From the Selected Works of D'Andre Lampkin

Spring 2017

Patriot Act A More Perfect Policy.docx

D'Andre Devon Lampkin
The Patriot Act: Post 9/11 Reaction to Jump the Boundaries of the First and Fourth Amendment

D’Andre Lampkin

National University
Abstract

This essay provides an overview of the USA Patriot Act and introduce readers to some of the controversial aspects of the main provisions outlined in the original bill. While the paper states an affirmative position regarding the language of the law, this essay challenges readers to decide whether the benefits of the Patriot Act outweighed the founded, potential, and unknown violations of the United States Constitution.
Area of Interest

The area of interest for this essay is the interpretation of the Patriot Act and its implementation, practical application, and misuse by U.S. law enforcement and investigatory agencies. There is also interest in analyzing the oversight and legal standards by which intelligence agencies have reason to obtain a warrant.

Research Questions

What is the Patriot Act?

What were the various ways the Patriot Act was used by intelligence agencies?

Had the use of the Patriot Act infringed upon rights guaranteed by the United States Constitution?

Discussion

The Patriot Act is a congressional act signed into law in response to the terrorist attacks of September 11, 2001. Formally known as Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, the purpose of the policy was to intercept and obstruct future attacks by foreign and domestic terrorist groups and individuals. The act was signed into law in October 2001 by then President, George W. Bush. The goal of the Patriot Act is to strengthen domestic security and provide local law enforcement and intelligence agencies with the tools necessary to identify and stop terrorists and terrorist activity. Since its inception, the Patriot Act has been controversial.
The Patriot Act has been extremely successful in thwarting several known and not-so-known terrorist acts. However, the Patriot Act has also been used in ways that conflict with freedoms and rights guaranteed by the United States Constitution. The language and parts of the act are broad and leave opportunity for federal and local agencies to misinterpret or abuse its intended purpose. Furthermore, the way in which the Patriot Act was enacted and renewed without scrutiny has led to the public's distrust of intelligence agencies.

According to the U.S. Government Printing Office, the Patriot act is broken down into 10 parts. They are as follows:

- Enhancing domestic security against terrorism
- Surveillance procedures
- Anti-money-laundering to prevent terrorism
- Border security
- Removing obstacles to investigate terrorism
- Victims and families of victims of terrorism
- Increased information sharing for critical infrastructure
- Terrorism criminal law
- Improved intelligence
- Miscellaneous (107th Congress, 2001).

The act was passed only one month after September 11th and less than 48 hours between the initial final working of the bill and its passing in both the House and Senate. The timing of the bill’s passing supports the notion that very few members of Congress took the time to read the very lengthy bill carefully.
Since the passing of the law there have been several instances of abuse already identified. In an article titled “FBI Finds It Frequently Overstepped in Collection Data”, author John Solomon discusses an internal audit conducted by the Federal Bureau of Investigations in 2007. The audit revealed that the agency misused National Security Letters in more than 1,000 instances since 2002 (Solomon, 2007). National Security Letters refer to search warrants pertaining to phone calls, emails, financial transactions, and social media accounts. The audit was a sample and covered 10% of the FBI's national security investigations since 2002.

Prior to 2001, National Security Letters were granted only after negotiating what type of personal information could or could not be released. The demands were reviewed by a judge in advance. After 2001, Congress relaxed the rules for issuing National Security Letters and required only that the FBI certify that the records are "sought for" or "relevant to" an investigation "to protect against international terrorism or clandestine intelligence activities." (OIG Report, 2014).

In 2007 Glenn A. Fine, Inspector General of the U.S. Department of Justice conducted an audit and stated the FBI reported more than 19,000 National Security Letters were requested in 2005 for 47,000 pieces of evidence. The audit also uncovered more than 1,000 violations. Of the more than 1,000 violations, 700 involved telecommunication companies providing information that exceeded what the initial search warrant requested (Fine, 2007). According to Fine, the results seemed to reveal that agents acted in good faith and that the errors were possibly the fault of the telecommunications company. However, Fine went on to say that deeper analysis of the data uncovered that rather than destroy the information after realizing it was erroneous or exceeded the scope of the search warrant, Federal agents sent several more NSLs to justify keeping the records (OIG Report, 2007).
In a 2007 letter addressed to the Committee of the Judiciary, the Electronic Privacy Information Center (EPIC) brought to the attention of the committee "documents that revealed at least 13 instances in which the FBI’s Office of General Counsel investigated alleged FBI misconduct during intelligence activities and found these matters serious enough to report them to the Intelligence Oversight Board (IOB)" (Rotenberg, 2007). By April 2008, then FBI Counsel Valerie E. Caproni acknowledged there were insufficient internal controls in place to insure the new investigative tools deriving from the Patriot Act were not abused. There were no annual audit schedules, compliance programs, checks and balances, or policies establishing clear lines of responsibility (Caproni, 2007).

There are instances when the anti-terrorism policy was used outside its initial scope of purpose successfully. Eric Lichtblau, a reporter for the New York Times reported in 2003 the Patriot Act was being used to investigate suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies, and corrupt foreign leaders. When asked, the Justice Department stated, "we are simply using all the tools now available to us to pursue criminals - terrorist or otherwise" (Lichtblau, 2003). The news report also stated federal officials confirmed the Patriot Act was used to track an unidentified fugitive and investigate a computer hacker who stole a company's trade secrets. By contrast, there have been several controversial invocations of the Patriot Act. In 2005, the Patriot Act is said to be responsible for the dismissal of eight United States Attorneys by the United States Department of Justice (U.S. Department of Justice, 2009). In an email from Kyle Sampson to Harriet Miers dated January 1, 2006 Sampson stated,

"You have asked whether President Bush should remove and replace U.S. Attorneys whose four-year terms have expired. I recommend that the Department of Justice and the
Office of the Counsel to the President work together to seek the replacement of a limited number of U.S. Attorneys."

On March 9, 2006, the USA Patriot Act Improvement and Reauthorization Act of 2005 was signed into law. The new law suspended term limits and allowed for the United States Attorney General to appoint interim U.S. Attorneys indefinitely until presidentially appointed U.S. Attorney were confirmed by the Senate. Appointments of interim U.S. Attorney’s appointed by the Attorney General do not require Senate confirmation. On September 13, 2006, Sampson e-mailed Miers a list of federal attorneys "In the Process of Being Pushed Out" and those "We Now Should Consider Pushing Out." and proposed using a provision of the anti-terrorism Patriot Act to circumvent the standard appointment process (Gonzales, 2007).

By skipping the Justice Department's normal personnel system, Sampson told Miers, "we can give far less deference to home-state senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House."

During a special congressional committee hearing, then Attorney General Alberto Gonzalez testified that the explanations initially given to congress explaining the firing of the eight attorneys were "incomplete" and "mistakes were made." Senator Charles Schumer, D-New York said the revelations "proved beyond any reasonable doubt that there has been an unprecedented breach of trust, abuse of power and misuse of the Justice Department. And that is very serious and very important," said Schumer, referring to the e-mails. Soon after the hearings Gonzales resigned from his position.
Abuses of the Patriot Act have also extended to the film and television industry and online banking records. According to the website www.sg1archive.com/nightmare.shtml, television series Stargate SG-1 webmaster Adam McGaughey was charged with copyright infringement and computer fraud. When Federal Bureau of Investigations investigators found it difficult to obtain financial records from the website's Internet Service Provider, they amended the Patriot Act's Computer Fraud and Abuse Act to include search and seizure of records from Internet Service Providers.

Another controversial invocation of the USA Patriot Act includes the arrest of Sami Omar Al-Hussayen for maintaining websites that supported violent terrorist activities (Fick 2004). Prosecutors claimed Al-Hussayen's maintenance of the websites equated to actively participating in fundraising, recruiting, and spreading propaganda rhetoric on behalf of the terrorist organizations. During the prosecution phase, laws had not yet been created to address webmaster’s obligation to report terrorist activity to authorities.

In 2005, Bloomberg Business reported National Security Letters were sought to allow FBI agents to demand financial records of several Las Vegas businesses (Dunham, 2005). Fearing a New Year's Eve celebration terrorist attack, FBI agents knocked on the doors of casinos, storage warehouses, and other Las Vegas businesses and demanded financial records for approximately 1 million patrons. The hunt for these documents was done under the guides of the Patriot Act. According to the article, an anonymous Justice official stated, despite the large number of records requested, "We are not inclined to ask courts to endorse fishing expeditions." It was unclear whether those businesses who were asked to turn over records had any legal recourse to stall the search since they were supposedly told to hand over the documents or face
spending time in court. Many of them questioned how broad the National Security Letters were (Dunham, 2005).

The Patriot Act has also contributed to misguided accusations and unlawful destruction of personal property by the federal government. In May 2004, Dr. Steven Kurtz, a Professor of Visual Studies at SUNY at Buffalo and cofounder of the award-winning art and theater group Critical Art Ensemble, arrived home to find his wife deceased from a heart attack. During the fire department’s investigation into the death of Hope Kurtz, the police found art materials, benign bacterial cultures, and biological equipment inside his home. Even though investigators determined that the materials and equipment were a part of his DNA extractions projects and artwork, the police contacted the FBI Joint Terrorism Taskforce and reported their findings. FBI agents responded to the scene and confiscated computers, manuscripts, books, and equipment. Kurtz was detained without being charged for 22 hours. Additionally, the Erie County Health Department declared the home a public health hazard and condemned it. According to the Critical Art Ensemble Defense Fund, the Justice Department sought charges under Section 175 of the US Biological Weapon Anti-Terrorism Act, a law which was expanded by the USA Patriot Act. After review by a federal grand jury, the federal judge ruled to dismiss all charges citing the elements to commit the crime were not met (United States of America v Steven Kurtz, 2008). Dr. Kurtz was later cleared of all charges on June 11, 2008 (CAE Defense Fund, 2008), however, his home was already destroyed.

**Progress Toward A Better Policy**

Since 2005 some progress has been made in improving the Patriot Act. Critics of the Patriot Act had contested its constitutionality in court and prevailed. For example, a plaintiff
identified by alias as “John Doe” sued Attorney General John Ashcroft with the assistance of the American Civil Liberties Union and prevailed. In their complaint, they argued that citizens should have the right to contest a National Security Letter. A federal judge agreed and ruled that the judgement applied to all National Security Letters citing they were a restriction on the First Amendment (American Civil Liberties Union, John Doe v John Ashcroft, 2015). The courts also ruled that it is unconstitutional to create a clause that would make it illegal to provide expert advice to a terrorist group (Cole, 2006). The courts felt the clause was too vague by not defining what would constitute “expert advice.” It could also be inferred that a subject of an investigation forfeits their right to seek expert legal advice after being accused of engaging in terrorist activity.

**Conclusion**

The FBI's internal audits found no evidence federal agents knowingly or willing violated the law or that supervisors encouraged agents to violate the law. However, the audits reaffirm the need for checks and balances and revisions that align with the protections guaranteed by the United States Constitution. Parts of the USA Patriot Act expired on June 1, 2015. On June 2, 2015, under President Barack Obama, the USA Freedom Act was signed into law. The USA Freedom Act renewed many of the provisions from the USA Patriot Act that received congressional approval. Even though the name of these provisions has changed, they are still subject to human nature. Without any judicial oversight and continuous review, violations will continue to occur and only come to the attention of judges when civil rights afforded by the Constitution are presented in the form of a legal challenge. Unlike the Patriot Act, the USA Freedom Act restricts bulks interception on telecommunications metadata from United States citizens. It is a step in the right direction, but intelligence agencies should be mindful not to erode the trust of the American public.
References

American Civil Liberties Union, John Doe v. John Ashcroft, 04 Civ. 2614 35 (United States District Court, Southern District of New York August 28, 2015)


Government Printing Office, 107th Congress Public Law 56


United States of America v Steven Kurtz, Order 04-CR-0155A 12 (United States District Court, Western District of New York April 21, 2008)