December 2003

The Patriot Act under Fire

By John Yoo and Eric Posner

Criticisms of the Patriot Act as unconstitutional and as a danger to individual rights are unfounded. Any marginal reduction in peacetime liberties entailed by the act seems to be a reasonable price to pay for an important weapon in fighting al Qaeda and other terrorists.

The Patriot Act has become a magnet for claims that the government is violating our individual rights. In early December, the federal commission investigating the September 11 attacks heard testimony from several prominent law professors on the dangers of the act. Last month, Al Gore called for the act's repeal, accused the Bush administration of suspending civil liberties, and claimed that the government was using "fear as a political tool to consolidate its power and to escape any accountability for its use." Democratic front-runner Howard Dean has called the act "morally wrong," "shameful," and "unconstitutional." Many cities have refused to assist the federal government in its implementation.

Putting aside the hysterics, the worst thing about the Patriot Act is its Orwellian name. It creates no revolution in government powers, nor does it violate the Constitution. If the act marginally reduces peacetime liberties, this is a reasonable price to pay for a valuable weapon against al Qaeda, a resourceful and adaptable enemy that is skilled at escaping detection.

The Patriot Act's most controversial provisions concern electronic surveillance of individuals who threaten national security. But the act did not initiate this practice. The system of secret search and wiretap warrants, granted in a secret hearing by a group of federal judges, without notice to the target, was established twenty-five years ago by the Foreign Intelligence Surveillance Act. FISA was passed because before 1978, authorities could conduct searches to stop threats to national security without any judicial warrants at all. No court has ever found FISA to be unconstitutional, and just last year a special panel of federal appeals court judges reviewed the Patriot Act's central modification of FISA and unanimously found it constitutional.

Before the Patriot Act, FISA warrants were issued upon a showing that the "primary purpose" of the surveillance was to gather foreign intelligence information. Both the Department of Justice and the special FISA court that issued the warrants interpreted this language, for reasons known only to themselves, to mean that any such information gathered by counterintelligence services could not be shared, except under rare circumstances, with law enforcement officials. This "wall" prevented law enforcement officials and counterintelligence officials from pooling their information—a dangerous and stupid practice given that al Qaeda has demonstrated that terrorists can easily operate outside and inside the United States.

The Patriot Act changed the warrant standard from "primary purpose" to "significant purpose" in order to eliminate the wall of separation between foreign threats and domestic crimes, and to allow

---

John Yoo, a visiting professor at the University of Chicago law school and scholar at the American Enterprise Institution, was an official in the Bush Justice Department. Eric Posner is a law professor at the University of Chicago. *A version of this article appeared in the* Wall Street Journal *on December 9, 2003.*

law enforcement to be used as a weapon against terrorism. Civil libertarians would have us believe that the Patriot Act allows CIA and NSA agents to roam freely through the country detaining anyone they please. Nothing could be further from the truth. The Patriot Act represents a modest retrenchment from an overcautious interpretation of FISA, but nothing like the pre-1978 regime of warrantless searches.

The Patriot Act also expands FISA to include business and other records that are relevant to a terrorism investigation. The claim that this provision is unconstitutional is false. Individuals generally do not have a Fourth Amendment right over records about them held by someone else. Given that al Qaeda terrorists have used libraries to conduct research and to communicate, and that their activities can be traced through credit-card receipts and travel reservations, this expansion of FISA is eminently reasonable.

Balancing Liberty and Security

Much of the rest of the Patriot Act contains similar common-sense adjustments that modernize existing laws like FISA. FISA warrants, for example, are now technology-neutral—for example, they allow continuing surveillance of a terrorist target even if he switches communication devices and methods. Warrants now authorize nationwide surveillance, rather than surveillance only within a single city or district. Patriot Act changes allow the search and surveillance tools that had been used against drug dealers and the Mafia to be used against terrorists.

These changes are modest and are worth the small, perhaps even imaginary, reduction in civil liberties. Even well-known liberal Democrats have dismissed the idea that constitutional freedoms are in danger. Sen. Dianne Feinstein stated: "I have never had a single abuse of the Patriot Act reported to me. My staff e-mailed the ACLU and asked them for instances of actual abuse. They e-mailed back and said they had none." Sen. Joe Biden said at a recent hearing that "the tide of criticism" being directed against the act "is both misinformed and overblown."

But some think that even a small restriction of civil liberties can never be justified. These people think that, as a mark of our commitment to freedom, courts should not allow the government to invade our civil liberties even during emergencies. The truth is the opposite. Civil liberties throughout our history have always expanded in peacetime and contracted during emergencies. During the Civil War, the two world wars, and the Cold War, Congress and the president restricted civil liberties, and courts deferred; during peacetime, civil liberties expanded.

The image of a government rationally balancing liberty and security might seem falsely reassuring. What if Mr. Gore is right that the government is using public fear as a tool for consolidating its power? Historical precedents—Lincoln's suspension of habeas corpus, the Roosevelt administration's internment of Japanese-Americans—do not bode well. Shouldn't the courts protect us against such abuses?

Whenever a war or emergency occurs, critics often argue that the government's reaction is motivated by fear. History surely does suggest that the government is frequently ill-prepared for emergencies, and that fear provoked by a new threat can spark official action. But this is not a bad thing. Although not all fear-driven policies are good—again, we must remember the Japanese-Americans' internment—fear provoked by emergency also can motivate government to react to new threats in creative ways. Common-sense changes in surveillance law could have been used against al Qaeda before they murdered three thousand people. Errors may occur, but they happen during peacetime as well as during emergencies.

What of the charge that the administration is using public fear to consolidate political power? History shows that new security policies usually last only as long as the war or emergency. The president and Congress usually voluntarily give up their emergency powers; when they do not, courts step in. Despite a succession of wars and emergencies since the Civil War, civil liberties in our country have expanded steadily.

President Roosevelt said at the beginning of the Great Depression that the only thing we need to fear is fear itself. But he later realized that the absence of fear could be just as dangerous, because it prevented the United States from preparing for the coming war. It took Pearl Harbor to shatter the complacency of the American public. We can only hope the absence of an al Qaeda attack on American soil during the last two years will not lull us back into our pre–September 11 stupor.