

The PATRIOT Act has been the subject of heated debate for nearly 14 years now. “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” is the name of legislation hastily approved as P.L. 107-56 on October 26, 2001, in the wake of the September 11 terrorist attacks only weeks earlier. It has become known as the USA PATRIOT Act but patriots on either side of the political divide in the US are not happy as some argue for expanded powers and others for repeal. Much of the controversy regarding and scrutiny of the PATRIOT Act has centered on the surveillance provision which amended the Foreign Intelligence Surveillance Act (FISA) in order to reduce restrictions on the government's legal and legitimate ability to conduct surveillance. Sunset clause provisions were reauthorized in 2006 with minimal difficulty and most sections became permanent. The PATRIOT Sunsets Extension Act of 2011 extended non-permanent provisions for four years. These three provisions of Section 215 regarding roving surveillance, "lone wolf" surveillance, and business records searches expired again at the end of May 2015. However, senators voted 67-32 on June 2 to approve the USA Freedom Act, which had previously been passed by the House, and President Obama signed it the same day. The expired provisions were restored and now are extended through 2019. Arguably the most controversial provision of Section 215 has been changed to stop the National Security Agency (NSA) from continuing on with its mass phone data collection program. Now, phone companies will retain the metadata and the NSA can only obtain information about specifically targeted individuals when permitted by a federal court. While an improvement over the unmodified PATRIOT Act, the USA Freedom Act still grants too much authority to the federal government in the name of homeland security as can be demonstrated by three key points: 1) The PATRIOT Act is not constitutional; 2) The PATRIOT Act is not useful; and 3) The PATRIOT Act is an attack on the privacy and trust of the American public.

Contents of the Patriot Act

As described by the Congressional Digest Corporation (2004), the Patriot Act has nine broad categories providing for: "enhancement of domestic security against terrorism, surveillance, anti-money-laundering practices to prevent terrorism, border security, removal of judicial obstacles to investigation, compensation for victims of terrorism, classification of terrorism as criminal activity, establishment of terrorism criminal law, and improved intelligence." (Fox, 2013, 23). Passage of the Patriot Act into law amended at least 34 standing laws or regulations in addition to FISA. Some of these, which impact nearly any business handling personal information, are:

1. Title 18, United States Code (Crimes and Criminal Procedure)
2. International Power Act
3. Communications Act of 1934
4. Title 31, United States Code (Money and Finance)
5. Bank Holding Company Act of 1956
6. Bank Secrecy Act (Public Law 91-508)
7. Right to Financial Privacy Act of 1978
8. Fair Credit Reporting Act
9. National Security Act of 1947
10. Telemarketing and Consumer Fraud and Abuse Prevention Act
11. Crime Identification Technology Act of 1998 (Carrigan, Alex and Ward, 2008).

While the PATRIOT Act was promoted as enlarging the powers of law enforcement and intelligence agencies of the Federal government to deal with terrorism and the number of terror-related offenses was greatly increased, some sections of the extensive bill apply to criminal acts in general. The Act put into effect a number of amendments and increased penalties for earlier crimes and also created many new money laundering crimes. Examples of these changes are increased penalties for counterfeiting, authorization for prosecution of overseas fraud involving

US credit cards, and allowable confiscation of property in the US for a wider range of criminal violations of the laws of foreign countries. Section 215 amends sections of FISA regarding the collection of business records. Prior to the PATRIOT Act, authorities investigating international terrorism or gathering foreign intelligence could request a FISA court order and obtain access to hotel, airline, storage locker, or car rental business records, binding the businesses to silence regarding the court order. Under the PATRIOT Act, "[f]ederal authorities may obtain a FISA order for access to any tangible item no matter who holds it," (PATRIOT, 2004, 260).

Ongoing Concerns

A growing number of opponents to the PATRIOT Act argue persuasively that it was a "dangerous overreach" of government powers and should be terminated in its entirety. The USA Freedom Act is a compromise measure of sorts, an improvement over the unmodified PATRIOT Act, but it still grants too much authority to the federal government in the name of homeland security. While there are many areas of concern, three will be discussed here.

First, the PATRIOT Act, particularly Section 215, is not constitutional. The government argues that its surveillance program under this Section is not inconsistent with either the First or the Fourth Amendment, but it is. And even the Congressional Digest admitted that due process, double jeopardy, and *ex post facto* clauses might be found to limit the newly enacted forfeiture provisions. (PATRIOT, 2004). A number of federal judges have ruled separately that key parts of the Act are unconstitutional in various suits going back to 2004. Clearly, the PATRIOT Act violates civil liberties and it is small consolation that so do some actions under the FISA and other legislation upon which it is based. The First Amendment, of course, protects freedom of speech and assembly. In addition to the potentially invasive acts of surveillance that can lead even law-abiding citizens to worry about their privacy, rights to free speech, and their ability to express private opinions, there is fear of facing guilt by association. US citizens can be and are being investigated for activities protected under the First Amendment just because another party's related conduct is not protected. This can happen even where there is no relationship to

cause suspicion that the law-abiding citizen would aid and abet or conspire. At issue now also is the fact that it is now a crime for any US citizen to engage in peaceful, lawful activity for a group which has been designated as a terrorist organization. The crime is providing material support, but that support does not just include money or weapons. It also includes training and expert advice, "including advice on how to resolve disputes peaceably or training on how to make human rights claims before the United Nations." (Totenberg, 2010). The Humanitarian Law Project is one organization which had been engaged in just those activities and it has the support of the Carter Center and other human rights organizations. Former President Carter has spoken on the need to interact sometimes with violent groups, reminding all that just such activities led to peaceful resolutions with the Ireland's IRA and South Africa's African National Congress. The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures, but the PATRIOT Act allows nearly unfettered power to obtain private information and it has authorized unmerited and unlawful seizures. Less often debated, but equal violations of civil liberties, are the infringements of the Fifth and Sixth Amendments and their guarantees of due process and fair trial.

Proponents of the PATRIOT Act argue that the FISA court has considered and found metadata collection legal more than 40 times. This is not a reasonable defense, however, because the court is not an independent court, but an actual tool of the intelligence-gathering process. Since the court was established in 1978 through 2012, it has reviewed some 35,000 government requests and denied only 11. Additionally, supporters hold that metadata collection is not a Fourth Amendment search because 1) it does not involve trespass in any physical sense; 2) call records do not include information about location except approximately; and 3) call data is voluntarily turned over to third parties, the telephone providers. (Mornin, 2014). However, in the 2012 *United States v. Jones*, the Supreme Court had to examine Fourth Amendment implications of *prolonged* collection and analysis of information generally available publicly. While the case was decided on narrower grounds, ultimately five of the Justices wrote

that the collection and analysis of metadata raises Fourth Amendment concerns even though the data might have been voluntarily disclosed to some third party. They expressed support for a so-called "mosaic theory" of Fourth Amendment privacy which holds, "that we maintain reasonable expectations of privacy in certain quantities of information even if we do not have such expectations in the constituent parts." (Mornin, 2014, 1004). It is essential to remember that unlike the pre-digital, pre-cellular calling of yesteryear, a great deal of information can be obtained through telephony metadata which is how the NSA justifies spending so much money on its phone record surveillance. Private information can be exposed in at least three ways, through individual call records, an individual's records collected over time, and the aggregation of the records of many callers. As an example of extremely private information being revealed through nothing other than a record of a single number called, one has to only consider that the single number is to an anonymous whistleblowing or rape support hotline. Other significant information can be revealed through the records of text messages to organizations or campaigns that accept donations in this way. Similar story-building is possible through reviewing calls over time, exposing confidential sources, litigants, professional and personal relationships, etc. The government itself argues that there is useful information that will only be available to them through analysis of large-scale depositories of metadata. (Mornin, 2014).

Next, the PATRIOT Act is not useful. It was simply not necessary as it does not enhance homeland security nor protect our citizens abroad. The PATRIOT Act was created and passed in less than a month after the September 11 terrorist attacks, almost without discussion, packaging old FBI wish-list items and new surveillance encroachments as a necessary response to avoid what Attorney General Ashcroft called another "Pearl Harbor-like attack." (Erlinder, 2002), It was an unnecessary power grab by the Federal government because all the tools were already in place but had not been correctly used to prevent the September 11 attacks. One justification was that there were walls in place that prevented the sharing of acquired information between various levels of law enforcement. However, speaking before the

National Committee on Terrorist Attacks Upon the United States, in 2004, former Attorney General Janet Reno reported that the Joint Intelligence Community – Law Enforcement Working Group found that there were *no* restrictions on sharing the vast majority of information. Any failure to have done so was the result of agency culture and a failure of understanding. (Erlinder, 2005). Reno also voiced her opposition in 2006 through means of a legal brief. Additionally, while the PATRIOT Act certainly expands federal powers, its central provisions simply modify the provisions of 1978's Foreign Intelligence Surveillance Act. That decades-old legislation had already created the secret court and system of secretive warrants which allowed covert wiretaps and email interceptions. It would have been sufficient to update FISA in order to accommodate advances in technology. However, FISA itself as modified by the PATRIOT Act was designed to combat old-style spying by nation-states. Instead of a piece-meal, overly expansive PATRIOT Act, serious discussion should have gone on regarding the appropriate means of fighting non-state terrorism. Moreover, the compliance costs to law-abiding individuals and businesses have been exorbitant, particularly in the financial services industry, where costs have fallen disproportionately on smaller financial institutions. (Dolar and Shughart, 2012). These costs do nothing to combat non-state terrorism.

Supporters of the PATRIOT Act point out that that it is not a crime-solving tool in principal, but is used to assemble intelligence and that has value. (Woodruff, 2015). The Bush administration consistently stated that the Act was necessary to prevent, investigate, and prosecute acts of terror. George W. Bush in lobbying for renewal of the Act argued that previously there were walls between various agencies, but this has been found to be untrue. He argued that regular crime-fighting had better tools than anti-terrorist activities, but as discussed, there were better ways to address this than the overreaching PATRIOT Act. Even the Justice Department, on its Website aimed at dispelling myths about the effects of the Act, states [in particular regarding delayed notification search warrants]: "The Patriot Act simply codified the authority law enforcement had already had for decades." (Department of Justice, n.d.)

Finally, the American public should not have to trade privacy or trust for security. Trust has been compromised because of illegal programs like warrantless eavesdropping which were only uncovered because of whistleblowers. It is only because of the actions of Edward Snowden that the vast program of metadata collection came to view. Supreme Court Justice Sotomayor has cautioned, "Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." (Mornin, 2014, 1005). New technologies may make it easier to detect and apprehend criminals, but they also threaten personal privacy and disrupt the "balance of power between citizens and their government." (Mornin, 2014, 988).

There are those who would argue for even stronger provisions than the ones currently in place in the PATRIOT Act as modified by the USA Freedom Act. Former Attorney General Michael Mukasey argues that the government should continue to keep metadata, stating that this is simply a record of a call, with no content and no identification of people. By his explanation, only if a suspect number is identified, and only if a court concurs, can those numbers be used to figure out if a terrorist has called or been called by a US number. He fears that giving the responsibility to carriers for maintaining this information places the government at risk because it can be imagined that the carriers will eliminate or scrub the information or even devise plans that don't require them to keep the metadata. However, this does not answer the larger question of whether this is legal or useful. Additionally, Mukasey insists the metadata collection program is trustworthy because there are only 33 people with access to the information and they are under the observation of what might be called "a Madisonian trifecta, a court, their own—the executive supervision that they have, and the oversight of at least two committees of Congress." (Woodruff, 2015). He argues that this is observation by all three branches of government, but in fact the "court," as pointed out earlier in this analysis, is their own, the Foreign Intelligence Surveillance Court.

The debate over the validity and usefulness of the PATRIOT Act is not likely to go away soon. There are those in the Senate and in academia and law who will continue to advocate for its repeal and others who will only be satisfied when it is expanded.

In sum, while an improvement over the unmodified PATRIOT Act, the USA Freedom Act still grants too much authority to the federal government in the name of homeland security. This has been demonstrated by three key points. The PATRIOT Act is not constitutional. It seriously compromises civil liberties under the First, Fourth, Fifth, and Sixth Amendments and overreaches long-held traditions regarding forfeiture. The PATRIOT Act is not useful. It has created a labyrinth of compliance issues and overwhelming costs without adding any useful crime-fighting or intelligence gathering tools. The PATRIOT Act is an attack on privacy and the trust of the American people. It provides limited, if any, additional security that could not better be provided by readdressing underlying legislation and engaging in thorough analysis of more effective anti-terrorist measures.

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