A Faustian Dilemma? The USA PATRIOT Act and the Compromise between National Security and Civil Liberties

An essay by August Dombrow

On September 20, 2001, President George W. Bush addressed the nation in the wake of the tragic terrorist attacks of September 11: "I've directed the full resources of our intelligence and law enforcement communities to find those responsible and bring them to justice." In the subsequent investigations, the 9/11 Commission would argue that an artificially legislated "wall" prevented those charged with National Security from performing their duties. Rather than evolving from a Cold War approach to intelligence gathering, law enforcement and intelligence collection remained distinct and separate operations, preventing the right information from reaching the right people. The report describes a cumbersome bureaucratic process, burdened by tradition:

> "Instead of facing a few very dangerous adversaries, the United States confronts a number of less visible challenges that surpass the boundaries of nation-states and call for quick, imaginative and agile responses." (399)

The Patriot Act promised to rectify these shortcomings, equipping our law enforcement with the legal tools necessary to prevent future attacks rather than the traditional emphasis on prosecution following a crime. Drafted by the U.S. Justice Department and signed into law by President Bush on October 26, 2001, the USA PATRIOT Act bypassed conventional standards of the legislative process as part of an expedited response to the terrorist attacks of September 11. This moment marked a drastic shift in the FBI's role and, as later investigations would suggest, perhaps one the agency was not prepared for.

Advocates of the law argue that the unprecedented nature of the attacks, the largest on U.S. soil since Pearl Harbor, demanded an unprecedented response, greatly expanding executive powers. Critics counter that there is nothing unprecedented about the bill, a laundry list of executive powers collected over previous decades. As history shows, however, there is nothing novel or unfamiliar about several provisions of the Patriot Act, particularly those regarding domestic surveillance. The controversial nature of several provisions guaranteed that an extensive body of literature examining the merits and concerns of the bill already exists. Lawyers have provided extensive critiques, citing legal precedents and court cases, in defense of and in condemnation of the Patriot Act. To date, after a reauthorization in 2005 and a series of extensions beyond the 2010 expiration date, the debate continues as lawyers duke out the constitutionality of certain provisions.

Of course, even if the courts can provide the legal foundations necessary to enshrine the Patriot Act into canon, such judicial jousting ignores another fundamental question: do these statutes actually make America safer? Historical analogies potentially offer some insight into the Faustian dilemma of a post-9/11 America. More importantly, a judicious reading of history can provide a way to move forward, restoring oversight and, consequently, legitimacy to the law's tarnished reputation. Specifically by focusing on two provisions, Sections 215 and 505, that expanded FBI authority to collect intelligence on US citizens, this paper will explore the compromise between civil liberties and national security.

"There is no doubt that if we lived in a police state, it would be easier to catch terrorists." –Russ Feingold

Due to the breadth of the USA PATRIOT Act, advocates can rightly argue that it codifies many important tools to protect America, such as grants for emergency services, protection for critical infrastructure, and cross-agency training.

Alongside these provisions, however, the legislation's primary author, Deputy Attorney General Viet Dinh and his team at the Justice Department, inserted a number of contested sections, which promised to significantly alter the domestic intelligence landscape.

While much of the debate focuses on the constitutionality of the legislation, this ignores other important questions. After all, a law can be constitutional, but that does not necessarily make it beneficial or necessary. After ten years, one reauthorization, and several extensions, we can start to consider whether the Patriot Act has accomplished what it set out to do, namely preventing another terrorist attack on US soil. Unfortunately, certain provisions of the USA PATRIOT Act may be worse than ineffective at "investigating and obstructing terrorism" and may actually make America less secure. Reports of Patriot Act abuses, particularly those provisions pertaining to treatment of aliens, could potentially provide propaganda opportunities for terrorist groups, part of a provocation strategy as discussed in Kydd & Walter (67).

As deadlines come and go, the President and Congress continue to postpone a substantive debate over the merits of several of the more contentious provisions. Most recently, on February 28, 2010, President Obama signed a provision that extended the sunset provisions for another year, a deadline that has again passed as Congress delays a decision. Now that yet another year has passed, Congress continues to stall, voting on additional extensions to examine the issue further. As time passes and the issue fades from our collective consciousness, congressional debates appear increasingly secretive. This un-democratic combination of the politically passive public and secretive procedures for reauthorization demands a fresh look at the expansive Patriot Act and a few of its more contentious statutes.

Section 215 authorizes the seizure of "any tangible things," which "allows the FBI to obtain a search warrant for 'any tangible thing' without demonstrating 'probable cause' of an illegal act" (Foerstel, 62). This new standard permits the government to demand records of any transaction between an individual,

including citizens not accused of any criminal activity, and a third-party. Because the bill explicitly mentions books and records as the first two examples of what might constitute "tangible things," librarians have been understandably nervous since the bill's inception.

Heavily redacted records and congressional testimony indicate that Section 215 has not been invoked on any grand scale. Of course, if the provision is rarely implemented, that raises legitimate concerns as to how essential it is to counterterrorism. By the FBI's own admission provided during congressional testimony, however, NSLs are more likely to be used to gain access to records from libraries.

Section 505 facilitates use of the National Security Letter (NSL), a form of administrative subpoena approved by the appropriate FBI field office. The language of Section 505 lowers the previous standard from "specific and articulable" reasons for a NSL to mere "relevance." Foerstel describes a process lacking oversight, relying on internal checks as the approving authority: "issued by an FBI field supervisor without the need for authorization from a prosecutor, a grand jury, or a judge…After their issuance, they receive no review" (76). Additionally, a notorious "gag order" prevented recipients from reporting receipt of an NSL, even to legal council, arguably violating the recipients' First Amendment rights.

Advocates argue that the Patriot Act includes language intended to preserve constitutionally protected rights of citizens, particularly through Congressional oversight. Experience to date, however, has revealed an evasive and stubborn Justice Department. In his analysis of the Patriot Act, Foerstel summarizes interactions between Congress and Department officials:

> "The oversight provisions in the Patriot Act require only the submission of reports and statistics, leaving congressional hearings as the only method by which DOJ officials could be directly confronted. The ineffectiveness of written inquiries became painfully clear during the first few months after the passage of the Patriot

> Act, when the DOJ showed itself to be unresponsive to congressional requests for information." (123)

The Freedom to Read Protection Act of 2003 (HR 1157), introduced by Rep. Bernie Sanders, marked the first of several failed attempts at restricting some of the new executive powers granted under the Patriot Act (150). The proposed legislation explicitly addressed the concerns of libraries and booksellers regarding Section 215 and called for a return to pre-9/11 standards. Later that year, Senator Barbara Boxer introduced a similar Library and Bookseller's Protection Act (S. 1158), which also included restrictions on the use of NSLs. Neither bill received the necessary votes. The debate returned in 2005 when 16 provisions were scheduled to expire pending reauthorization. Though the notion enjoyed some support in the House, the Senate response was less enthusiastic. A reconciled bill never emerged, and Congress reauthorized all sixteen provisions, making 14 permanent and extending the remaining two.

Critics of the Patriot Act argue that the bill limited judicial oversight while simultaneously expanding executive powers. What little congressional oversight did exist proved ineffectual in practice as delay tactics and secrecy undermined the spirit of the law and, at times, even the letter of the law.

"History doesn't repeat itself, but it does rhyme." — Mark Twain

On September 18, 1987, *The New York Times* ran the headline "F.B.I. in New York Asks Librarians' Aid in Reporting on Spies." The article provided the first glimpse at a program that permitted the FBI to collect intelligence on US citizens without any indication that a crime had been committed. The controversy started when Paula Kaufman reported a seemingly benign visit to Columbia University's Academic Information Services in a letter to the American Library Association. The report triggered a flurry of highly critical media coverage and

revealed a program extending back a decade. Because of an opaque record-keeping process and bureaucratic subterfuge, the full extent of the program can never be known.

The ill-fated Library Awareness Program was intended "to prevent foreign nationals from accessing 'open' scientific literature at America's public and university libraries and to enlist librarians in identifying foreign agents" (Foerstel, 5) in response to a perceived Soviet/KGB threat. As more information on the program became available, Congress joined the growing chorus of criticism, arguing that the FBI had overstepped its investigative functions. Since the LAP exploited ambiguity in existing statutes, states and organizations responded with new and stronger confidentiality statutes, explicitly granting confidentiality protection to libraries and the borrower records therein. By the time the dust had settled on the controversy, 48 states and the District of Columbia had emplaced such statutes.

Following the government excesses of the Watergate scandal and the COINTELPRO revelations, Congress legislated a solution. Upon signing the Foreign Intelligence Surveillance Act (FISA) into law in 1978, President Carter observed that "one of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our Nation's security on the one hand, and the preservation of basic human rights on the other hand." This observation, made over two decades prior to the September 11th terrorist attacks, echoes the sentiments and the challenge that lawmakers faced in the wake of the tragedy. Contrary to claims that the nation faced new challenges, this delicate balance between national security and civil liberties reaches back into the pages of history.

FISA altered pre-existing law to require a warrant for electronic surveillance in the United States and clarified executive authority. In other words, FISA codified the long-standing tradition of checks and balances and ensured that Fourth Amendment guarantees of "probable cause" extended to new and emerging electronic methods of surveillance, well before voice mail and

e-mail became investigating treasure troves. As an unintended consequence, however, federal law enforcement pursued an agenda that clearly separated law enforcement, concerned with *prosecutions*, and intelligence gathering with its emphasis on *prevention*. The 9/11 Commission would term this divide the "wall," describing a prohibitive culture where a lack of interagency coordination and cooperation prevented the necessary intelligence from reaching the appropriate authorities.

Although it is unclear how much of this obstacle is legislative and how much is administrative. Compared to conventional standards applied in criminal trial, FISA established a relatively low standard of probable cause, "requiring only that the target be involved in activity which 'may involve' a criminal violation" (Birkenstock, 844). Additionally, exemptions ensured judicial compliance in most instances involving a perceived threat to national security. Despite these relatively low standards and flexibility for times of crisis, the law enforcement and intelligence communities remained divided, erring on the side of caution.

In subsequent decades the Justice Department sought covert and overt mechanisms for expanding executive authority and loosen the rules governing the FBI's investigations. According to Patriot Act opponent and librarian Henry Foerstel, "in reality the Patriot Act was not a bold new anti-terrorism bill. It was a resurrected wishlist of executive powers that had accumulated in the Justice Department over many years" (30).

"Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." – Benjamin Franklin

Franklin's famous words adorn the titular legislation H.R. 3171, the Benjamin Franklin True Patriot Act of 2003, another ill-fated attempt to empower Congress

to provide better oversight without compromising the FBI's ability to effectively prevent another terrorist attack within the United States. Such legislation was never intended to hinder the FBI by denying them access to the records. Rather, Congress sought to reestablish traditional standards of judicial review and restore transparency with more thorough reporting to Congress. H.R. 3171 proposed "To provide for an appropriate review of recently enacted legislation relating to terrorism to assure that powers granted in it do not inappropriately undermine civil liberties." The bill provided a laundry list of complaints, noting that the Patriot Act "limit[ed] the traditional authority of Federal courts," while "expanding the authority of Federal agents" and "granting law enforcement and intelligence agencies broad access to…records with little if any judicial oversight."

Assuming the government could establish the legal grounds for compiling detailed information about US citizens without violating constitutionally protected rights, would such data be useful, i.e., protect the US from another terrorist attack? Recent experience with "watch lists" and terrorist databases have revealed an embarrassing inability to "connect the dots," that is decipher large volumes of data in any meaningful way. Despite reported ties to al-Qa'ida and a listing on the Terrorist Identities Datamart Environment, Umar Farouk Abdulmutallab boarded a plane bound for Detroit, Michigan, with concealed explosives. Ultimately, a defective device and passenger action prevented tragedy, while US government agencies were left trying to explain how Abdulmutallab qualified for the National Counterterrorism Center watch list but not the FBI's similar database for potential threats.

In the aftermath of 9/11, Senate Majority leader Tom Daschle pledged Congress' support to the President: "We, Republicans and Democrats, House and Senate, stand strongly united behind the president, and we'll work together to ensure the full resources of the government are brought to bear in these efforts" (Foerstel, 25). The Senator made good on his promise, passing the Patriot Act despite the misgivings of several individuals. As congress continues

to stall deliberation on reauthorization, advocates hide behind a "better safe than sorry" defense, arguing that repealing *any* provisions risks handicapping our law enforcement community. Invoking the specter of September 11, 2001, supporters further suggest that such a move would recreate the environment that permitted the terrorist attacks in the first place. Similarly, opponents suggest that without action, America is doomed to an Orwellian dystopia where the freedoms of private citizens are sacrificed for fear of some invisible enemy. The evolving nature of international conflict, particularly those including transnational actors, demands a more moderate response: legislation that empowers law enforcement to meet these new challenges without sacrificing the civil liberties synonymous with the United States. Amendments that mandate more thorough reporting from the Department of Justice—especially implementation of Sections 215 and 505—and enforce such requirements with an external review process would be a good start.

Works Cited:

"ACLU State Chapters Launch Campaign to Warn Patrons about Patriot Act." *American Library Association*. 4 Aug. 2003. Web. 21 Jan. 2011.

Birkenstock, Gregory E. "The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis." *Georgetown Law Journal*. 80 (1992): 843-873.

Bush, George W. Address to the Nation. White House. Washington D.C. 11 Sep. 2011.

Carter, Jimmy. Foreign Intelligence Surveillance Act of 1978 Statement on Signing S. 1566 Into Law. White House. Washington D.C. 25 Oct. 1978.

Foerstel, Herbert N. The Patriot Act: A Documentary and Reference Guide. Westport: Greenwood Press, 2008.

Kydd, Andrew H., Walter, Barbara F. "The Strategies of Terrorism." *International Security*. 31:1 (2006). 49-80.

McFadden, Robert. "F.B.I. in New York Asks Librarians' Aid in Reporting Spies." *The New York Times*. 18 Sep. 1987. Web. 12 Jan. 2011.

Phillips, Heather. "Libraries and National Security Law: An Examination of the USA PATRIOT Act." *Progressive Librarian*. 25 (2005): 28. ProQuest Advanced Technologies & Aerospace Collection. Web. 6 Feb. 2011.

National Commission on Terrorist Attacks. The 9/11 commission report: Final report of the National Commission on Terrorist Attacks upon the United States. New York: W.W. Norton, 2004.