janet Reno, John Ashcroft, or Alberto Gonzales. Suspicion of unchecked executive power began with the administration of George Washington, probably the most widely trusted leader in our history, and it has been the lesson of experience in every other country around the world.

Understandably, the Justice Department has been frustrated by the documentation and justification that accountability invariably entails. It has sometimes explained the need to reduce the judicial role on the ground that resources consumed by administrative requirements could better be devoted to investigative effort on the ground.³¹ Again, the universal experience is that well-designed checks and balances, though they seem cumbersome, invariably pay their way. The solution to the dilemma is not to stint on investigation; nor is it to sacrifice the rule of law in order to free personnel for field work. Instead, it is simply to commit the modest resources required for appropriate documentation, accountability, and oversight. Facing threats and resource constraints at least as serious as those the United States confronts, the Israeli supreme court recently reaffirmed that difficulty in organizing sufficient personnel to permit effective judicial review cannot justify curtailment of checks and balances. Rather, the court stressed, when "emergency conditions undoubtedly demanded a large-scale deployment of forces . . . by the same standards, effort and resources must be invested in the protection of the detainees' rights."³²

The unusual challenges of a war on terrorism in no way diminish the traditional importance of accountability. On the contrary, the superficial attractions of unchecked executive power are especially deceptive and shortsighted in today's world. Our security depends on building confidence, here and around the globe, not only that America is strong but that America is fair, a society in which our government practices what it preaches in terms of human rights, treats all people with decency, and respects the rule of law.

If we fear potential terrorists lurking in our communities of Muslim Americans and immigrants from the Middle East, we will do far better to work at winning the respect and cooperation of law

abiding members of those communities than to alienate them by oppressive surveillance and harsh policies of detention and deportation. Yet, the current acceptance of secrecy and unchecked law enforcement power sows alienation and mistrust. With their penchant for secrecy, their strong preference for unilateral executive power, their disdain for international human rights, and their efforts to detain Muslim citizens and foreign nationals with no access to lawyers or to the courts, America's present policies pursue short-term gain (usually slender at best) at the price of fostering lasting animosity and resentment among the very people here and abroad whose help we need most to break the cycle of terrorist violence.

This report examines the Patriot Act closely with these concerns in mind. Before plunging into the statutory details, however, it is essential to consider the nature of the terrorist challenge and to assess the importance of more powerful surveillance tools in the effort to meet it—their value, their limitations, and the risks they pose, not only to civil liberties but to the success of the counterterrorism campaign itself.

