USA PATRIOT ACT: The Impact of USA Patriot Act on American Society: An Evidence Based Assessment

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"Those who would give up essential liberty to purchase a little temporary safety deserves neither liberty nor safety."

Benjamin Franklin

Introduction

There is little research on USAPA legislative process. Existing research shows that the USAPA was “rushed” passed Congress by the Bush administration without

following the formal legislative procedure,² i.e., agency review,³ public hearings,⁴ mark up,⁵ floor debate,⁶ and conference report,⁷ in both chambers.⁸ For example, floor debate was limited to four hours for USA ACT. The debate was less a real debate as it was an opportunity for respective senators to put statements on the record, i.e. to detail the content and describe the process (e.g., Senator Leahy started by observing that the Bill was not to anyone’s liking); list the concessions and catalogue the (negotiated) achievements made (e.g., Senate Leahy spent most of the time allotted explaining various technical provisions to the Act); leave a legislative record anticipating Supreme Court

³ “Less Secure, Less Free,” supra, note 1. (The Administration’s original anti-terrorism measures (Combating Terrorism Act (CTA) – Anti-Terrorism Act (ATA) – Mobilization Anti-Terrorism (MTA) was the handmaiden of the Attorney General staff, alone. The Office of Budget Management (OBM) was intentionally bypassed to deny input and avoid comments from affected agencies.)
⁴ There were a total of two hearings being held before the passage of USAPA, one on September 25, 2001 when Attorney General Ashcroft was invited to answer questions on Administration’s anti-terrorism proposals (MATA – ATA). Senate Committee on the Judiciary Hearing, Tuesday, September 25, 2001, on "Homeland Defense." Presided by Chairman Leahy. The other public hearing was called by Senator Feingold on October 3, 2001 to discuss civil liberties implications of the USAPA and related anti-terrorism measures. The Senate Judiciary Committee’s Subcommittee on the Constitution, Federalism, and Property Rights held a hearing titled "Protecting Constitutional Freedoms in the Face of Terrorism." Presided by Sen. Russ Feingold (D-WI)
⁵ Morton H. Halperin, “The Liberties We Defend,” American Prospect Vol. 12 (18) Oct. 22, 2001. http://www.prospect.org/print/V12/18/halperin-m-2.html (“Four key Republicans on the House Judiciary Committee wrote to their chairman questioning the rush to mark up a bill (MATA) after only one hearing with the Attorney General on 9/25/01. "What we must avoid … is the impulse to hastily approve wholesale changes to search and seizure, surveillance, immigration and other laws in an understandable but misguided attempt to thwart future attacks.")
⁶ “Seven Weeks”, note 1, supra.
⁷ Ibid. (House and Senate Conference on PATRIOT ACT and USA ACT was done away with because the Bush Administration in general and Attorney General Ashcroft in particular was afraid that the conference leadership (as then constituted) might jeopardize the chance of quick passage.).
challenges ahead (Senate Specter (R-PA)). From the beginning to the end, the anti-terrorism legislation was orchestrated for passage by the Administration, not open for input by the public or subject to scrutiny of the Congress. In the final USA ACT debate, the Senate leadership from both parties made it known that that the USA ACT was not to be changed. No floor amendments were allowed, except for three by Senator Feingold. Dissenters were shunned, lest they would undo the hard fought compromised bill.

More significantly, throughout the entire USAPA legislative process, neither the Congress nor the Administration has systematically investigated, judiciously examined, openly debated, and comprehensively considered the relative merits and utilities – necessity and efficacy, costs and benefits – and the impact and implications – long and short, direct and indirect - of the USAPA on the Constitution, on the society, and on the people. A few vocal Senators, e.g. Leahy, Feingold, and a coalition of interested groups, e.g. ACLU and EFF, did raise objections over the dire consequences of the USAPA on civil liberties. But these voices were intentionally suppressed and conveniently ignored. As a result, there was no serious consideration given to the long term impact and implications of the USAPA on our Constitutional form of government and democratic governance, e.g. how USAPA might affect the constitutional structure, process and culture, in historical terms or international arena.

As it turned out and with hindsight, 9/11 was a watershed event. It has changed international opinion about US democratic institutions and domestic attitude towards law and order. Increasingly the world – friends and foes alike – from Europe to Asia, from South America to Africa - have a negative image of America. For example, in terms of favorable ratings of America, Britain went from 75% (summer 2002) to 58% (Mar. 2004)

9 “Seven Weeks”, note 1, supra.
10 Andrew Kohut and Bruce Stokes, America Against the World: How We Are Different and Why We Are Disliked (Times Book, 2006) (Pew Global Attitudes Project interviewed 91,000 in fifty nations from 2002 through 2005 and come to the conclusion that after 911 and as a result of Bush administration, anti-Americanism is on the rise world-wide.)
11 For international opinion, see “Global Opinion: The Spread of Anti-Americanism A review of Pew Global Attitudes Project findings,” January 24, 2005.
and Jordon went from 25% to 5% in the same period. The sincerity of US war on terrorism was widely questioned in 2004: Britain (41%), France (61%), Russia (48%), Germany (65%), Turkey (64%), Morocco (66%), Jordon (58%) and Pakistan (58%).

Most significantly, world public opinion about US’s commitment to democracy has slipped in 2004 survey: Britain (45% less committed), France (79%), Russia (53%), Germany (70%), Turkey (73%), Morocco (66%), Jordon (56%) and Pakistan (57%).

Domestically, by a margin of 52% vs. 38%, US public surveyed observed that the remove of (Constitutional) limitations on government has gone too far. Contrary to Bush government policy, a majority of the public in the U.S. believed that U.S. citizens detained as terrorists should be given rights (80%) and afforded lawyers (78%).

Knowledgeable insiders observed that the USAPA was entirely a Bush administration brainchild, conceived by the Attorney Generation, imposed on the Congress and fed to the American people in a time of crisis and with the use of high handed tactics. To date, no serious attempt has been made to understand how and why the USAPA was able to rush through Congress without serious contest and effective challenge. This is a first attempt to do so.

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12 For domestic opinion, see "Americans on Terrorism: Two Years After 9/11," Program on International Policy Attitudes and Knowledge Networks (2003)

13 See text to notes 68 – 71, infra.

14 “Less Secure, Less Free.” Supra, note 1 (Even the Attorney general did not read the ATA.). See also “Seven Weeks”, note 1, supra.

15 The Bush Administration has rejected this charge, emphatically. Viet Dinh “A White Paper: How Does the USAPA defends democracy.” The Foundation for the Defense of Democracies, June 1, 2004. (During the drafting of the anti-terrorism measures, the Administration has listened to and took suggestions from a coalition of concerned people and interested parties. (p. 3)


16 See also “Seven Weeks”, not 1, supra. (Attorney General Ashcroft repeatedly demanded the quick passage of the Administration’s proposals without debate and with no revisions, with threats of political fallouts of yet another terrorist attack.) See Chapter 2, infra.

17 The two exceptions being “Seven Weeks” note 1, supra. (an insider account of the legislative process) and Robert O’ Harrow Jr. (with assistance from the Center for Investigative Reporting) “Six Weeks in Autumn,” note 1, supra. (The USAPA was rushed through Congress by the administration under the stewardship of Attorney General staff.) There were suggestions that the President Bush was personally involved
This chapter investigated into the legislative history of the USAPA. This chapter is organized into the following parts. After this “Introduction,” Part II: “The Legislative Process” traced the origin and followed the development of the USAPA. It observed that the USAPA was rushed through the Congress with few consultations with the public and virtually no participation by the legislators, individually. Part III: “Conclusion” summarized the chapter’s major findings as it discussed the implications of a such a flawed legislative process. The reasons why the legislative process was compromised is a subject matter to be dealt with at length and in more detail in Chapter Three.

II

The Legislative Process

There were many legislative measures – Acts, Bills, Resolutions - introduced during the first two week after 9/11 including: Victims of Terrorism Tax Relief Act of 2001, Public Law No: 107-134 (introduced 9/13/2001) (“Exempts from income taxes any individual who dies as a result of wounds or injury incurred from the terrorist attacks against the United States on April 19, 1995, or September 11, 2001, or who dies as a result of illness incurred from a terrorist attack involving anthrax occurring on or after September 11, 2001, and before January 1, 2002 (such attacks).”); Public Safety Officer Benefits Bill, Public Law No: 107-37 (introduced 9/13/2001) (“To provide for the expedited payment of certain benefits for a public safety officer who was killed or suffered a catastrophic injury as a direct and proximate result of a personal injury sustained in the line of duty in connection with the terrorist attacks of September 11, 2001.”); Intelligence Authorization Act for Fiscal Year 2002 (“To authorize appropriations for fiscal year 2002 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes.”); 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to

by giving the matching order, i.e. Attorney General Ashcroft acted only as a loyal foot soldier.)

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Combing Terrorism Act of 2001 - AMENDMENT NO. 1562

The first comprehensive and significant post 9/11 anti-terrorism legislative measure introduced was in the form of an amendment attached to a budget appropriation bill, “DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS ACT, 2002” (HR 2500), in the Senate on September 13, 2001, i.e. AMENDMENT NO. 1562, entitled: “Combating Terrorism Act of 2001." (CTA)  

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The original ideas


20 For a list of 9/11 legislations, see “LEGISLATION RELATED TO THE ATTACK OF SEPTEMBER 11, 2001,” http://thomas.loc.gov/home/terrorleg.htm

21 See Congressional Record, September 13, 2001, at pages S9401-4.

The professed purpose of the CTA was: “To enhance the capability of the United States to deter, prevent, and thwart domestic and international acts of terrorism against United States nationals and interests.”

In layman’s terms and as Senator Hatch put it: “It is essential that we give our law enforcement authorities every possible tool to search out and bring to justice those individuals who have brought such indiscriminate death into our backyard.”

The CTA was cosponsored by Senators Hatch (R-Utah), Feinstein (D-CA), and Kyl (R-Arizona). Senators Dewine (R-OH), Session (R-AL), Thompson (R-TN), Thurmond (R-SC), McCain (R-AZ), and Schumer (D-NY) also joined. The CTA passed the Senate two days after 9/11, with about 30 minutes of floor debate and one lone dissenting voice, i.e. that of Sen. Patrick Leahy (D-VT). Leahy wanted more time to study the bill. This was an all too familiar pattern with post 9/11 legislative measures to be repeated again with the USAPA.

The CTA was intended to provide law enforcement officials with the necessary resources and added legal authority to fight terrorism, particularly in the investigation of 9/11.

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25 Senators Kyl, Hatch, and Feinstein were all members of the Subcommittee on Technology, Terrorism, and Government Information and Terrorism, (106th Congress), and later the Technology and Homeland Security (107th and 108th Congress) which was responsible for “Oversight of anti-terrorism enforcement and policy”. Senator Feinstein was the Democratic Chairman of Subcommittee on Technology, Terrorism, and Government Information (106th Congress) in 2001 with Senator Kye acting as the Ranking Republican. Senator Kyl was the Chairman and Senator Feinstein was the Ranking Democrat on the Terrorism, Technology and Homeland Security (107th and 108th Congress).
26 See Senate Leahy floor speech, Combating Terrorism Act of 2001 debate.
28 Id.
terrorists and to bring them to justice.\textsuperscript{29} As observed by Senator Hatch in introducing the CTA: “we, as lawmakers, must take every step possible to ensure, in addition to adequate financial resources, that the law enforcement community has the proper investigative tools at its disposal to track down the participants in this evil conspiracy and to bring them to justice.” \textsuperscript{30}

Facing a national crisis of yet untold proportions, the Congressional leadership had other contingency plans to secure the nation, should CTA failed to materialize.\textsuperscript{31} For example, on September 20, 2001, Representative Lamar Smith circulated a bill - Public Safety and Cyber Security Enhancement Act (PSCSEA) – similar to the CTA as a backup for S.A. 1562 should H.R. 2500 failed to pass. Senator Patrick Leahy was also working on his own anti-terrorism bill, later passed as the USA ACT.

The CTA was demanded by the public (to track down the culprits, to secure the nation)\textsuperscript{32} and required by the situation (in fighting an illusive enemy).\textsuperscript{33} Above all else it reflected and reinforced the nation’s sober mood and crisis mentality. The political climate of the time was in seeking security at all costs.\textsuperscript{34} Most of the provisions have been

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\item At this juncture, the traditional law and order paradigm in dealing with terrorism and terrorists still applies, i.e. reactive and punitive (terrorism as crime), not pre-emptive and destructive (terrorists as enemies). In this regard, the CTA diverges from USAPA, philosophically, in substantial and material ways.\textsuperscript{30} See Combating Terrorism Act of 2001 debate.
\item It also registers a starch reality, everyone America is trying to find a way to express their anger, stamp their anxiety and “do something” about 9/11. View this way, the USAPA is a must pass legislation.
\item Senator Kye: “But, as policymakers, we have also been asked some hard questions by our constituents and those questions include things such as: Why can't our Government do something about these horrible crimes?” \textit{Id}. See “USAPA supported by the public” (text to notes 35 to 37). In “USAPA: More Questions than Answers” \textit{International Journal of the Sociology of Law} (In print, March 2006).
\item “On the Importance of Anti-terrorism Legislation,” (“Viet Dinh: I think the American people have made their preferences very clear in their public statements expressed to the various news agencies, not only with respect to the fight against terrorism, but on this package in particular.”) \url{http://www.aclj.org/news/nf_011004_viet_dinh_interview.asp} \textsuperscript{34}
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recommended by former anti-terrorism commissions, e.g. National Commission on Terrorism and requested by law enforcement officials for years. As Senator Kye observed when speaking in support of the bill: “the Director of the FBI and other U.S. Government officials all imploring us to do some things to help in this battle against terrorism.” Nearly half of the provisions have passed the Senate one and half year before.

CTA substantive provisions

The “Combating Terrorism Act of 2001 was "sought to for improve upon current counter-terrorism readiness:

(a) Assessment of readiness The Comptroller General was asked to conduct “an assessment of the capabilities of the National Guard to preemptively disrupt a terrorist attack within the United States involving weapons of mass destruction, and to respond to such an attack” (Section 811 (a).

(b) Scientific and technology research The President was asked to establish a comprehensive long-term scientific and technology research program to prevent, preempt, detect, interdict, and respond to catastrophic terrorist attacks (Section 812 (b).

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36 Id.
37 See testimony of Senator Kyle, Combating Terrorism Act of 2001 debate. (“In fact, we incorporated some of the provisions of these commission recommendations in the bill that passed the Senate a year and a half ago.”)
38 SEC. 811. ASSESSMENT OF NATIONAL GUARD CAPABILITIES TO PREEMPTIVELY DISRUPT DOMESTIC TERRORIST ATTACKS INVOLVING WEAPONS OF MASS DESTRUCTION.
39 SEC. 812. LONG-TERM RESEARCH AND DEVELOPMENT TO ADDRESS CATASTROPHIC TERRORIST ATTACKS.
(c) **Legal authority** The Attorney General was asked to conduct a review of the legal authority of the Federal government agencies to adequately respond to and prevent, preempt, detect, and interdict – “catastrophic terrorist attacks.” (Section 813(a))

(d) **Intelligence agent recruitment** The Director of Central Intelligence was asked to rescind the 1995 CIA guidelines relating to “the recruitment of persons who have access to intelligence related terrorist plans, intentions and capabilities.” (Section 814)

(e) **Sharing of intelligence** The President was asked to report on “legal authorities that govern the sharing of criminal wiretap information under applicable Federal laws, including section 104 of the National Security Act of 1947 (50 U.S.C. 403-4)(Section 815 (a) and made recommendations for sharing intelligence between DOJ and intelligence community (Section 815 (b) (2).

(f) **Terrorism financing** The Federal Government was asked to use all the tools available to prevent, deter, or disrupt the fundraising activities of international terrorist organizations. (Section 816 (2))

(g) **Controls of biological pathogens** The Attorney General was asked to report upon “the means of improving United States controls of biological pathogens and the equipment necessary to develop, produce, or deliver biological weapons” (Section 817 (a). The President was asked to adopt measures “to enhance the standards for the physical

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40 SEC. 813. REVIEW OF AUTHORITY OF FEDERAL AGENCIES TO ADDRESS CATASTROPHIC TERRORIST ATTACKS.
41 SEC. 814. GUIDELINES ON RECRUITMENT OF TERRORIST INFORMANTS
42 SEC. 815. DISCLOSURE BY LAW ENFORCEMENT AGENCIES OF CERTAIN INTELLIGENCE OBTAINED BY INTERCEPTION OF COMMUNICATIONS.
43 Ibid.
44 SEC. 816. JOINT TASK FORCE ON TERRORIST FUNDRAISING.
45 SEC. 817. IMPROVEMENT OF CONTROLS ON PATHOGENS AND EQUIPMENT FOR PRODUCTION OF BIOLOGICAL WEAPONS
protection and security of the biological pathogens … from illegal theft or other wrongful diversion” (Section 817 (b).\textsuperscript{46}

(i) \textit{Reimbursing employee liability insurance} The Head of Federal agencies were to reimburse law enforcement agents and intelligence employees for professional liability insurance covering counterterrorism duties (Section 818 (a)\textsuperscript{47}

(j) \textit{Authorizing the use of a pen register or trap and trace device} Federal and State investigative or law enforcement officers are authorized to use a pen register or trap and trace device to obtain “dialing, routing, addressing” information by certifying “to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.” (Section 832 (b).\textsuperscript{48} It also authorized the emergency installation of such devices without a court order by U.S. Attorneys if there is a certified immediate threat to “national security”, “public health or safety”, “attack on the integrity or availability of a protected computer” (Section 832 (c)\textsuperscript{49}

(k) \textit{Authority to intercept wire, oral and electronic communications} Law enforcement officials are authorized to intercept wire, oral and electronic communications in the investigation of terrorism (Section 833)\textsuperscript{50} and computer fraud and abuse (Section 834) offenses.\textsuperscript{51}

As it turned out, the process and debate over AMENDMENT NO. 1562 served as a dry run for the USAPA. Specifically, it anticipated many of the substantive issues that were raised, e.g. roving wiretap as threatening civil liberties, and rehearsed most of process

\textsuperscript{46} \textit{Ibid.}
\textsuperscript{47} SEC. 818. REIMBURSEMENT OF PERSONNEL PERFORMING COUNTERTERRORISM DUTIES FOR PROFESSIONAL LIABILITY INSURANCE
\textsuperscript{48} SEC. 832. MODIFICATION OF AUTHORITIES RELATING TO USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES.
\textsuperscript{49} \textit{Ibid.}
\textsuperscript{50} SEC. 833. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO TERRORISM OFFENSES.
\textsuperscript{51} SEC. 834. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO COMPUTER FRAUD AND ABUSE.
related arguments that were made, e.g. Congress should not rush to judgment without proper notice and public hearing. For example, much like the USAPA, the Senators were given the CTA bill only 30 minutes before the floor debate. In this regard, Senator Leahy floor speech on CTA was instructive on things to come:

“Unfortunately, because this is something that we have had no hearings on, we haven't had the discussions in the appropriate committees--Intelligence, Armed Services, and Judiciary--we are somewhat limited in opposition… I would feel far more comfortable voting on something like this if these various committees not only had a chance to look at it but that President Bush's administration--the Attorney General, the Director of CIA, the Secretary of Defense--would have the opportunity to let us know their views on it. I would feel far more comfortable with that.”

Muted public awareness, vocal special concerns

The CTA did not attract much media attention nor generate any public concerns. The nation was still taken back over the aftermath of 9/11 attack and struggling to deal with many of its unforeseen consequences.

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54 There were occasional constituent letters to the law-makers. There was no systematic counting or analysis of such letters. See letter of Mike Perry (505 E. White St #4, Champaign, Il, 61820) to Senators Durbin and Fitzgerald, and Representative Johnson (“All post 9/11 anti-terrorism legislations – Attorney General Ashcroft's Anti-Terrorism Act (ATA); Sen. Leahy's Uniting and Strengthening of America Act (USAA); Rep. Smith's Public Safety and Cyber Security Enhancement Act (PSCSEA, H.R. 2915); Sen. Hatch's Combating Terrorism Act (CTA, amendment S.A. 1562 to bill H.R. 2500); and Sen. Graham's Intelligence to Prevent Terrorism Act (IPTA, S. 1448), and Sen. Gregg's draft anti-encryption legislation - were ill advised. Instead of catching hard core terrorists, they would only affect innocent citizens. For example by declaring computer crime terrorism acts, it resulted in serving up extensive and severe punishments for unsuspecting and not deserving “young, curious programmers, essentially pranksters” who, who left alone, might one day “grow up to be accomplished security professionals.”) http://fscked.org/rants/letters/Repleter
There were however some very serious concerns over the vagueness of many of its provisions form some quarters, such as America Civil Liberties Union (ACLU), and (civil rights) advocacy coalitions, such as Electronic Frontier Foundation (EFF).\(^{55}\) What is the exact meaning of “addressing” and “routing” data?\(^ {56}\) How might the CTA impact on liberties, e.g. how intrusive is electronic surveillance on web based activities?\(^ {57}\) For example, the EFF was critical of various aspects of CTA, mostly because CTA intrudes into computer users’ privacy with very little safeguards: \(^ {58}\)

(1) CTA expands “traditional” wiretap authority beyond recognition. Before CTA, wiretap orders were authorized for a few well defined predicated offences. Now, the CTA allows for wiretapping based on loosely copulated terrorism crime (Section 833)\(^ {59}\) and computer offenses (Section 834).\(^ {60}\)

(2) CTA allows for application of “pen register” and “track and trace” to electronic communication, e.g. e-mail, web surf, URL search. The definition of pen register under

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\(^ {55}\) The Electronic Frontier helped to keep track of the impact of anti-terrorism measures (not all of them related to terrorism law or USAPA) from day one: “Chilling Effects of Anti-Terrorism "National Security" Toll on Freedom of Expression, including: Websites Shut Down by US Government; Websites Shut Down by Other Governments; Websites Shut Down by Internet Service Provider; Websites Shut Down or Partially Removed by Website Owner; US Government Websites That Shut Down or Removed Information; US Government Requests to Remove Information Media Professionals Terminated or Suspended; Other Employees Terminated or Suspended; Related Incidents.” [http://www.eff.org/Censorship/Terrorism_militias/antiterrorism_chill.php#websiteshutdownwnusgov](http://www.eff.org/Censorship/Terrorism_militias/antiterrorism_chill.php#websiteshutdownwnusgov)

\(^ {56}\) “Senate OKs FBI Net Spying,” *Wired*, September 11, 2001 (“Nobody really knows what routing and addressing information is.... If you're putting in addressing information and routing information, you may not just get (From: lines of e-mail messages), you might also get content," the source said. ) [http://www.wired.com/news/politics/0,1283,46852,00.html](http://www.wired.com/news/politics/0,1283,46852,00.html)


\(^ {59}\) SEC. 833. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO TERRORISM OFFENSES.

\(^ {60}\) SEC. 834. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO COMPUTER FRAUD AND ABUSE.
the amended (18 U.S.C. § 3127(3) now reads: "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted ..."
Similarly, 18 U.S.C. § 3127(4) defines "trap and trace device" as “a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication..” In this way, the CTA allows “pen register” to go beyond merely capturing phone numbers to capture routing and addressing information, which is revealing of message content and threatening personal privacy.

(3) CTA allows for multi-jurisdiction “pen register” and “trap and trace” order. Whereas before CTA “pen register” and “trap and trace” order only apply "within the jurisdiction of the court." The CTA makes “pen register” and “trap and trace” orders applicable nation wide: "The order shall, upon service of the order, apply to any entity providing wire or electronic communication service in the United States whose assistance is required to effectuate the order." (Section 832 (b) (1).

(4) CTA lowers the threshold of court approval (i.e. based on relevant to ongoing criminal investigation) and minimizes judicial supervision (i.e. based on certification of law enforcement officials) in the application for “pen register” and “trap and trace” orders in electronic surveillance cases. Section 832 (b) (1) reads in pertinent part: “Upon an application made under section 3122(a)(1) of this title, the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device if the court finds that the attorney for the Government has certified to the court that the

61 Under the former law “pen register” and “track and trace” devices only applied to "wire" communications. Thus, a “pen register” is "a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached ..." UNITED STATES CODE, TITLE 18 - CRIMES AND CRIMINAL PROCEDURE, PART II - CRIMINAL PROCEDURE, CHAPTER 205 - SEARCHES AND SEIZURES. Section 3127. Definitions for chapter. (3).
information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.” (Emphasis supplied) In so doing, CTA extends the old wiretap order application standard and procedures to electronic searches.62

There were also grave concerns with the legislative process:

“Perhaps extending the privileges of government to limit our privacy is something that should be done in half an hour in the middle of the night, as it was here, but then again, maybe Senators Carl Levin of Michigan and Patrick Leahy of Vermont were correct, that this was all being done far too quickly, with a speed in fact that prevented most of the senators to make a full review of the legislation which was presented to them a mere half hour before they were to vote on it.”63

Some felt that the CTA provisions were more show than substance,64 symbolic than real.65

62 18 U.S.C. 3223 provides in pertinent parts "the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the attorney for the Government or the State law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation."


64 Bob Barr the maverick Republican Representative openly questioned the necessity and utility of the CTA. “Fighting Terrorism, Preserving Civil Liberties,” CATO, POLICY FORUM, Tuesday, October 2, 200. 4:00 p.m. (Featuring Rep. Bob Barr (R - Ga.), with commentary by Solveig Singleton, Senior Analyst, Competitive Enterprise Institute; Stuart Taylor, Senior Writer, National Journal; Jonathan Turley, Professor of Law, George Washington University.)

65 “SECRECY NEWS: from the FAS Project on Government Secrecy,” September 14, 2001 (Most of the post 9/11 legislations only consisted of declaration of the sense of Congress and/or requests for reports, rather than providing for new powers to fight terrorism. The exception substantive policy change was the doing away with the 1995 CIA guidelines governing the recruitment of informants who have committed human rights violations or terrorism acts.)
The Bush administration in general, and Attorney General Ashcroft in particular, was universally condemned for using 9/11 to introduce draconian police powers and ushering in an Owellian state with the passage of CTA – MATA - ATA – Patriot Act. As lamented by Al Gore: "They have taken us much farther down the road toward an intrusive, 'big brother'-style government - toward the dangers prophesied by George Orwell in his book '1984' - than anyone ever thought would be possible in the United States of America."

While Ashcroft was responsible for initiating many of the post 9/11 counter-terrorism legislation, he did not, however, draft all of them out of clean cloth. A fair reading of historical records suggests that many of the counter-terrorism measures already existed on the book and were just being applied to new situations, e.g. extending and applying “pen register” and “track and trace” to search and seizure of electronic data.

**The MATA & ATA**

The drafting of USAPA started with a simple instruction from President Bush to the Attorney General Ashcroft immediately after the 9/11 attack: “John, make sure this

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67 *Id.*
69 To date, there is no investigation into the role of President Bush in the drafting and passage of the USAPA and related anti-terrorist, measures. Was President Bush a hands-off manager, aloof and detached, as many observers made him out to be? To what extent and in what manner did Bush contributed – in content and process - to the passage of the USAPA? 9/11 was a defining moment for the Bush administration. How Bush handled 9/11, from talking to the crowd at ground zero to pushing the USAPA through Congress, unmistakably reflected Bush’s governing philosophy and management style.
(9/11 – terrorism) can’t happen again.” The Attorney General took the charge seriously, and zealously, and above all else personally.

The drafting process

The Attorney General turned to Viet Dinh, an Assistant Attorney General in charge of Department of Justice (DOJ), Office of Legal Policy, to work on an anti-


72 In public service, officials are supposed to separate private preferences from public choices. In this case, Ashcroft not only failed to draw such a distinction but actively made his own ideology, values and interests to stand for the common good of the nation; from religious beliefs, to moral values to political ideology. JUDY BACHRACH, “John Ashcroft's Patriot Games,” *Vanity Fair* Feb. 1, 2004. [http://www.mindfully.org/Reform/2004/Ashcroft-Patriot-Games1feb04.htm](http://www.mindfully.org/Reform/2004/Ashcroft-Patriot-Games1feb04.htm) (“There are only two things you find in the middle of the road, a moderate and a dead skunk” He believes that "you can legislate morality," and that any senator who suggests otherwise will simply be legislating "immorality, and we've done too much of that already." The attorney general invested his fight for the Patriot Act with a Crusader's fervor, "questioning his opponents' patriotism...")

73 Viet Dinh was known as the “chief architect of the USAPA. "At Home in War on Terror: Viet Dinh has gone from academe to play a key behind-the-scenes role. Conservatives love him; others find his views constitutionally suspect." *Los Angeles Times* September 18, 2002. [http://www.asianam.org/viet%20dinh.htm](http://www.asianam.org/viet%20dinh.htm) In time, he becomes the USAPA chief spokesman and main defender. His rationale for the USAPA is security before freedom; one cannot enjoy the later without the guarantee of the former. Viet Dinh “A White Paper: How Does the USAPA defends democracy.” The Foundation for the Defense of Democracies, June 1, 2004.
terrorism package on the same day. On Thursday (September 13, 2001) Dinh told Ashcroft that the package – Mobilization Anti-Terrorism Act (MATA) - would be ready by Friday (September 14, 2001). Dinh was assisted by David Carp, a DOJ lawyer who helped draft the Oklahoma City (1995) anti-terrorism legislative measures, input from John Yoo who later co-authored a report to the President arguing that Geneva Conventions do not apply to Taliban or Al Qaeda fighters as a matter of international law because Afghanistan was a "failed state", and “torture” can be used.

In the course of a little over six weeks a 20 – 30 pages of MATA – ATA turned into a document which was 131 pages in length with 1016 different sections.


75 Another account suggested that Dinh’s marching order came on September 12, 2001 (Wednesday) indirectly and by way of Adam Ciongoli, Ashcroft’s counselor. Robert O'Harrow Jr., “Six Weeks in Autumn,” Washington Post Sunday, October 27, 2002; Page W06.

76 The original draft of the anti-terrorism package released to the Congress on September 19, 2001 was a 31 page document entitled MATA. For the proposed text of the first draft of MATA, see http://www.eff.org/Privacy/Surveillance/20010919_mata_bill_draft.html For a fair and balance analysis of original draft to MATA, see DOJ http://www.eff.org/Privacy/Surveillance/20010919_doj_mata_analysis.html

The second draft of the MATA, a 21 pages bill, rendered on September 19, 2001 – 12.30 pm, was entitled ATA of 2001. For text of second draft of MATA a/k/a ATA, see http://www.cdt.org/security/010920bill_text.pdf

For DOJ analysis of second draft of MATA, i.e. ATA, see http://www.cdt.org/security/010919terror.pdf Draft 9/19 12:30 pm [ET] Since then MATA and ATA has been interchangeably used to refer to both drafts. As late as September 24, 2001, the Attorney General still referred to the second draft MATA, when people outside the administration have correctly identity it as ATA. See “ATTORNEY GENERAL ASHCROFT OUTLINES MOBILIZATION AGAINST TERRORISM ACT,” USDOJ September 24, 2001. http://www.usdoj.gov/opa/pr/2001/September/492ag.htm


78 Ibid. p. 53.

According to Dinh his first order of business was to consult law enforcement agents and prosecutors all over the nation for their ideas on how best to fight terrorism. The three criteria for suggestions from the field were: operation necessity, civil rights impact, and constitutionality. All told, fifty legislative proposals were compiled and submitted. Most of them have been proposed and considered before. In fact, many of the proposed provisions in the MATA of 2001 were just off the shelf items from the 1996 anti-terrorism legislation. These included roving wiretaps, obtaining customers’ information from telephone and Internet companies, and seizing of personal property. Additional provisions of the proposed MATA included measures which: allowing law enforcement officials to obtain e-mail message header information; allowing law enforcement officials to gather web browsing data; diluting judicial supervision over roving wiretaps; allowing law enforcement officials to share wiretap information with the Executive branch; allowing FISA to be used domestically; allowing grand jury evidence to be shared with the US intelligence community; allowing the President to designate any “foreign-directed individual, group, or entity, including any United States citizen or

80 This consultation process (if substantiated) contradicted the common impression and repeated allegations that the Bush administration has not done enough to incorporate different ideas and opposing views in the drafting process. Alternative, the USAPA was an ideological statement, not a consultative or consultation document. A question still remains, why was the ATA – MATA – USAPA bill not distributed for comments through the proper channels, i.e. through OMB onto each and every related and affected agencies. This detracted from opponents’ argument that the USAPA provisions need to be thoroughly researched and critically examined. See Viet Dinh Interview.
81 This detracted from opponents’ argument that the USAPA provisions need to be thoroughly researched and critically examined. See Viet Dinh Interview.
82 There was an inconsistency in positions offered by the opponents to the Act, i.e. the USAPA contained new and radical provisions vs. USAPA contained old and tested rules. Jennifer Van Bergen, “The USAPA Was Planned Before 9/11,” Truthout.org, 20 May, 2002 (“Many people do not know that the USAPA was already written and ready to go long before September 11th.”)
http://www.truthout.org/docs_02/05.21B.jvb.usapa.911.htm
83 SEC. 103. MODIFICATION OF AUTHORITIES RELATING TO USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES (2) (A) and 3 (B).
84 SEC. 106. MULTI-POINT WIRETAPS.
85 .SEC. 108. AUTHORIZED DISCLOSURE.
86 SEC. 157. PEN REGISTER AND TRAP AND TRACE AUTHORITY.
87 SEC. 154. FOREIGN INTELLIGENCE INFORMATION SHARING.
organization” as fitting for FISA surveillance; preventing people from exercising their first amendment rights in discussing terrorism related matters; establishing a DNA database for every criminals and certain sex offenders.

Gathering opposition

Meantime, the first attempt to organize different opposition interest groups into a viable political coalition started to take shape. It later became a thorn to Bush administration’s effort in creating a garrison state. The impetus and agenda for the organization effort was bested summed up by Nat Hentoff, a longtime activities of civil rights causes and key members to the group:

To save our liberties, we have to organize nationally—as was done effectively in the civil rights and antiwar campaigns of the 1960s. There are already a large number of groups that can and should form an organizing and educational network to put ads in newspapers and on radio and television, set up teach-ins on campuses and in town meetings around the country, and plan a March on Washington on the order of the 1963 assembly addressed by Martin Luther King (“I Have a Dream”).

On September 14, 2001 (Thursday), Halperin and ACLU called a meeting at the ACLU white townhouse in D.C. to discuss strategy in how to deal with 9/11 counter-terrorism measures. Participants came with different ideologies, interests, agenda and political affiliation. They come together to oppose ill advised 9/11 legislations. For example, People for the American Way was formed in the 1981 to fight right-wing extremist. The group joined to protect minority and civil rights and minorities rights.

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88 SEC. 156, DEFINITION.
89 SEC.202. DEFINITIONS RELATING TO TERRORISM
90 SEC.356. DNA IDENTIFICATION OF TERRORISTS
91 Nat Hentoff, “Getting Back Our Rights Don’t Brood and Despair. Organize!” Village Voice, December 7th, 2001 2:45 PM
Government Accountability (at George Mason University) was formed to improve government policy and decision making. The group joined to promote government accountability. The Free Congress Foundation was dedicated to preserving traditional American way of life. The group joined to check expansion of Federal power at the expense of the state and individuals. Finally, the Competitive Enterprise Institute was dedicated to advancing free market and limited government. The group joined to reduce government regulation in the name or as a result of war on terrorism.

The coalition decided to issue a 10 points public statement calling for a more reflective and rational debate before adopting any anti-terrorism measures as follows:

IN DEFENSE OF FREEDOM

1. On September 11, 2001 thousands of people lost their lives in a brutal assault on the American people and the American form of government. We mourn the loss of these innocent lives and insist that those who perpetrated these acts be held accountable.

2. This tragedy requires all Americans to examine carefully the steps our country may now take to reduce the risk of future terrorist attacks.

3. We need to consider proposals calmly and deliberately with a determination not to erode the liberties and freedoms that are at the core of the American way of life.

4. We need to ensure that actions by our government uphold the principles of a democratic society, accountable government and international law, and that all decisions are taken in a manner consistent with the Constitution.

5. We can, as we have in the past, in times of war and of peace, reconcile the requirements of security with the demands of liberty.

95 http://www.cei.org/pages/about.cfm
96 The statements in text is a verbatim account from http://www.indefenseoffreedom.org/
6. We should resist the temptation to enact proposals in the mistaken belief that anything that may be called anti-terrorist will necessarily provide greater security.

7. We should resist efforts to target people because of their race, religion, ethnic background or appearance, including immigrants in general, Arab Americans and Muslims.

8. We affirm the right of peaceful dissent, protected by the First Amendment, now, when it is most at risk.

9. We should applaud our political leaders in the days ahead who have the courage to say that our freedoms should not be limited.

10. We must have faith in our democratic system and our Constitution, and in our ability to protect at the same time both the freedom and the security of all Americans.

The “In Defense of Freedom statement” above was endorsed by more than 150 organizations, 300 law professors, and 40 computer scientists.

**Explaining and promoting the law**

On September 16, 2001, Attorney General John Ashcroft announced his intention to ask Congress for more powers to fight terrorism. Subsequently on Monday, September 17, 2001, Ashcroft discussed the details of an anti-terrorist package he intended to send to the Congress:

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97 Some of these included NAACP Board of Directors; National Association of Criminal Defense Lawyers; National Council of Churches of Christ, National Council of La Raza, National Gay and Lesbian Task Force, National Lawyers Guild, National Native American Bar Association, NOW Legal Defense and Education Fund, Physicians for Human Rights, Rutherford Institute; the American-Arab Anti-Discrimination Committee; American Federation of State, County, and Municipal Employees; Amnesty International USA; Baptist Joint Committee on Public Affairs; Center for Constitutional Rights; Free Congress Foundation; Gun Owners of America; Leadership Conference on Civil Rights.

98 [http://www.indefenseoffreedom.org/](http://www.indefenseoffreedom.org/)
“Yesterday I met with several members of the House and Senate leadership, including the leadership of the Intelligence and Judiciary Committees. FBI Director Mueller and I discussed with them the current threat assessment, including our belief that associates of the hijackers that have ties to terrorist organizations may be a continuing presence in the United States. This threat assessment has helped us to identify several areas where we should strengthen our laws to increase the ability of the Department of Justice and its component agencies to identify, prevent and punish terrorism ...In the next few days, we intend to finalize a package of legislative measures that will be comprehensive. Areas covered include criminal justice, immigration, intelligence gathering and financial infrastructure...”99

The proposed anti-terrorists legislation substantially enhances the intelligence gathering capacity of law enforcement officials, including:

First, allowing wiretapping of persons, instead on just a phone number:
“And given the nature and availability of literally disposable telephones in modern society, we need to be able to have the court authority to monitor, not the phone, but the telephone communications of a person.”100

Second, allowing for a nationally valid wiretapping order (“roving”):
“so that one wiretap approval can be obtained for all jurisdictions working on an investigation, particularly given the mobility of individuals and the capacity of individuals who are mobile to communicate.”101

100 Id.
101 Id.
Third, making sure that terrorism offenses are treated the same as other serious crimes. “For example, we are identifying instances where the law currently makes it easier to prosecute drug trafficking and organized crime or espionage than it is to prosecute terrorism…We think this reflects an inadequate response to the kind of threat that terrorism poses to our culture.” 102

Finally, the proposed legislation makes: “providing material support or resources to a terrorist organization an offense that would enable us to prosecute someone under the money laundering statutes.”103

On September 19, 2001 congressional members, White House and justice department leadership gathered formally to exchange proposals and informally to negotiate for a compromise. Attorney General John Ashcroft distributed the proposed MATA to members of Congress.104 The Attorney General further “demanded” the MATA to be passed within the week, i.e. in two more days,105 with a dire warning issued on September 24, 2001 at a Congressional hearing:

"Everyday that passes with outdated statutes and the old rules of engagement, each day that so passes is a day that terrorists have a competitive advantage. Until Congress makes these changes we are fighting an unnecessary uphill battle." 106

102 Id.
103 http://www.patriotresource.com/wtc/federal/0917/AGFBI.html
105 http://www.patriotresource.com/wtc/federal/0917/AGFBI.html
106 Such strong languages, while reflecting a sense of urgency and frustration in the face of crisis, was most unhelpful in promoting cooperation and between the two branches of government. The ascendancy of the Executive branch of government and diminution of constitutional check and balance process in time of war has began. “ASHCROFT ASKS CONGRESS FOR ANTI-TERRORISM MEASURES,” PBS September 24, 2001, 5:45pm EST
Running into obstacles

While the MATA was not well received on the Hill, the Congress nevertheless promised expedited action. House Judiciary Committee Chairman F. James Sensenbrenner, Jr. (R-Wis.) declared that the leadership: “intend to have the House Judiciary Committee hold a legislative hearing followed by a full committee markup as soon as possible once legislation is introduced.”

In the face of an imminent and oppressive MATA, EFF Executive Director Shari Steele sounded the all familiar alarm against emergence legislations: no trading of civil liberties for national security:

“One particularly egregious section of the DOJ’s analysis of its proposed legislation says that "United States prosecutors may use against American citizens information collected by a foreign government even if the collection would have violated the Fourth Amendment."  

EFF Senior Staff Attorney Lee Tien followed with an ominous warning: Americans could be paying a high price in the war on terror if were to give up our liberties and dilute the

107 Brandon Spun, “Attorney General John Ashcroft Fails to Justify Encroachment of Civil Liberties,” Insight Magazine, 9/25/01 (In spite of the Attorney General’s plead for expedited action on MATA - “The American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorism attacks.” The law makers were more reticent, preferring to take a more wait and see approach. The immigrant provisions in Part II were found to be most objectionable. “Reps. Steve Chabot (R-Ohio), John Conyers (D-Mich.) and Zoe Lofgren (D-Calif.) shared their concern that such stipulations may allow for the indefinite and discriminatory detainment of aliens…Rep. Jerrold Nadler (D-N.Y.) was unwilling to give an attorney general “carte blanche” in deciding whether an already detained alien posed a threat to national security and how long the detainment of such an individual, if determined dangerous, could last”. While Rep. Barney Frank (D-Mass.) was concerned with “inappropriate release of information”, Judiciary Committee members Reps. Maxine Waters (D-Calif.) and Bob Barr (R-Ga.) wanted more time to study the document.)


109 Id.
nation’s Constitution to fight terrorism, another point of contention in the looming war of ideas (and works) over how to fight terror without (too much) sacrifice. Finally, the EFF issued a call to arms, asking its member to protest against the impending anti-terrorism laws, starting with a nation wide write in campaign.

Originally, Attorney General Ashcroft was counting on Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee, for a speedy passage of this legislation. Rep. Sensenbrenner planned to hold hearings on Monday (9/24), conduct a mark up session on Tuesday (9/25), and then take the bill to the House floor for a final vote and (assured) passage before the House breaks for the Yom Kippur holiday on Thursday (9/27). However, at the Committee hearing on Monday afternoon all Democrats and a few Republicans expressed strong opposition to this expedited schedule. By the end of the hearing Rep. Sensenbrenner agreed to postpone mark up for another week, i.e. into October.

Meanwhile, Sen. Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, has already indicated that his Committee might take weeks to pass a bill. The senate Judicial Committee was scheduled to hold a hearing on Tuesday, September 25, 2001.

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111 “Cyber rights groups urges defeat of 'Anti-Terrorism' Act' [http://groups.yahoo.com/group/portside/message/1413](http://groups.yahoo.com/group/portside/message/1413)
Once tabled, ATA was widely attacked from liberals and conservatives alike. President George Bush has to come to its defense. On September 25, 2001, the President for the first time openly embraced the ATA and advocated for its passage in a policy speech at FBI:

“I hope Congress will … give the tools necessary to our agents in the field to find those who may think they want to disrupt America again. We're asking Congress for the authority to hold suspected terrorists who are in the process of being deported, until they're deported…And we're asking for the authority to share information between intelligence operations and law enforcement …” 112

On September 27, 2001, President Bush issued yet another statement in support at the CIA. Finally, on September 29, 2001, the President, frustrated by the delay, appealed directly to the people in his weekly radio address:

"I'm asking Congress for new law enforcement authority, to better track the communications of terrorists, and to detain suspected terrorists until the moment they are deported. I will also seek more funding and better technology for our country's intelligence community." 113

Meantime, on September 24, 2001, the House Judiciary Committee held a “briefing” for civil liberties groups regarding the ATA of 2001. 114 As expected, critics of the ATA raised substantial civil rights concerns,115 including:

114 Strategically, the Chairman of the House Judiciary Committee, Rep. Sensenbrenner, did not want to have Attorney General and the ACLU appearing on the same day as co-equal. Sensenbrenner also did not want to give ACLU and other civil liberties organizations a forum to argue their case and promote their cause at the risk of derailing
James Dempsey\textsuperscript{116} and Morton Halperin\textsuperscript{117} both objected to the proposed changes to the FISA and associated electronic surveillance procedures. The CDT was also displeased with defining hacking as terrorism and allowing IPS to monitor clients account.\textsuperscript{118}

While Greg Nojeim (ACLU) raised electronic surveillance issues, David Cole (Georgetown University Law Center) articulated immigration concerns. For Brad Jansen (Free Congress Foundation), he was concerned with money laundering and forfeiture issues and Rachel King (ACLU) was troubled over criminal law problems.\textsuperscript{119}

\textsuperscript{115} For a Congressional reaction to the ATA, see Brandon Spun, “Judiciary Committee balks at Proposed Antiterrorism Act,” \textit{Insight Magazine} (Sept. 25, 2001), at http://www.citizenreviewonline.org/sept_2001/judiciary_committee.htm. (Rep. Jerrold Nadler (D-N.Y.) was unwilling to allow the Attorney General to decide whether an alien should be detained indefinitely as a national security threat. Rep. Barney Frank (D-Mass.) objected to FBI spying on American, as in the case of Rev. Martin Luther King Jr. Judiciary Committee members Reps. Maxine Waters (D-Calif.) and Bob Barr (R-Ga.) did not want to rush the USAPA without the proper hearing and deliberation, since many of the provisions are very controversial (such as computer surveillance and data mining) and had been rejected by the committee before.)

\textsuperscript{116} Statement of James X. Dempsey, Deputy Director, Center for Democracy & Technology, before the House Committee on the Judiciary on Legislative Measures to Improve America's Counter-Terrorism Programs, September 24, 2001. http://www.cdt.org/testimony/010924dempsey.shtml


\textsuperscript{116} Statement of James X. Dempsey, Deputy Director, Center for Democracy & Technology, before the House Committee on the Judiciary on Legislative Measures to Improve America's Counter-Terrorism Programs, September 24, 2001. http://www.cdt.org/testimony/010924dempsey.shtml


Finally, People For the American Way had called for public hearings on the proposed 9/11 legislations. Legislations should only be passed if they adhere to three basic principles:

(1) The provisions should be carefully drafted to preserve constitutional liberties and to prevent abuse of power;
(2) There should be meaningful judicial review and strict congressional oversight;
(3) Anti-terrorism laws should be narrowly tailored to achieve clearly stated goals and objectives. 120

The Attorney General’s pushed for early adoption of ATA backfired for a number of reasons. First, the Attorney General has failed to discuss with the White House and consulted with key administrative officials before making the ATA public. 121 Under the leadership of Dinh, it was very much a DOJ production. For example, Joshua Bolten the deputy chief of staff of the White House was kept in the dark until the ninth hour. Likewise, the White House legal counsel’s and legislative affairs office were not advised. None of the government departments were informed or consulted. They did not even have a copy of the proposal before Monday September 17, 2001. 122

Second, the Attorney General has failed to sought support from key Congressional leadership, choosing instead to adopt an us (administration) vs. them (the world – court, Congress, interest groups, dissenters) attitude, and a “take it or leave it” approach. The Bush administration has decided early on the USAPA legislative process not to seek a negotiated bill (with Congress) but preferred to impose an all or nothing law. For example, the powerful Republic chairman of the Judiciary Committee, Sensenbrenner, only heard about the ATA package on the morning of September 16, 2001 at home while

121 The Bill was not vetted by respective agencies through MBO but instead drafted by the DOJ lawyers alone; a most unusual process.
122 “After 9/11,” supra note 66, p. 75. (Source Bolten, see p. 646).
Ashcroft was making the announcement on TV in a talk show.\(^\text{123}\) House Speaker Dennis Hasket was likewise not informed.\(^\text{124}\) Sensenbrenner was finally given a fax copy of the proposed ATA in the evening.\(^\text{125}\) In this regard, the Bush administration claimed (incorrectly) absolute President power to lead the nation in time of war\(^\text{126}\) and relied (correctly) on total public support of the President in time of a national crisis.\(^\text{127}\)

The first sign of trouble came when Sensenbrenner informed Ashcroft that while he was eager to work with Ashcroft his cooperation was not to be taken for granted. Still, Ashcroft was unyielding and unapologetic.\(^\text{128}\) To demonstrate his resolve - seriousness and power, Sensenbrenner insisted upon having the Attorney General removed the suspension of habeas provision in the original ATA draft before reaching his committee.\(^\text{129}\)

Third, the Attorney General underestimated the political resistant he was to encounter, particularly from members of his own party, such as Bob Barr. He certainly did not anticipate ACLU joining cause with Bob Barr in seeking the delay, if not derailment, of the ATA.\(^\text{130}\) On September 21, 2001 (Friday), Bob Barr with four other members of the House Judiciary Committee sent a letter, drafted by ACLU, to Sensenbrenner listing their concerns with the ATA as proposed. The letter particularly listing ten provisions that

\(^{123}\) After 9/11,” supra note 71, p. 73. (Source Sensenbrenner, see p. 646).
\(^{124}\) Ibid. p. 73. (Source Sensenbrenner, see p. 646). Hasket was unhappy at not being kept informed, and still less not being consulted, p. 74.
\(^{125}\) Ibid. p. 74 (Source Sensenbrenner, see p. 646).
\(^{127}\) Brian J. Gaines, “Where's the Rally? Approval and Trust of the President, Cabinet, Congress, and Government Since September 11,” PS: Political Science & Politics, Volume 35 (3): 531-536 (2002). (President Bush popularity rating went up precipitously (in less than one week) and to unprecedented high level (90%) after 911. There it stayed for a long time.) http://www.apsanet.org/imgtest/Where'stheRally-Gaines.pdf
\(^{128}\) Ibid.
\(^{129}\) Ibid.
\(^{130}\) Ibid. p. 121.
required significant “further public debate” before final adoption. The letter sealed the fate of an early passage of the ATA as planned. By September 25, 2001 ATA was dead on arrival.

**The USA ACT**

The democratic response to ATA (later USAPA) was the USA ACT Senate bill 1510 Senator Leachy, Chairman of Senate Judiciary Committee along with the Democratic majority leader, Senator Daschle, and the Republican minority leader, Senator Lott, also the chairmen of the Banking and Intelligence Committees, Senators Sarbanes, Graham, Hatch, and Shelby introduced the USA ACT on October 4, 2001.

**Partisan politics**

Originally the USA ACT was to be tabled for a vote on October 9, 2004. But in the last minute, after an all-night negotiation by the Senate leadership the USA ACT was withdrawn. A brand new “bi-partisan” bill was introduced. The majority leader, Senator Daschle of South Dakota, called for unanimous consent to bring the bill to a floor vote without debate or amendment. This was postponed for two days to accommodate Senator Feingold’s amendments. The Senate finally passed the USA ACT on October 11th 2001 after a brief (4 hours) of debate.

133 Senate Bill 1510 was introduced by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes  
135 While the final USAPA was much improved over the original (September 19, 2001 MATA aka ATA) draft, it did not go far enough in protecting citizens’ rights. For example, the original Administration proposal allowed the use of foreign law enforcement agencies’ wiretapped information in U.S. criminal proceedings as against U.S. citizens; the freezing of non-criminal assets before trial and conviction; and obtaining of educational records without a court order. All of these objectionable provisions were either removed nor revised in the final bill. “Statement of Senator Patrick
For two weeks, the USA ACT became a tedious negotiation between Democratic Chairman Patrick Leahy and Republican Ranking Member Orrin Hatch in the Senate Judiciary Committee, as representing the legislative branch on the one hand, and the Department of Justice as representing the executive branch on the other. The negotiation was a difficult, tortuous and meandering one. The difficulties resulted as much from bitter partisanship in the Senate as it is from an overbearing Attorney General and obstinate President. After all, it was Ashcroft who made national and international news with this inflammatory statement which united the oppositions to the USAPA:

“To those who pit Americans against immigrants, citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists for they erode our national unity and diminish our resolve… They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil”

Thus observed, legislative conflicts resulted from disagreeable style rather than disagreeing positions. Impasses over policy were caused by clashes of ideology more so than parting of interests.

138 Mike Allen and David S. Broder, “Bush's Leadership Style: Decisive or Simplistic?” Washington Post Monday, August 30, 2004; Page A01. (Mitchell E. Daniels Jr., Bush's first budget director: “He would pick the basic trajectory, and he was pretty resolute then about sticking with the policies it required …He never thought about reversing course." http://www.washingtonpost.com/wp-dyn/articles/A45277-2004Aug29.html
The USA Act having passed in the Senate was defeated in the House.¹⁴⁰

Partisanship ruled the day. Senators were voting along party lines, not reason, logic, and most certainly not facts and evidence. For example, provisions that have been rejected by prior Republican Senators as an encroachment on liberty under the Clinton administration were now supported by the same Senators as promoting security of the nation post 9/11.

“In fact, then Sen. Ashcroft voted to table that amendment, and my good friend from Utah, Senator Hatch, spoke against it and opined, "I do not think we should expand the wiretap laws any further." I recall Senator Hatch’s concern then that "We must ensure that in our response to recent terrorist acts, we do not destroy the freedoms that we cherish."¹⁴¹

An overbearing Attorney General

An overbearing, and over-confident, Attorney General with an overwhelming public support was quick to browbeat meek (thoughtful?) opposing lawmakers into submission. Those who spoke up to the Administration were not only considered as weak and indecisive, but labeled as disloyal and unpatriotic. The Attorney General also demonstrated his contempt for Congress by not keep faith with negotiated anti-terrorism terms. Senator Leahy bitterly observed:

“On several key issues that are of particular concern to me, we had reached an agreement with the Administration on Sunday, September 30. Unfortunately, within two days, the Administration announced that it was reneging on the deal. I appreciate the complex task of considering the concerns and missions of multiple federal agencies, and that sometimes

¹⁴⁰ Declan McCullagh, “USA Act Stampedes Through,” Wired News 2001-10-25 14:00:00.0.
agreements must be modified as their implications are scrutinized by affected agencies.”

For example, negotiated agreement to allow for judicial supervision of grand jury testimony released to executive branch for intelligence purposes was reneged within two days of September 30, 2001.

The content of USA ACT
The USA ACT was a collective effort of many Senators. Senator Leahy drafted the original USA ACT. It included Intelligence Committee provisions sponsored by then Chairman Bob Graham; Banking Committee money laundering provisions and other provisions proposed by other Senators.

The USA ACT adopted a more balanced and integrated approach in providing security for the nation after 9/11. In terms of legislative process, USA ACT differed from ATA in one major respect, USA ACT was a bi-partisan and inter-branch legislation. As Senator Patrick Leahy put it:

“This is not the bill that I, or any of the sponsors, would have written if compromise were unnecessary. Nor is the bill the Administration initially

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142 Id. para. 9.
143 Id. para. 9.
144 Mainly on securing Northern border, providing for the needs of victims and State and local law enforcement, and criminal law improvements. Leahy initial proposals were given to the AG on September 19, 2001, the day the AG unveiled his ATA effort. Id. Para. 5.
146 Senator Levine (D-MI), Hearing of Committee on Banking, Housing and Urban Affairs on Money Laundering and Terrorism, September 26, 2001. http://levin.senate.gov/newsroom/release.cfm?id=211390 Terrorism was provided in Title III to USAPA.
proposed and the Attorney General delivered to us on September 19, at a meeting in the Capitol…

In negotiations with the Administration, I have done my best to strike a reasonable balance between the need to address the threat of terrorism, which we all keenly feel at the present time, and the need to protect our constitutional freedoms. Despite my misgivings, I have consented to some of the Administration’s proposals because it is important to preserve national unity in this time of crisis and to move the legislative process forward.”

The USA ACT was sold as a work in progress. As it stood, the House version of the USA Act of 2001 as passed on October 12, 2001 (HR 3108) was a compromise between the House PATRIOT ACT (HR2975) and Senate USA ACT (S. 1510) (passed on October 11, 2001). The majority staff who prepared the House USA ACT of 2001 was instructed to start with the Senate version of USA ACT and jettison provisions that were not compatible with the House’s version, e.g. adopted a 5 years instead of 2 years sunset clause for selected provisions. The Senate’s USA ACT was used as the foundation for negotiation because it was already a work of compromise incorporating many of the Administration desired and Senate accepted provisions, during the last three weeks of negotiation. Some of the more significant provisions included, provisions providing for (1) modernization of pen register and trap and trap law, i.e. authority to capture address not content; (2) nation wide service of electronic warrant and terrorism warrant; (3) “roving wiretap” of target’s phone; (4) FISA wiretap after showing that terrorist investigation is “a significant” reason of wiretap probe; (5) sharing of “foreign intelligence information”, including grand jury testimony, between law enforcement and intelligence community, (6) expanded authority to obtain business information with FISA order by “certifying to the court that information is relevant to on

going foreign intelligence investigation; (7) 5 years sunset on selected provisions with civil liberties implications.\textsuperscript{148}

It was understood that US ACT would be most likely be subjected to future judicial scrutiny (on Constitutionality) and Congressional oversight hearings (on implementation).\textsuperscript{149}

Substantively, the USA ACT was more comprehensive in scope, defined in focus, integrative in approach and broad in operations. For example, in terms of scope, the ACT did not stop at giving the federal government more power to fight terrorism. It also provided compensation for victims and liabilities for terrorism workers.\textsuperscript{150} In terms of focus, the ACT protected civil liberties and individual rights by punishing “hate crime” (against Islamic people).\textsuperscript{151} In terms of integration, the ACT invited and engaged the state and local law enforcement authorities to play a key role in fighting terrorism, alongside with the Federal government.\textsuperscript{152} In terms of broadness, the ACT moved from reacting to terrorism to preemptively neutralize the terrorism threats.\textsuperscript{153}

The lone dissenter to the USA ACT was Senator Feingold (D-Wisconsin. His major concerns were four folds. First, the nation should not rush to judgment; haste makes waste.\textsuperscript{154} Second, as a nation we should learn from history and not make the same mistakes we did when we passed the Alien and Sedition Acts and suspended habeas corpus during the Civil War, interned Japanese-Americans during World War II,

\begin{itemize}
  \item \textsuperscript{148} See Judiciary Committee Majority Staff Description of the House bill, as of Friday morning, Oct. 12, 2001. \url{http://www.cdt.org/security/011012patriotinfo.pdf}
  \item \textsuperscript{149} “Statement of Senator Patrick Leahy The Uniting And Strengthening of America Act Of 2001 ("USA ACT")” (October 9, 2001). para. 4.
  \item \textsuperscript{150} See “VICTIMS” \textit{Id.} para.15 – 24, esp. 20.
  \item \textsuperscript{151} See “HATE CRIME”, para. 25 – 26, esp. 36.
  \item \textsuperscript{152} See “STATE AND LOCAL LAW ENFORCEMENT”, para. 27 – 37.
  \item \textsuperscript{153} See “NORTHERN BORDERS” \textit{Id.} para. 38 to 42, esp. 40 – 42.
  \item \textsuperscript{154} Senate Debate on The Uniting and Strengthening America Act of 2001, Congressional Record: October 11, 2001 (Senate), Page S10547-S10630, S10571 (“But I still believe we needed a more deliberative process on this bill, and more careful consideration of the civil liberties implication of it.”) \url{http://www.fas.org/sgp/congress/2001/s101101.html}
\end{itemize}
blacklisted communist sympathizers during the McCarthy era, and harassed antiwar protesters during the Vietnam war.\(^{155}\) We should secure the nation without losing sight of the nation’s Constitution and the people’s rights. Third, the Senate has an important Constitutional role to play in providing meaningful scrutiny for the bill.\(^{156}\) Fourth, the Administration should not be allowed to use the (9/11) occasion to seek unlimited and unsupervised executive powers.\(^{157}\) Fifth, the nation should fight security without destroying our treasured civil liberties.

Specifically, Feingold supported the idea of "roving wiretaps" but objected to its indiscriminate application, e.g., to permit eavesdrop when the targeted person is not the one using the phone. He objected to unsupervised police access to any electronic data - typed or stored, or “tangible” information just with an administrative order. He objected to “sneak and peek” which allowed the police to search people’s place without notifying the person involved. He objected to allowing system administrators at universities or libraries to monitor private net activities of "computer trespasser." \(^{158}\)

When USA ACT came to a floor vote, Senate Feingold negotiated for three amendments, all of them were defeated, though not without some consoling support and soul searching comments from Senate colleagues, afterward.

**FROM PATRIOT ACT to USA PATRIOT ACT**

\(^{155}\) *Id.*

\(^{156}\) *Id.* (“We took an oath to support and defend the Constitution of the United States. In these difficult times that oath becomes all the more significant.”)

\(^{157}\) *Id.* (“Why does the administration insist on leaving open the possibility that this provision will be abused to entirely eliminate the privacy of students' and library patrons' computer communications? Is there a hidden agenda here? “)

The current USAPA found its genesis in the PATRIOT ACT, introduced as House bill 2975 on October 2, 2001. The PATRIOT ACT incorporated most of the administration ATA provisions and expanded on them.

**The negotiated settlement**

The PATRIOT ACT was the negotiated product of Republican Congressman Jim Sensenbrenner of Wisconsin, Chairman of the Judiciary Committee, and John Conyers, Ranking Democrat from Michigan.

In the Senate “on October 12, 2001, after another all-night drafting session, a text was produced that had only minor changes from the Senate-passed bill. It was rushed to the floor and passed with only three Republican and 75 Democratic votes in opposition. Thus by Friday, October 12, both houses had passed nearly identical antiterrorism bills.”

House and senate leaders worked non-stop to resolve the differences between HR2975 and S1510. The work was interrupted by an anthrax attack on the Hill. Issues were unresolved for a week.

The negotiation and compromise between the House (HR2975) and Senate (S1510) fell in the following areas:

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159 *Substantively*, the PATRIOT ACT (HR 2975) was based on Administrative anti-terrorism proposals contained in CTA, MATA, ATA. H.R. 2975 - Provide Appropriate Tools Required To Intercept and Obstruct Terrorism (PATRIOT) Act (Rep. Sensenbrenner (R) Wisconsin). Oct. 12, 2001. OBM. (“H.R. 2975 includes the provisions proposed by the Administration in three main areas: (1) information gathering and sharing; (2) substantive criminal law and criminal procedure; and (3) immigration procedures.”) [http://www.whitehouse.gov/omb/legislative/sap/107-1/HR2975-h.html](http://www.whitehouse.gov/omb/legislative/sap/107-1/HR2975-h.html)

160 **Procedurally**: A version of H.R. 2975 was passed by the House Committee on the Judiciary unanimously, i.e. 36 to nothing. The House then passed H.R. 2975 by a vote of 337 to 79.

160 R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren. S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

Major compromise between House and Senate PATRIOT Bill

<table>
<thead>
<tr>
<th>Provisions</th>
<th>Original House version</th>
<th>Senate version</th>
<th>Compromise</th>
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<tr>
<td>Sunset clause</td>
<td>5 years</td>
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<td>4 years</td>
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<td>McDades law162</td>
<td>None</td>
<td>Revisions to McDade</td>
<td>None</td>
</tr>
<tr>
<td>Money laundering provisions</td>
<td>None</td>
<td>None</td>
<td>Comprehensive Money laundering provisions</td>
</tr>
<tr>
<td>Information-sharing provisions163</td>
<td>Sharing information subject to prior court authorization</td>
<td>Sharing information without notice to court</td>
<td>Sharing with notice to the court after disclosure.</td>
</tr>
<tr>
<td>Electronic surveillance note</td>
<td>None</td>
<td>None</td>
<td>Ex parte and in camera notice with the court when a lawful pen register or trap and trace order is installed on ISP.</td>
</tr>
<tr>
<td>Certification of alien as terrorists</td>
<td>Declaration of alien as terrorist limited to Deputy AG</td>
<td>Declaration of alien as terrorist limited to Commissioner of INS</td>
<td>Declaration of alien as terrorist limited to Deputy AG.</td>
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<td>Revisit of alien terrorists</td>
<td>Revisit of alien terrorists</td>
<td>None</td>
<td>Revisit of alien terrorists</td>
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162 The McDade law requires federal prosecutors to comply with state ethics laws.
163 Sharing of grand jury information.
164 Between law enforcement and intelligence community.
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<tr>
<th>Certification</th>
<th>certification every 6 months.</th>
<th>certification every 6 months</th>
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<tr>
<td>Electronic Tacking of Foreign Students</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Accountability: Inspection</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Accountability: Court Liability</td>
<td>None</td>
<td>None</td>
</tr>
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A breach of faith

On October 23rd 2001, the USAPA was debated in the House for one hour. The major objections concerned two key issues: i.e. legislative procedure and legal due process:

First the legislative process was considered highly unusual and irregular. The draft bill was reported out the House Judiciary Committee 36-0. But that bill was jettisoned in lieu of a new one that was negotiated by the Congressional leadership and behind closed door, without input from the Committee or House members. The Congressional members were
informed of the change, *afterward*. Each Party was given two copies of the bill shortly before the floor debate on October 23, 2001. No amendments were entertained. The debate was held late at night and after working hours. As a result most members were ignorant of the content of the bill when asked to vote on it. Representative Frank (D – Mass.) found the process totally unacceptable:

“There is no reason why we could not have had this open to amendment tonight. This bill should not be debated now. Was it really necessary to debate one of the most profound pieces of legislation and its impact on our society that we have had, was it really necessary to debate it at night after all of the Members who have been working all day were told to go home? Why could this not have been a full-fledged debate with some amendments?”

Representative John Conyers, Jr. (D - MI) likewise complained:

“The members of the Committee on the Judiciary had a free and open debate; and we came to a bill that even though imperfect, was unanimously agreed on. That was removed from us, and we are now debating at this hour of night, with only two copies of the bill that we are being asked to vote on available to Members on this side of the aisle. I am hoping on the other side of the aisle they at least have two copies…there is something wrong with that process….79 Members were not able to go along with the bill, is that a legislative body that does not debate is being

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165 Kelly Patricia O’Meara, “Police State,” *Insight magazine* November 9, 2001 (Rep. Ron Paul of Texas, one of only three Republican lawmakers to vote against the USAPA, observed: “It's my understanding the bill wasn't printed before the vote — at least I couldn't get it. They played all kinds of games, kept the House in session all night, and it was a very complicated bill. Maybe a handful of staffers actually read it, but the bill definitely was not available to members before the vote.”)

166 USAPA, House floor debate, Congressional Record: October 23, 2001 (House) Page H7159-H7207
railroaded whether they know it or not, whether they want to accede to it or not.”

Varieties of objection

Some members also complained of the lack of due process for citizens subject to the USAPA and possibility of abuse of power by the government empowered (and emboldened) by the USAPA. For example, Representative Jackson – Lee (D – Texas) was heard to complain:

Mr. Speaker, I think Americans know very well that character is judged not so much on how a man or woman acts in the good times, but how we act in the face of adversity …I do believe that in making our country safe against terrorism, that we do not necessarily need to do away with due process, and that we should not target innocent people unfairly because of their race, color, sexual orientation, creed, gender, or religion.

Other criticism was more pointed and specific. For example, Mr. Scott (D-VA) observed that:

First, the new wiretap power is not limited to intelligence gathering but broad enough to be used to investigate common crime and innocent citizens;

Second, there are very little protection against the abusive use of wire tape, e.g. no probable caused is required for issuance of a FSIA search warrant.

Third, pen register and track and trace search violates people’s privacy right and Constitutional protection against government search and seizure powers;

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167 Id. H7206.
168 Id. H7203
169 Congressional Record: October 23, 2001 (House), Page H7159-H7207, 7201.
Fourth, the government can conduct “sneak and peak” searches without informing the target.\textsuperscript{170}

\textbf{The final debate}

Finally, on October 25th the final bill, HR 3162, the "USAPA" was debate in the Senate and passed.\textsuperscript{171} The floor debate was a tightly managed one. Except for Senator Feingold, only those Senators who were involved in the drafting or negotiation process were allowed to participate in the debate.

In terms of actual floor procedure, “[t]he PRESIDENT pro tempore. The chairman and ranking member of the Judiciary Committee have 90 minutes each; the Senator from Michigan, Mr. Levin, has 10 minutes; the Senator from Minnesota, Mr. Wellstone, has 10 minutes; the Senator from Maryland, Mr. Sarbanes, has 20 minutes; the Senator from Wisconsin, Mr. Feingold, has 1 hour; the Senator from Florida, Mr. Graham, has 15 minutes; and the Senator from Pennsylvania, Mr. Specter, has 15 minutes.”\textsuperscript{172}

Senator Leahy opened the floor speech with an emphatic observation that the bill was the result of a hard earned compromise: “This was not the bill that I, or any of the sponsors, would have written if compromise was unnecessary. Nor was it the bill the Administration had initially proposed and the Attorney General delivered to us on September 19, at a meeting in the Capitol.”\textsuperscript{173}

He was also quick to point out that: First, the bill was a much improved legislation from the September 19, 2001 Administration proposal (ATA – MATA); Second, both Senate and Administration has made much concession; Third, important safeguards are put in

\textsuperscript{170} \textit{Op Cit.} H7201.
\textsuperscript{171} The ACT was passed in the Senate without a conference with the House, which passed a similar bill a day earlier.
\textsuperscript{172} USAPA, Floor Debate, Congressional Record: October 25, 2001 (Senate), Page S10990-S11060; From the Congressional Record Online via GPO Access [wais.access.gpo.gov] [DOCID:cr25oc01-91]. (USAPA, Floor Debate).
\textsuperscript{173} \textit{Id.} Page S10991.
place to limit government abuse of power and protect citizens’ rights; Fourth, the USAPA would remain to be a work in progress, subject to supervision by court, monitoring by Senate, and revisions on sunset by the Congress and amendments along the way.

As to improvements, the Senator named ten areas that the USAPA has been improved from the Administrative proposal of September 19, 2001: 174

First, improve security on the Northern Border; Second, added money laundering provisions; Third, enhance information sharing and coordination with State and local law enforcement, provide grants to State and local governments to respond to bioterrorism, and increased payments to families of fallen first responders; Fourth, add humanitarian relief to immigrant victims of the September 11 terrorist attacks; Fifth, hire more translators for the FBI; Sixth, add more comprehensive victims’ assistance; Seventh, add measures to fight cybercrime; Eighth, add measures to fight terrorism against mass transportation systems; Ninth, use technology to make our borders more secure; Tenth, provide additional checks on the proposed expansion of government powers contained in the Attorney General's initial proposal. 175

As to supervision and oversight, a key issue in the floor debate/speeches, Senate Leahy observed:

“I do believe that some of the provisions contained both in this bill and the original USA Act will face difficult tests in the courts, and that we in Congress may have to revisit these issues at some time in the future when the present crisis has passed, the sunset has expired or the courts find an infirmity in these provisions. I also intend as Chairman of the Judiciary Committee to exercise careful oversight of how the Department of Justice, the FBI and other executive branch agencies are using the newly-expanded powers that this bill will give them. I know that other members of the

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174 S10091.
175 Id. (verbatim quotes).
Judiciary Committee—including Senator Specter, Senator Grassley, and Senator Durbin—appreciate the importance of such oversight.”

The USAPA passed the Congress with an overwhelming majority, i.e. 356-66 in the House and 98-1 in the Senate and in record time (six weeks – 9/19 to 10/26/2001); with the nation laboring in a war time environment and Congress operating with a siege mentality.

The lack of public feedback

As to the process, there were few opportunities made available and no time set aside for public consultation, community feedbacks, professional study, special interests lobbying, and Congressional scrutiny. Not only were there no consultation, the public has a difficult time in obtaining the necessary information to formulate an informed judgment on the issues involved.

176 S 10091 – 2.
177 It is extremely difficult for UUA and other organization to obtain information on the USAPA, then being considered behind closed door. UUA Washington Office. http://www.witnessforcivilliberties.org/doc/education/factsheetspatriotact.pdf
See also “USAPA: A Summary of ALA activities,” ALA Washington Office, January 19, 2002. (The ALA has to be kept informed about the progress and language of the ACT through informal channels, e.g. via leaks from Congressional staffers.) http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/ALA_Washington/Issues2/Civil_Liberties,_Intellectual_Freedom,_Privacy/The_USA_Patriot_Act_and_Libraries/background.pdf
178 For a contrary observation, see Orrin G. Hatch, Square Peg: Confessions of a Citizen Senator (Basic Books, 2002) (According to Hatch, there were much debate and full discussion behind close door by Congressional leadership and staff alike. See pp. 80-90). The Patriot Act did have hearings and discussion in the House, but the House anti-terrorism bill was virtually ignored in favor of the Senate version, by fiat. Similarly, there was time set aside for presentations of individual Senators on the USAPA in the Senate on October 25, 2001. The Congressional leadership has decided that the ACT would pass on October 25, 2001, notwithstanding many strong and vocal objections, remaining. See Congressional Record: October 25, 2001 (Senate), Page S10990-S11060. http://www.cdt.org/security/011025senate.txt
The only public feedback on the USAPA and related drafts came in the form of personal letters to individual Congressman or Editorial comments in the Newspapers. For example, on September 25, 2001 an editorial entitled “Why the rush?” appeared in the *St. Petersburg Times (Florida).* It observed that the House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.) was rushing the ATA of 2001 through Congress and the Justice Department was suspected of using 9/11 to get as many powers it has failed to obtain from the Congress in the past. The editorial concluded with the observation, since then repeated by many others: “Congress needs to slow down and get this right.”

Another editorial - “An improved antiterrorism bill” – a week later (October 3, 2001) in the same page observed that Congressional leaders of both parties were doing their best in crafting a compromised ATA that would give law enforcement more tools to combat terrorism while protecting civil liberties.

There were many others editorials during the legislative period, e.g. an editorial in *The Washington Post*: “Stampeded in the House,” (October 16, 2001) faulted the House Republican leadership in bypassing the legislative process and forcing a vote on a major anti-terrorism bill (USAPA) that was anonymously drafted in the middle of the night before without Judiciary Committee approval, in lieu of one that was unanimously approved of by the House Judiciary Committee.

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179 Sonia Arrison is the director of the Center for Freedom and Technology at the San Francisco-based Pacific Research Institute, “OPINION, “ New anti-terrorism law goes too far.” *The San Diego Union-Tribune*, October 31, 2001, Wednesday, Pg. B-9, 791 words. (Defending the nation against terrorist acts can and should be done without eroding America's liberties.)


On the day the USAPA was passed, October 26, 2001, the *Denver Post* published an editorial: “Proceed with caution.” It cautioned: “We hope that the executive branch and Congress will be especially vigilant to make sure that, in the rush to defeat terrorism, they don't turn a free country into a virtual prison.”

Feedback from special interest groups, e.g. ACLU\(^\text{184}\) or EFF,\(^\text{185}\) came with many blow by blow analysis and point to point rebuttal to the USAPA when it was moving through the Congress. But none of these NGOs were invited to submit their comments, officially.\(^\text{186}\) There is evidence that any of such “unofficial” submissions, which were widely circulated, received the attention or consideration they deserved,\(^\text{187}\) from a zealous Attorney General and close minded Bush Administration.\(^\text{188}\)

The lone dissenter

In the Senate, Senator Feingold cast the lone dissenter voted against the USAPA. Senator Russ Feingold, chairman of the Constitution Subcommittee of the Judiciary Committee, has consistently expressed his strong reservations about the USAPA (H.R. 3162). In his final floor speech, the Senator called upon the Nation, Congress and public to “continue to respect our Constitution and protect our civil liberties in the wake of the

\(^{183}\) “EDITORIAL Proceed with caution,” *The Denver Post* October 26, 2001 Friday, Pg. B-06, 458 words.  
\(^{184}\) USAPA (11/14/2003) ACLU – Safe and Secure.  
http://www.aclu.org/safefree/resources/17343res20031114.html  
\(^{185}\) “EFF Analysis Of The Provisions Of The USAPA: That Relate To Online Activities” (October 31, 2001) Last updated October 27, 2003. Electronic Frontier Foundation (EFF)  
http://www.eff.org/Privacy/Surveillance/Terrorism/20011031_eff_usa_patriot_analysis.php  
\(^{186}\) On September 24, 2001, the House Judiciary Committee held a “briefing” for civil liberties groups regarding the ATA of 2001. See note 116, *supra*.  
\(^{187}\) For example, “EFF: Analysis of Anti-Terrorism Act (ATA) of 2001,” Electronic Frontier Foundation (Sep. 27, 2001) (ATA expands FISA powers to cover non-terrorism cases and increase surveillance of U.S. citizens and non-citizens alike.)  
http://www.eff.org/Censorship/Terrorism_militias/20010927_eff_ata_analysis.html;  
Chris Elliott, “Public Inexcusably Tolerant of Bush’s Law-Breaking,” *Seacoast Online* (New Hampshire) January 6, 2006 (“This arrogant administration is so assured of its own righteous providence that any kind of process associated with its self-appointed directives is regarded as a nuisance and optional at its own discretion.”)  
http://www.commondreams.org/views06/0106-27.htm
attacks” and cautioned against “the mistreatment of Arab Americans, Muslim Americans, South Asians, or others in this country.”

Senate Feingold reminded the Nation that “wartime has sometimes brought us the greatest tests of our Bill of Rights” such as the passage of “Alien and Sedition Acts [of 1798], the suspension of habeas corpus during the Civil War, the internment of Japanese-Americans, German-Americans, and Italian-Americans during World War II, the blacklisting of supposed communist sympathizers during the McCarthy era, and the surveillance and harassment of antiwar protesters, including Dr. Martin Luther King Jr., during the Vietnam War.”

The Senator objected to the USAPA on philosophical, procedural and substantive grounds:

Philosophically, Feingold was against trading liberties for security:

“Of course, there is no doubt that if we lived in a police state, it would be easier to catch terrorists…But that probably would not be a country in which we would want to live…Preserving our freedom is one of the main reasons that we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people.”

Procedurally, he was against rushing the USAPA through Congress:

“You may remember that the Attorney General …provided the text of the bill the following Wednesday, and urged Congress to enact it by the end of the week….the pressure to move on this bill quickly, without deliberation

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190 Id.
and debate, has been relentless ever since...It is one thing to shortcut the legislative process in order to get federal financial aid to the cities hit by terrorism...It is quite another to press for the enactment of sweeping new powers for law enforcement that directly affect the civil liberties of the American people without due deliberation by the peoples' elected representatives.” 191

Substantively, Feingold was of the opinion that the USAPA (“bill”) failed to “strike the right balance between empowering law enforcement and protecting civil liberties.” Particularly, he has the following objections: 192

(1) The bill gives the law enforcement agencies new and expansive powers to investigate not only terrorism but other crimes, e.g. the “sneak and peak” warrant can be used to investigate all kinds of crime, e.g. official corruption and organized gambling.

(2) The bill gives law enforcement officials too much power to investigate crime. Law enforcement agents can now avoid the stricture and protection of the Fourth Amendment.

(3) The bill allows law enforcement officials to monitor a computer with the permission of its owner or operator, but without knowledge or consent of the user. The bill allows search and seizure of unauthorized use of company computer by employees or library computer by patrons. No warrant is required.

(4) The bill allows the use of FISA to conduct search and seizure without meeting the rigorous probable cause standard under the Fourth Amendment. Under the bill the government only needs to show that the intelligence gathering is a "significant purpose"

191 Id.
192 Feingold was supportive of many provisions in the bill, including: FBI should be able to seize voice mail messages as well as being able to tape a phone; federal criminal law on the possession and use of biological weapons should be re-written; cable - communication should be treated the same way as phone lines communication; penalties of terrorist crimes should be increased; statues of limitations for terrorist offenses should be extended or eliminated.
of the investigation, even if the underling criminal investigation is not the primary purpose.

(4) The bill allows the use of FISA to compel the production of business records regarding any person if that information is sought in connection with a terrorism or espionage investigation.

(5) The bill allows the Attorney General extraordinary powers to detain immigrants, including legal permanent residents, indefinitely, based on no more evidence than “mere suspicion” that the person is engaged in terrorism.

(6) The bill allows the Attorney General to charge a detained immigrant within seven days. It further allows the Attorney General or its deputy to continually hold a detained immigrant indefinitely, subject only to a review of detention decision every six months. Suspected or non-deportable aliens might be detained without trial based on mere suspicion for an indefinite period of time.

(7) The bill allows the detention and deportation of aliens for mere association with terrorists. For example innocent people can be arrested, detained and deported for rendering lawful assistance to terrorist groups, without their knowledge. They can be held accountable even when such groups were not designated by the Secretary of State as terrorist organizations, but instead have engaged in vaguely defined "terrorist activity" which happened sometime in the past. To avoid deportation, the immigrant is required to prove a negative, i.e., that he or she did not know, and should not have known, that the assistance rendered would further unknown terrorist activity.

(8) The broad definition of terrorism is so loose and imprecise that it might easily include philanthropic activities, such as Operation Rescue, Greenpeace.

Feingold was also not pleased to the intense pressure asserted and high handed tactics employed first by the Administration and later by his own party to speed up the
legislative process and otherwise forced him to consent to the Act. In Feingold’s own word:

“When the original Ashcroft anti-terrorism bill came in, they wanted us to pass it two days later…. But then something happened in the Senate, and I think the Democratic leadership was complicit in this. Suddenly, the bottom fell out. I was told that a unanimous consent agreement was being offered with no amendments and no debate. They asked me to give unanimous consent. I refused. The Majority Leader came to the floor and spoke very sternly to me, in front of his staff and my staff, saying, you can't do this, the whole thing will fall apart. I said, what do you mean it'll fall apart, they want to pass this, too. I said, I refuse to consent. He was on the belligerent side for Tom Daschle. And everybody said they were surprised at his remarks. Reporters thought it was so unlike him. And it is unlike him.

One of the interesting stories in this-and this is one that a lot of progressives don't want to hear, but it's the truth-is that John Ashcroft gave me a call and said, what are your concerns? And I told him my concerns about the computer stuff and sneak and peek searches. He said, you know, I think you might be right. The White House overruled him, which is a fundamental point here. Anyone who wants to focus their fire on Ashcroft is missing the point. This is the Bush Administration. Ashcroft is its instrument. What happened in the Senate was that even though the Attorney General was going to allow these changes to make it moderately better, the Administration insisted, and Daschle went along with pushing this through. I finally got to offer the amendments late at night, and I got up there and I made my arguments. And a lot of Senators came around to me, who, of course, voted for the bill, and said, you know, I think you're right. Then Daschle comes out and says, I want you to vote against this amendment and all the other Feingold amendments; don't even consider
the merits. This was one of the most fundamental pieces of legislation relating to the Bill of Rights in the history of our country! It was a low point for me in terms of being a Democrat and somebody who believes in civil liberties.”

The final passage

The USAPA was signed into law by President G.W. Bush on October 26, 2001.

III

Conclusion

This chapter addressed the question of how the USAPA was passed, leaving the issues of why to the next chapter. The chapter confirmed that the legislative process was hurried and flawed. The USAPA was passed with little Congressional scrutiny and still less public input. The USAPA became law without the citizens being fully aware of its impact and implication. For example, an investigation into the media coverage of USAPA found that both ABC and NBC did not give the USAPA the coverage it was due. Only ABC has a short segment on 9/25/01 warning that that proposed anti-terrorism law: “give the government more power to spy on Americans here at home, monitor internet use with little oversight from a judge, lock up immigrants whom the government says might be a threat to national security without presenting evidence.”

194 The public have a lot of misunderstanding about the USAPA. “Don't fault the misunderstood Patriot Act,” “Letter to Editor” Detroit Free Press, July 26, 2003 (Jeffrey G. Collins, U.S. Attorney Eastern District of Michigan, pointed out that the public oftentimes misconstrued the USAPA. For example, they wrongly assumed that the investigative (surveillance) powers given to the government is a sharp departure from the past. Or, they erroneously blamed the USAPA for allowing “holding prisoners as "enemy combatants.”) http://www.freep.com/voices/letters/ecoll26_20030726.htm
195 The USAPA was not widely known, before, and in some quarters, long after it became law. The National news agencies and wire syndicates that inform citizens, define issues, provide perspective and establish frame of reference, did not see fit to report upon the USAPA. See “Analysis of the Nightly News Glossing Over Anti-Terrorism Act” 8th Day Center for justice http://www.8thdaycenter.org/092801.html
The lack of public awareness and involvement in the drafting and passage of the USAPA caused grave consequences with our political system.

First to observe is that the USAPA has real impact on the public, especially on affected institutions (universities) and discriminated groups (Muslim).\textsuperscript{196} For example, notwithstanding the fact that Section 215 of the USAPA has rarely been invoked, library patrons feared that their reading habits were constantly being monitored.\textsuperscript{197} More tellingly, Senator Feinstein reported that her office has received 21,434 anti-Patriot Act letters, but less than half cited USAPA provisions as a basis of complaint.\textsuperscript{198} In essence, the citizens knew something was wrong with the government’s draconian anti-terrorism measures but was not able to articulate the source, nature, prevalence or magnitude of the problem.

The public were further confused and aggrieved when the government, in order to “mollify” the public,\textsuperscript{199} mischaracterized the intent and purpose,\textsuperscript{200} reach and scope,\textsuperscript{201} and impact and effect of the USAPA.

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\textsuperscript{196} Judging by public surveys, the public was hardly concerned much less alarmed with any loss of civil liberties, when the USAPA was passed. Majority of the citizen, until very recently, think that it is right and proper to allow the government to have more power to fight terrorism at the expense of civil liberties. But “ignorance” and “misunderstanding” do contribute to breeding concerns and cultivating alarms, especially when the fear of terrorism begin to subsides after 9/11.

\textsuperscript{197} Nat Hentoff, “Big John wants your reading list,” \textit{The Village Voice}. Mar 5, 2002. Vol. 47 (9); p. 27 (1 page) (The public is not informed and aware of the extent of government powers.)

\textsuperscript{198} Susan Schmidt, “Patriot Act Misunderstood, Senators Say Complaints About Civil Liberties Go Beyond Legislation's Reach, Some Insist,” \textit{Washington Post} Wednesday, October 22, 2003; Page A04. (At a Senate Judiciary Cmte. oversight hearing (Oct. 21, 2003) Senators expressed concerns that the public has been misinformed about the scope and reach, implementation and utility of the Act.). Watch, Sen. Orrin Hatch (R-UT) chairs a Senate Judiciary Cmte. hearing on the adequacy of federal laws for responding to and preventing acts of terrorism at C-Span on Tuesday, Oct. 21, 2003)

\textsuperscript{199} “Interested Persons Memo on Congressional oversight of the USAPA and Department of Justice anti-terrorism policies – DOJ’s dismissive response on civil liberties,” ACLU Memo, dated June 4, 2003. (“DOJ has been deceptive in describing the scope of the
For example, U.S. Attorney for Alaska testified before a state Senate Committee:
“[T]here is concern that under the PATRIOT Act, federal agents are now able to review library records and books checked out by U.S. Citizens… If you read the Act, that’s absolutely not true… It can’t be for U.S. citizens.” In fact, Section 215 of the USA Patriot makes clear that “U.S. persons” – a term referring to citizens and some non-citizens alike -- can have their record seized by the FBI with a FISA order.

Mark Corallo, Justice Department Spokesperson, spoke to the Bangor (ME) Daily News:
“For the FBI to check on a citizen’s reading habits….it must convince a judge “there is probable cause that the person you are seeking the information for is a terrorist or a foreign spy.” In fact, Section 215 of the USAPA allows the government to obtain materials like library records without probable cause.202

powers it has been granted, apparently to mollify widespread public concern”)
http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12812&c=206
200 “RIGHTS AND THE NEW REALITY; Telemarketer Terrorists?” Los Angeles Times California Metro; September 13, 2003. Part 2; Page 10 (476 words) (The USAPA was being used to investigate common criminals, e.g. telemarkers accused of swindling elderly consumers, a lawyer accused of stashing stolen funds in a Belize bank account and various drug dealers. This was contrary to the original purpose of the USAPA, and avowed promise of the Department of Justice.)
201 Maine Civil Liberty Union Executive Director, Louise G. Roback, wrote a letter on April 16, 2003 to Senator Olympia Snowe complaining of FBI spokesperson’s untruthful characterization of the USAPA when responding to a Bangor Daily News article: “Calais library fights Patriot Act” (April 1, 2003) about Calais Free Library’s opposition to the USAPA. Deputy Director Corallo’s misrepresentation was reported in “Official counters Patriot Act critics.” On April 9, the Bangor Daily News printed an editorial criticizing DOJ’s misstatements. See “MCLU Demands Truth From Justice Department,” MCLU (“We are concerned that Deputy Director Corallo provided false information concerning the powers of the Justice Department under the USAPA to the public.”) http://www.mclu.org/calais_letter_041603.htm See also Net Hentoff, “Op-ed: The state of our liberties,” Washington Post Aug. 25, 2003. (The government put a spin of USAPA.) http://www.washtimes.com/op-ed/20030824-110950-4866r.htm
202 See “Reports: Government Missteps After Sept. 11,” Summer 2003.ACLU of Northern California. http://www.aclunc.org/aclunews/news0309/reports.html Both the government and ACLU have accused each other of misleading the public. For ACLU’s allegations, see Seeking Truth From Justice: PATRIOT Propaganda - The Justice Department's Campaign to Mislead The Public About the USAPA (ACLU, July 2003) (“The Justice Department’s repeated assertion that the USAPA’s surveillance provisions
The government’s failure to provide the public with timely, responsive and accurate information over USAPA enforcement policy (e.g., under what circumstances would Section 215 powers be invoked?) and practices (e.g., how often has Section 215 powers been invoked?) generated widespread anxiety and induced indeterminate fear, leading to personal resentment, individual protests and collective resistance across the United States. Even Representative Bob Barr, a keen supporter of Bush, has reason to be concerned: “The administration has not been at all forthcoming since then in

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203 Eric Lichtblau, “Patriot Act's reach has gone beyond terrorism,” *Seattle Times* September 28, 2003 (Government is using the USAPA to investigate all kinds of crimes: suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies and corrupt foreign leaders.)

204 The DOJ chose to answer only 28 of the 50 questions posed by the House Judiciary Committee by letter of July 13, 2002. See letters to Congress on implementation of the USAPA, dated July 26, August 26, and September 20, 2002. 

205 Eric Lichtblau (NYT), “Demand for library records? Zero,” *Deseret Morning News* (Salt Lake City) Pg. A02, September 19, 2003, Friday (872 words) (Emily Sheketoff, executive director of the Washington office of the American Library Association observed: "If the Justice Department had been more forthcoming with the public … this high level of suspicion wouldn't have developed. But they've been fighting for two years not to tell people what they were doing, and that left a lot of people wondering what they had to hide."

explaining in a clear and open way how that act would be used and is being used. The lack of being forthcoming about discussing that has bothered me."  

Finally, the Attorney General Ashcroft’s farcical justification208 and inept defense of USAPA209 infuriated USAPA hard opponents and alienated the core Bush supporters.210 For example, Attorney General Ashcroft was openly contemptuous of the law makers who want to find out more about the of USAPA: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve They give ammunition to America's enemies and pause to America's friends."  

Ashcroft was also publicly dismissive of librarians’ legitimate concern with the erosive impact of USAPA on library privacy: “The charges of the hysterics are revealed for what

http://www.prospect.org/print/V14/8/tomasky-m.html

208 “Civil libertarians criticize FBI rules; They fear the terrorism crisis is being used as a cover to erode personal freedoms,” The Associated Press. The Grand Rapids Press May 31, 2002. p. A.3. (James X. Dempsey, deputy director of the Center for Democracy and Technology observed: “They are using the terrorism crisis as a cover for a wide range of changes, some of which have nothing to do with terrorism.” Dempsey predicted that the power will be used for "every other type of investigation the FBI does.")

209 “ASHCROFT'S ENDLESS ATTACKS DIMINISH OFFICE,” Dayton Daily News (Ohio), August 11, 2003, Monday, CITY EDITION, EDITORIAL; Pg. A6 (540 words) (The Attorney General was best remembered for his fear-mongering and vindictive antics.)


they are: castles in the air built on misrepresentation, supported by unfounded fear, held aloft by hysteria.” 212

Last not least, Barbara Comstock, a spoke person the DOJ, was heard oudly belittling local grassroots communities’ anti-Patriot sentiments:

“So some of the different ordinances that have passed throughout the country, about 45 percent of them, almost half, are either in cities in Vermont, very small populations, or in sort of college towns in California. It’s in a lot of the usual enclaves where you might see nuclear-free zones or, you know, they probably passed resolutions against the war in Iraq.”

The statement drew predictable and angry response from Senator Leahy:

“It is unfortunate that the Justice Department felt it appropriate to ridicule these grass-roots efforts to participate in an important national dialogue. The opportunity to engage in public discourse is one of the essential rights of Americans, and I am proud that Vermont towns are among those dedicated to thinking about and acting on these important issues. More importantly, the concerns expressed in my home state are being echoed by Americans in all 50 states. These communities represent millions upon millions of Americans, not just a few liberty-and-privacy-conscious Vermonters, as the Justice Department has insinuated. Impugning Vermonters, dedicated librarians and United States Senators for asking questions and raising concerns does not advance the debate or instill public confidence in the Ashcroft Justice Department’s use of the vast powers it wields. In fact, it achieves the opposite.” 213

212 Ashcroft later explained to ALA that he was not directing his comments to the librarians, but the ACLU.
213 Statement of Senator Patrick Leahy, Ranking Member, “Senate Committee on the Judiciary Hearing on Protecting Our National Security from Terrorist Attacks: A Review
As a result of above observed public confusion and anxiety, government zealotry and ineptitude, the USAPA continues to draw vociferous criticism and fiery protests, five years after its passage. Many of the issues that should and could have been carefully investigated and seriously discussed, such as the impact and implications of

http://www.senate.gov/~judiciary/member_statement.cfm?id=965&wit_id=2629

214 By far the most vocal and prolific commentator is Nat Hentoff, a columnist with the Village voice. For his brief Bio. See “Nat Hentoff” Washington Post. (1998)
http://www.washingtonpost.com/wp-srv/politics/opinions/hentoff.htm For a sample of his critique of the Patriot Act, see “Ashcroft Out of Control: Ominous Sequel to USAPA,” Village Voice February 28th, 2003 and “Crossing Swords With General Ashcroft: Where Is Our Bill of Rights Defense Committee?” truthout December, 20., 2002 (Citing Thomas Jefferson: “The spirit of resistance to government is so valuable on certain occasions, that I wish it to be always kept alive.” (letter to Abigail Adams, February 22, 1787), he called for active grassroots resistance to the USAPA.) There are to be many others across the United States and from the very beginning. See “Opinion: The Patriot Act is a threat,” Deseret Morning News (Salt Lake City), OPINION; Pg. A15, August 27, 2003, Wednesday (479 words) (USAPA was compared with "general search warrants" used by British customs agents during American Revolution.)

215 The Attorney General’s 16 states and 18 cities road show to promote the USAPA was met with protesters everywhere. Diane Urbani, “Patriot Act undercuts King's dream, Utahn says,” Deseret Morning News (Salt Lake City, August 29, 2003. Friday (762 words) (The Attorney General was met with 200 protesters.) [Another account put it at 150. See Angie Welling and Jennifer Dobner, “Act called vital tool in war on terror.” Deseret Morning News (Salt Lake City), WIRE; Pg. A01, August 26, 2003.


217 See GREG BLUESTEIN, “University professors: Country must not overreact,” redandblack.com (University of Georgia student newspaper) September 12, 2001. (Notwithstanding the catastrophic nature and tragic consequences of 9/11 attack, the nation should not overact.). CATO analyst Timothy Lynch echoed many other others in saying that we should not react to 9/11 in a knee jerk fashion. Looking back in history, Lynch observed that all of the country’s effort to fight terrorism was reactionary in nature and laboring under a crisis mentality. “Government officials typically respond to terrorist attacks by proposing and enacting "antiterrorism" legislation.” The Feb. 26, 1993 bombing of the World Trade Center gave us the Terrorism prevention and Protection Act of 1993. The April 19, 1995 bombing of the Murrah Federal Building Bombing Oklahoma led to the passage of Comprehensive Terrorism Prevention Act of 1995. Lynch argued that “The cycle: Terrorist Attack and “Anti-Terrorism Legislation” must be
the USAPA on civil liberties, are now only beginning to be seriously addressed by the lawmakers, critically debated by the public, and systematically analyzed by the Courts.

The voices of dissents could be heard from interested citizens and concerned activists across the Nation, from California to New York, Wisconsin to Florida, on campaign trails and in public forums. The dissenters included republican and democrats, civil libertarians and conservatives.

stopped. Particularly, policy makers should refrain from legislation until they have time to study and deliberate upon four issues: (1) accountability; (2) history; (3) reality; (4) freedom. Timothy Lynch, “Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism,” Cato Policy Analysis No. 443, June 26, 2002. http://www.cato.org/pubs/pas/pa443.pdf


221 BILL ADAIR, “Graham quiet about his role on Patriot Act: On the campaign trail, he isn't bringing up that he co-wrote the controversial bill in the Senate,” St. Petersburg Times. June 14, 2003. (Senator Graham did not reveal his role in drafting part of the USAPA as former chairman of the Senate Intelligence Committee. Governor Dean publicized the fact that he opposed the USAPA as unconstitutional: “It can't be constitutional to hold an American citizen without access to a lawyer... Secondly, it can't be constitutional for the FBI to be able to go through your files at the library or the local
Activists mobilized grassroots movements to establish “Civil Liberties Free Zone” in open defiance of the Patriot Act. The Congress worked with afflicted groups and aggrieved citizens to pass law to limit the actual harm and contain the potential fallout of the Patriot Act, including denying money for enforcement, requiring oversight into implementation, and limiting the applicability of the Patriot Act. For example, on

http://www.sptimes.com/2003/06/14/Worldandnation/Graham_quiet_about_hi.shtml

“Panelists Examine Consequences of Patriot Act.” Virginia Law School. September 23, 2005. The panel was sponsored by the ACLU-UVA Law, the ACLU of Virginia, and the Charlottesville chapter of the ACLU. (Panelists included: Imad Damaj, president of the Virginia Muslim Coalition for Public Affairs, ACLU of Virginia executive director Kent Willis, and law professor Robert M. O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression.)


http://www.prospect.org/print/V12/19/confessore-n.html


http://www.bordc.org/states.htm

Republican Congressperson Butch Otter from Idaho introduced an amendment to a House Appropriations bill (HR 2799) to remove funding from the DOJ to conduct "sneak and peek" searches. The vote for Otter's amendment was 309-118 with widespread bipartisan support. See also Congressman Bernie Sanders (I-VT)’s effort in offering an amendment to the Commerce, Justice, State and Judiciary Appropriations Bill of 2004 to cut off Justice Department funding for searches of bookstore and library records under Section 215 of the USAPA. It is co-sponsored by John Conyers, Jr. (D-MI) and C.L. "Butch" Otter (R-ID).


http://www.fas.org/irp/congress/2003_cr/hr2429.html
March 6, 2003, House Representative Sanders (I-Vermont) introduced the “Freedom to Read Protection Act of 2003” (HR 1157) in the House “To amend the Foreign Intelligence Surveillance Act to exempt bookstores and libraries from orders requiring the production of any tangible things for certain foreign intelligence investigations, and for other purposes.” HR1157 was cosponsored by 129 bipartisan cosponsors. It was support by 20 newspapers editorial boards, 40 library, book, publishing industry, and civil liberty groups.

On May 23, 2003, Sen. Barbara Boxer (D-CA) introduced that “Library and Bookseller Protection Act” (S. 1158) in the Senate “To exempt bookstores and libraries from orders requiring the production of tangible things for foreign intelligence investigations, and to exempt libraries from counterintelligence access to certain records, ensuring that libraries and bookstores are subjected to the regular system of court-ordered warrants.”

On July 31, 2003 Senator Russell D. Feingold (D-WI) introduced “The Library, Bookseller, and Personal Records Privacy Act” (S. 1507) introduced on July 31, 2003 “To protect privacy by limiting the access of the Government to library, bookseller, and other personal records for foreign intelligence and counterintelligence purposes”

July 31, 2003 Sen. Lisa Murkowski (R-AK) introduced “Protecting the Rights of Individuals Act (S.1552) in the Senate “To amend title 18, United States Code, and the Foreign Intelligence Surveillance Act of 1978 to strengthen protections of civil liberties in the exercise of the foreign intelligence surveillance authorities under Federal law, and for other purposes.”

231 http://www.theorator.com/bills108/s1507.html
232 Specifically the Act provides: "Sec. 4 would....return the standards for the FBI to get orders from the FISA Court to the standards that applied pre-USA PATRIOT." "Sec. 4(b)
The unmaking of the USAPA has began!

would clarify that a library shall not be treated as a wire or electronic communication service provider for purposes of 18 U.S.C. 2709, so that a library cannot be required to turn over Internet usage records (including e-mail) about its patrons.” "Sec. 6(c) would impose a specific limitation on what aspects of electronic communications could be captured with a pen/trap order" http://www.fas.org/irp/congress/2003_cr/s1552.html