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The Patriot Act and the Quiet Death of the US Bill of Rights

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With the stroke of an autopen from the other side of the Atlantic Ocean, the once articulate critic of the Patriot Act signed a four year extension of the most dangerous assault on American civil liberties in US history without a single additional privacy protection.

One would think that this reauthorization would have incited vigorous debate in the halls of Congress and at least a fraction of the breathless 24/7 media coverage allotted the Anthony Weiner “sexting” scandal. Instead, three weeks ago the House (250 to 153) and Senate (72 to 23) approved, and the President signed, an extension of this landmark attack on the Bill of Rights with little notice and even less debate.

Most disturbing was the extension – without modification – of the Act’s three most controversial provisions:

- **allows broad warrants to be issued by a secretive court** for any type of record, from financial to medical, without the government having to declare that the information sought is connected to a terrorism or espionage investigation;
- **allows the FBI to obtain wiretaps from the secret court** (i.e. “roving wiretaps”,) known as the FISA court, without identifying the target or what method of communication is to be tapped;
- **allows the FISA court warrants for the electronic monitoring** of a person (“lone wolf” measure) for whatever reason — even without showing that the suspect is an agent of a foreign power or a terrorist.

Also in need of reform, are what’s called National Security Letters (NSLs) – which **allow the FBI, without a court order**, to obtain telecommunication, financial and credit records deemed “relevant” to a government investigation. The FBI issues about 50,000 a year and an internal watchdog has repeatedly found the flagrant misuse of this power.

The Long Record of Patriot Act Abuses

Any meaningful debate over whether to reauthorize any and all of these provisions without significant additional privacy protections should include a few key questions. One, have these provisions made us significantly safer (i.e. are there documented incidences they have led to

capturing terrorists plotting against us?)? Two, is there any evidence that they have been abused? Three, is their claimed usefulness somehow jeopardized by the kinds of modest reforms privacy rights groups (and others) advocate? And finally, have we created a dangerous constitutional precedent?

Thanks to the relentless work by groups like the American Civil Liberties Union (ACLU) - and information uncovered by the Freedom of Information Act - there is little to no evidence that these provisions, as written, have made us any safer. Yet there's a long list of incidences of unadulterated government abuse and malpractice for a host of purposes other than fighting terrorism. In other words, the threat this Act, and these particular provisions pose to the basic Constitutional rights of American citizens is not hypothetical, but documented fact.

Consider what we know:

- The FBI admitted in a recent report to the President's Intelligence Oversight Board that it violated the law at least 800 times on national security letters, going well beyond even the loose safeguards in the original provision. According to the report the FBI "may have violated the law or government policy as many as 3,000 times" between 2003 and 2007, according to the Justice Department Inspector General, while collecting bank, phone and credit card records using NSLs.
- As Adam Sewer of the American Prospect notes: *"It's no secret that the FBI's use of NSLs - a surveillance tool that allows the FBI to gather reams of information on Americans from third-party entities (like your bank) without a warrant or without suspecting you of a crime - have resulted in widespread abuses. All that the FBI needs to demand your private information from a third-party entity is an assertion that such information is "relevant" to a national security investigation -- and the NSLs come with an accompanying gag order that's almost impossible to challenge in court."*
- NSLs were used by the Bush administration after the Sept. 11, 2001 attacks to demand that libraries turn over the names of books that people had checked out. In fact, there were at least 545 libraries that received such demands in the year following passage of the Patriot Act alone.
- The Electronic Frontier Foundation (EFF) uncovered "indications that the FBI may have committed upwards of 40,000 possible intelligence violations in the 9 years since 9/11." It said it could find no records of whether anyone was disciplined for the infractions.
- Under the Bush Administration, the FBI used the Patriot Act to target liberal groups, particularly anti-war, environment, and anti-globalization, during the years between 2001 and 2006 in particular.
- According to a recent report by the ACLU, there have been 111 incidents of illegal domestic political surveillance since 9/11 in 33 states and the District of Columbia. The report shows that law enforcement and federal officials work closely to monitor the political activity of individuals deemed suspicious, an activity common during the Cold War – including protests, religious activities and other rights protected by the first amendment. The report also noted how the FBI monitors peaceful protest groups and in some cases attempted to prevent protest activities.
- According to a July 2009 report from the Administrative Office of the U.S. Courts, only three of the 763 "sneak-and-peek" requests in fiscal year 2008 involved terrorism cases. Sixty-five percent were drug related.

John Whitehead, author of "Renewing the Patriot Act While America Sleeps", described our post Patriot Act reality in appropriately stark terms, writing, *"Suddenly, for the first time in American history, federal agents and police officers were authorized to conduct black bag "sneak-and-peek" searches of homes and offices and confiscate your personal property without first notifying you of their intent or their presence. The law also granted the FBI the right to come to your place of employment, demand your personal records and question your supervisors and fellow*

employees, all without notifying you; allowed the government access to your medical records, school records and practically every personal record about you; and allowed the government to secretly demand to see records of books or magazines you've checked out in any public library and Internet sites you've visited."

And now - according to the New York Times - new guidelines from the Justice Department will allow FBI agents to investigate people and organizations "proactively" without firm evidence for suspecting criminal activity. The new rules will free up agents to infiltrate organizations, search household trash, use surveillance teams, search databases, and conduct lie detector tests, even without suspicion of any wrongdoing.

In other words, the Constitutional "precedent" set by the Patriot Act appears to be serving to accelerate the rapid disintegration of civil liberties in this country.

Of equal concern is what we still don't know about how the government might be using the Act, highlighted by recent statements made by US Senators regarding what they termed "secret Patriot Act provisions". Senator Ron Wyden (D-OR), an outspoken critic of the recent reauthorization, stated, "When the American people find out how their government has secretly interpreted the Patriot Act they will be stunned and they will be angry." As a member of the Senate Intelligence Committee Wyden is in a position to know, as he receives classified briefings from the executive branch.

In recent years, three other current and former members of the US Senate - Mark Udall (D-CO), Dick Durbin (D-IL), and Russ Feingold (D-WI) - have provided similar warnings. We can't be sure what these senators are referring to, but the evidence suggests, and some assert, that the current administration is using Section 215 of the Patriot Act - a provision that gives the government access to "business records" - as the legal basis for the large-scale collection of cell phone location records.

The fact that in 2009 Sprint disclosed that law enforcement made 8 million requests in 2008 alone for its customer's cell phone GPS data for purposes of locational tracking should only add to these legitimate privacy concerns.

Security Versus Privacy: A False Dichotomy

The Patriot Act was sold as an indispensable weapon in the government's arsenal to fight and "win" the "War on Terror". We were assured that the sole purpose of these unprecedented powers granted government were to locate and catch terrorists - not raid the homes of pot dealers and wiretap peace activists. Monitoring political groups and activities deemed "threatening" (i.e. environmentalists, peace activists), expanding the already disastrous and wasteful war on drugs, and eavesdropping on journalists isn't about fighting terrorism, it's about stifling dissent and consolidating power - at the expense of civil liberties.

How ironic that the very "tool" hailed as our nation's protector has instead been used to violate the very Constitutional protections we are allegedly defending from "attack" by outside threats. What was promised as a "temporary", targeted law to keep us safe from terror has morphed into a rewriting of the Bill of Rights.

John Whitehead explains: ***"The Patriot Act drove a stake through the heart of the Bill of Rights, violating at least six of the ten original amendments—the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments—and possibly the Thirteenth and Fourteenth Amendments, as well. The Patriot Act also redefined terrorism so broadly that many non-terrorist political activities***

such as protest marches, demonstrations and civil disobedience were considered potential terrorist acts, thereby rendering anyone desiring to engage in protected First Amendment expressive activities as suspects of the surveillance state."

It's almost as if Benjamin Franklin had the Patriot Act in mind when he famously stated, "Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety."

Noted privacy and security expert Bruce Schneier expanded on this false dichotomy, writing, "...those who would give up privacy for security are likely to end up with neither," concluding "If you set up the false dichotomy, of course people will choose security over privacy -- especially if you scare them first. But it's still a false dichotomy. There is no security without privacy."

The fact that the odds of EVER being killed or maimed in a terrorist attack are a fraction of that posed by being hit by lightning, we should always approach government demands for increasingly intrusive and ripe for abuse authority with a healthy dose of skepticism and a large grain of salt.

The long, documented record of government overreach and abuse since 9/11 begs a larger question, "Can we truly defeat "the terrorists" by succumbing to fear and embracing a less free and more authoritarian society (which are ostensibly primary goals of terrorists)?"

Constitutional scholar Glenn Greenwald further illuminates this false "security versus privacy" dichotomy promulgated by those with inherent conflicts of interest, writing:

"The problem is never that the U.S. Government lacks sufficient power to engage in surveillance, interceptions, intelligence-gathering and the like. Long before 9/11 -- from the Cold War -- we have vested extraordinarily broad surveillance powers in the U.S. Government to the point that we have turned ourselves into a National Security and Surveillance State. Terrorist attacks do not happen because there are too many restrictions on the government's ability to eavesdrop and intercept communications, or because there are too many safeguards and checks. If anything, the opposite is true: the excesses of the Surveillance State -- and the steady abolition of oversights and limits -- have made detection of plots far less likely. Despite that, we have an insatiable appetite -- especially when we're frightened anew -- to vest more and more unrestricted spying and other powers in our Government, which -- like all governments -- is more than happy to accept it."

Candidate Obama Versus President Obama

President Obama's now ardent embrace of the same provisions he so eloquently criticized as a candidate - while aggressively opposing any of the reforms he once advocated on behalf of -- has come to epitomize a disturbing shift in this country since 9/11.

The eloquent, pro-civil liberties "candidate Obama" branded the Patriot Act "shoddy and dangerous" and pledged to end it in 2003. In 2005, he pledged to filibuster a Bush-sponsored bill that included several of the recently extended provisions, calling them "just plain wrong".

In perhaps his most forceful critique, he stated, "Government has decided to go on a fishing expedition through every personal record or private document -- through library books they've read and phone calls they've made...We don't have to settle for a Patriot Act that sacrifices our liberties or our safety -- we can have one that secures both."

Now, channeling none other than George W. Bush himself, President Obama warns that any delay of the complete and absolute renewal of the Act - or even the addition of a single privacy protection - would endanger American lives.

Thus, what was once viewed as the signature of Bush/Cheney radicalism is now official, bipartisan Washington consensus – serving to codify our country’s continued departure from its commitment to the basic tenets articulated in the Bill of Rights.

Attempted Reforms Ignored, Rejected

Efforts to address the most dangerous and far reaching components of the Patriot Act have been repeatedly offered by Senators and House members alike – to no avail. The reforms sought have been modest in nature, targeted in scope, and critical to reining in government abuse – without weakening national security.

For example, this year, Senator Bernie Sanders offered an amendment - supported by the American Library Association, the ACLU and the National Association of Booksellers - which would have prevented the government from gaining access to Americans' reading records in libraries and bookstores without a traditional search warrant.

Similarly, former Senator Russ Feingold, during a previous Patriot Act extension fight, sought to require the government to specify more clearly the targets of their investigations and their connections to terrorism, keep the FBI from using its authority to engage in broad-based data-mining of Americans’ phone, library and business records, more effective checks on government searches of Americans’ personal records, reform the FISA Amendments Act by repealing the retroactive immunity provision for the same telecom companies that continue to make billions off overcharging the very customers they betrayed, and prevent “bulk collection” of the contents of Americans’ international communications.

Not only have such attempts been rejected year after year, many aren’t even granted a Congressional hearing or vote. Just as disturbing is the failure of the mainstream media to dedicate any significant time and attention to an issue that so clearly warrants a vigorous national debate – such as how to strike the proper balance between civil liberties and national security.

The Bill of Rights Under Siege

Some important questions demand answers: Does increasingly intrusive and even unconstitutional anti-terrorism measures actually make us any safer (or less so)? If so, what is the price we are willing to pay for that additional security?

Since 9/11 an undeniable pattern has emerged, from illegal search and seizures to warrantless wiretapping to the GPS tracking of cell phones to airport body scanners to the redefinition of Habeas Corpus to the increasing use of rendition for the purposes of torturing prisoners yet to be charged with a crime to military tribunals replacing courts of law, among many others.

What were once considered unassailable civil liberties granted to ALL citizens are under siege. The consequences of such a loss would be profound. Without the fundamental reform of the Patriot Act I fear this loss will be a permanent, and the American experiment will forever be altered.

Moving Forward: Building a Left/Right Coalition

So what to do? From a purely ideological perspective, the potential exists for growing a left/right coalition around a mutual commitment to the Bill of Rights. Already, more than 400 local, county and state resolutions have been passed in opposition to the Patriot Act. But, interest and opposition energy has largely waned over time. This must change.

On the left, while there still remains significant opposition (as evidenced by the recent votes in the House and Senate), a much larger and vocal effort existed when President Bush was abusing the same powers that exist now – no doubt in part due to sharing party affiliation with the new President. We must make the case to these voters that regardless of who sits in the White House, these are powers that NO branch of government, or intelligence agency, deserves.

On the right, it is common place to vocally declare allegiance to the Constitution and the principles of freedom and liberty. Yet, the Patriot Act – which desecrates those very principles – is close to a non-issue, with more focus on the alleged grave threat posed by expanding health care. This group’s inherent distrust of President Obama – warranted or not – may serve to enhance the likelihood of convincing these voters that the Patriot Act represents a clear and present danger to everything they espouse.

Also working in our favor is the broad based, ideologically diverse “Patriot Act Reform” coalition that already exists, including the ACLU (an excellent source of Patriot Act related information), the Electronic Frontier Foundation, the CATO Institute, the Liberty Coalition, the American Library Association, the Bill of Rights Defense Committee, and the Competitive Enterprise Institute. While impressive, this coalition must be vastly expanded.

Irrational fears of terrorism, hyped by political, military and corporate interests, are at the root of our nation's current "civil liberties" crisis. We must counter this growing “fear industrial complex” with a “people’s majority” dedicated to preserving the Bill of Rights and protecting the privacy of American citizens. This challenge - and responsibility - should begin in earnest today.

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