

On Collision Course the Patriot Act and our Constitutional Rights

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by

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Introduction:

So much has changed since September 11, 2001, but have these changes had a positive or negative effect on life in our free society? In an effort to protect the homeland, our government has introduced changes in the law that may dwindle away at many of our Constitutional rights. Most of us know this new law, or added freedom that the government has to fight terrorism, as the Patriot Act. What I plan to explain is what exactly is the Patriot Act and how does it affect our Constitutional rights such as free speech, illegal search and seizure, and due process. We will discuss if the government really needed such broad freedom right after the attack and if so, do they still need them? Finally, are we seeing a slow erosion of our rights or is it necessary to give up a little of our freedom in this quickly changing world, in order to keep our citizens and country safe?

Background:

Americans have long enjoyed freedoms that most of the world only dreams about. Many men and women have died to preserve those freedoms, and in reality the vast majority of us have not noticed any change in our normal life, since September 11, 2001. The question is has our government gone too far in the name of security or are the greater freedoms given to law enforcement fairly unobtrusive? Because of the events of that terrible morning our government passed the Patriot Act, which makes it much easier for government and in particular law enforcement to listen to our conversations, seize our property, and hold suspected terrorist without cause, or has it? The Constitution gives us as Americans certain rights under the Bill of Rights. To understand how this new power given to the government has either adversely affected our rights or had no effects, we need to first understand what those rights are. Generally speaking, the focus as it relates to the Patriot Act has been placed on four rights given to us by the U.S. Constitution.

1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (U.S. Constitution).

4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized (U.S. Constitution).

5th Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, with out just compensation (U.S. Constitution).

6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process or obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense (U.S. Constitution).

Patriot Act

The Patriot Act was signed into law on October 26, 2001 by President Bush and is over 300 pages of changes, deletions, and additions to former law that gives law enforcement more freedom to obtain information, conduct surveillance and seize property. However, law enforcement must still seek a warrant issued by a court to do these things. This Act like most law is written in a way that makes it difficult to understand even for an attorney, mostly because of the length of the document and numerous variables involved, so with that in mind for the

purpose of this paper I will concentrate mostly on sections 213 and 215 which tend to be the most controversial. The following information concerning the Patriot Act was taken from the Electronic Privacy Information Center which has the Patriot Act listed in its entirety.

Section 213 Authority for Delaying Notice of the Execution of a Search Warrant

Section 3103a of Title 18, United States Code is amended as such:

(1) by inserting `(a) **IN GENERAL**- ' before `In addition'; and

(2) by adding at the end the following:

`(b) **DELAY**- With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if `(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705); `(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and `(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.'

Section 215 Access to Records and Other Items Under the Foreign Intelligence Surveillance Act

Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking sections 501 through 503 and inserting the following:

Section 501 Access to Certain Business Records for Foreign Intelligence and International Terrorism Investigations

`(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

`(2) An investigation conducted under this section shall:

`(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

`(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

- `(b) Each application under this section:
 - `(1) shall be made to
 - `(A) a judge of the court established by section 103(a); or
 - `(B) a United States Magistrate Judge under chapter 43 of title 28, United States Code, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and
 - `(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to protect against international terrorism or clandestine intelligence activities.
- `(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.
- `(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).
- `(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.
- `(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

Section 502 Congressional Oversight

- `(a) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of tangible things under section 402.
- `(b) On a semiannual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period:
 - `(1) the total number of applications made for orders approving requests for the production of tangible things under section 402; and
 - `(2) the total number of such orders either granted, modified, or denied.'

Discussion

As is the case with most discussions there is always more than one side of an argument or disagreement. With the Patriot Act the disagreement is between those in government who view this Act as necessary, and those such as the American Civil Liberty Union (ACLU) who believe the Act violates certain aspects of the Constitution. I will discuss both sides explaining their arguments and finally try to disprove or sustain those arguments along with stating my case.

1st Amendment Violation

As a starting point I will discuss the affect the Patriot Act has had on our First Amendment right to freedom of speech and of the press. At the heart of the argument by those against the Patriot Act are their allegations that the government has used this act to prevent the release of information about those being held as alleged terrorist. Their argument is that the public has a right under the Constitution to have access to this information and that without it the government can hold captive American citizens without any rights to due process. The question is whether this is information that we as the citizens of this country have a right to know?

The government contends that much of the information obtained in the arrest of many of these alleged terrorist should be classified and that a release to the public could jeopardize ongoing investigations into terrorist activities. Such was the argument in the case of *Detroit Free Press v. Ascroft*, 303 F.3d 681 (6th Cir.2002). This case came about after former Attorney General Ashcroft designated that deportation hearings be labeled as “special interest cases” thus making them closed to the press and public. The Sixth U.S Court of Appeals ruled that “the First Amendment prohibits the Government from unilaterally holding secret deportation hearings for alien residences that the Justice Department determined might have connection to or knowledge of terrorist activities within the United States (Zolla II 3). However, the question is still unanswered on just how much information the public and/or press has the right to have. In 1999 the Supreme Court ruled in *Los Angles Police Department v. United Reporting Publishing Corp.* that the California law which allowed the denial of arrestee address information was lawful. Generally the Supreme Court has been reluctant to force the government to release information on the idea that the public has a First Amendment right to know (Haridakis 5). There are other laws such as the Freedom of Information Act that gives the public access to most information relating to our government, however there are limits to what the public can have, most notably information classified in the interest of protecting the national defense or foreign policy, of which one could make the argument that some of the information obtained from those alleged terrorist should remain classified due to national defense.

4th Amendment Violation

The second point I want to speak about is how the Patriot Act affects our rights when it comes to illegal search and seizure of our homes, personal property and even our private e-mail

accounts. How about what we read when we check out a book at the public library, can the government now have free access to our person life in a way that they may obtain information on our reading habits and use that to classify us as a terrorist. This is what the ACLU would argue is happening and could potentially happen because of the Patriot Act. Their argument comes from Section 215 which amended an existing law, the Foreign Intelligence Surveillance Act (FISA).

FISA originally allowed for the request of certain business records involving transportation carriers, hotels, storage locker facilities, and vehicle rental agencies. Critics argue that Section 215 of the Patriot Act allows for the FBI to obtain education records, computer files, book purchases and library borrowing records (O'Donnell 2). Government officials would argue that although law enforcement officials may request some of these things, they must follow the guidelines set out in Section 215 which states an investigation carried out under this section can not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States and that there must be an order by a court (US Patriot Act).

Opponents argue many different issues when it comes to how the Patriot Act adversely affects our 4th Amendment rights, but I will cover one more --- Sneak and Peek Warrants.

Sneak and Peek Warrants

Federal rules of Criminal Procedure require officers to leave a receipt detailing what items were seized during a search. Prior to the Patriot Act officers could delay notification if they received a warrant from the Foreign Intelligence Surveillance Court. However, this delay in notification only applied when no evidence was removed and officers could show a strong necessity for delaying notification. With the Patriot Act officers are able to seize items and delay notification if the court deems it is necessary to prevent adverse affects (Lilly 9). Opponents believe this new freedom given to the government allows them to delay for long periods of time any notification that a search warrant was served and that given the language of the Patriot Act that Law Enforcement can use this tool on any type of crime. Given such broad power to search and not notify for an undetermined period of time may lead to abuse of power by the government. Their case seems to have been solidified by ruling out of the U.S. District Court in Portland Oregon where a judge ruled parts of the Patriot Act to be unconstitutional because it allows the executive branch of the government to conduct surveillance and search American citizens without establishing probable cause (USA Today). In this case a Portland attorney was

falsely arrested and his property searched after a fingerprint discovered during the investigation of the Madrid train bombings was mistakenly identified as his prints. Prior to his arrest he was placed under surveillance, his phone calls were listened to and his office was searched by the FBI. The government argues that many of the rights given to law enforcement to delay notification of the service of a search warrant and to tap phone lines already existed and that the Patriot Act simply codified these laws. Furthermore, in some cases it is necessary to delay notification to prevent the destruction of evidence and fleeing of the suspect. Finally, the government reminds us that these tools can only be used with an order from the court and in certain circumstances such as death or serious injury, tampering with a case, flight from prosecution, witness tampering or serious jeopardy to the investigation (Department of Justice Website).

5th and 6th Amendment Violation

My final discussion deals with how the Patriot Act affects our 5th and 6th Amendment rights? In particular I want to speak about the detaining of suspected terrorist and the denial of the right to speak to an attorney and to have a trial. In as far as I can see the Patriot does not directly affect the holding of terrorist suspects and the practice of not providing an attorney or due process when it comes to a trial. The only mention of detention can be found in Section 412 which speaks about detention of suspected terrorists. However, there is a timetable set for charges to be filed and/or the person removed from the United States. The government has claimed it has not used the authority given in the Patriot Act to detain suspected terrorist aliens, do mostly to the fact administrative bond proceedings being more than enough to detain them (McCormack 4).

So you may ask how they can be held without the right to due process, which is a Constitutional right. The answer is “enemy combatant” which can be found in *Ex Parte Quirin*, 317 U.S. 1, 31(1942), and is described as the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or without uniform comes secretly through the lines for purpose of waging war by destruction of life or property (Williams 2). This term enemy combatant has been used against two U.S citizens since September 11, 2001. The first being Yaser Esam Hamdi who was captured in Afghanistan after the invasion by U.S. troops and the second being Jose Padilla who planned to explode a dirty bomb in the United States. The opponents argue that no U.S.

citizen should be denied due process, a right given to all Americans by the Constitution. The government justifies holding these enemy combatants given the President has the authority under Article 2 Section 2 of the Constitution. The U.S. Court of Appeals for the Fourth Circuit seems to have agreed with the government in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2002) when they upheld the government's authority to hold Hamdi. They gave this statement "one who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated as an enemy combatant and treated as such" (Zolla 3). As for the remaining enemy combatants being held they are not U.S. citizens thereby they have no rights under the Constitution.

My Argument

When I chose to write this paper, I had no real opinion either way. Like most Americans I had no idea what affect the Patriot Act has on our Constitutional rights. During the course of my research I have learned that the Patriot Act is a very difficult document to understand, given the sheer volume of information, nearly 300 pages of legal jargon that most attorneys have trouble completely understanding. I have chosen to address the concerns of how the Patriot Act affects a few of our most precious rights. I have not been convinced that the terminology used and the rights given to law enforcement in the Patriot Act pose a danger to our freedoms. As an example I firmly believe in the freedom of the press and our right to know what our government is doing, however that must be balanced with the ability to investigate those who pose a danger to our country. There must be the ability for law enforcement to conduct investigations into terrorist activity without the terrorist hearing about it on the six o'clock news. While I believe we have a right to know what our government is doing, that does not mean we need to know everything in real time. There is no better example than the Iraq war and the twenty-four hour a day coverage of the war, daily reminders of the lost of life. The media portrays this as something new, when in reality war has not changed that much. Had the same coverage been available during War World II the public would have been screaming for us to get out of the war. The media must fine a balance in reporting what is important and at the same time not over reporting or sharing military strategies with our enemies by posting them on the news. There is simply some things we don't need to know right away.

Secondly, I am not overtly concerned with law enforcement using delayed notification in certain situations as long as the initial warrant is approved by a court. There should always be some type of check and balance when it comes to making sure those of us in law enforcement are not abusing our power. This use of delayed notification must be narrow in scope in that giving notification may adversely affect the investigation and finally a court must give authority for law enforcement to delay notification. In reading Section 213 this seems to me to be the case.

I do have a concern with incidents such as the misidentification of the man in the Madrid train bombing, but there is no indication that the FBI was illegally listening to his conversations or searching his property without a proper warrant. The confusion was in the misidentification of man's fingerprint not the application of the Patriot Act.

Finally, should the government be holding American citizens without due process? No absolutely not! However, this is not being done by using the Patriot Act but instead by declaring them enemy combatants which gives the President the authority to detain them without due process. There are two issues here, the first being the detention of non-citizens and what rights do they have to due process. They have no rights under the U.S. Constitution. They must be treated humanely, only because it is the right thing to do, but should not be afforded rights in our court system. The second issue deals with citizens of this country. They must be given an opportunity to due process. Our government must never be able to hold a citizen without explanation as to why they are being held. To give this unquestioned authority to one or a few people opens the door to abuse. I completely trust the government of the United States, but I do not completely trust those in government. We must be secure in the fact that our government can't arrest and hold us without giving us the right to due process. When there is a wrong we must speak out for that person who is being wronged.

Recently I visited the Holocaust Museum in Washington D.C. where I was reminded of what can happen to a people when they give up their freedoms, when they fail to speak up. As I exited the museum I read the quote by Paster Martin Niemoller "they came for the socialist and I did not speak out because I was not a socialist, then they came for the trade unionist and I did not speak out because I wasn't a trade unionist, then they came for the Jew and I did not speak out because I was not a Jew, then they came for me and there was no one to speak for me". We may not be directly affected by this decision today, but we must be sure to speak out for those who are, if we don't then when it is our turn will there be anyone to speak for us?

I find no problem with the Patriot Act when it comes to due process. The problem seems to lie in other areas of the interpretation of the Constitution when it comes to Presidential authority. We must find the balance between protecting the security of our country and maintaining our most precious rights.

Conclusion

I began this paper by saying I was going to speak about the Patriot Act and what affect it has on several of our Constitutional rights. In conducting research on this question I have found that many of the rights given to law enforcement by the Patriot Act already existed in other laws. That the Patriot Act codified those laws and in some cases brought up to date laws that did not cover advancements in technology like the internet and voice mail. I was encouraged by the fact there are checks and balances such as a court must still approve delayed notification warrants and the search and seizure of property. There is no indication that a law enforcement officer can legally search personal property or listen into conversations without first obtaining permission from a court.

Our country faces some difficult and unique challenges, trying to maintain our freedoms and provide for the security of our people. I do not believe the Patriot Act has dimensioned our freedoms, but we must always be on constant guard for those who may attempt to take away our rights in the name of security. In this day of large populations of people moving around the world at a constant rate and technology that even H.G. Wells could not have dreamed up, I believe it is nearly impossible to keep our rights completely in tact and provide complete security. If faced with making a choice we must always chose freedom.

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