The USA Patriot Act and Civil Liberties (Part II)

IN THE United States, there is an inherent tension between the president’s obligation to defend the Constitution, particularly the Bill of Rights, and the fundamental freedoms conveyed to U.S. citizens through the Constitution. Congress passed the USA Patriot Act to enhance the government’s ability to monitor, collect information on, and detain individuals suspected of actively supporting terrorism. As the executive branch calls attention to perceived threats to national security, pressure increases for the legislative and judicial branches to restrict the rights granted to U.S. citizens. A perfect balance is rarely achieved, but today a growing number of voices are expressing concern about the degree to which the Patriot Act has swung the pendulum in the direction of security. To some minds, many of the methods currently being used to protect the “homeland” bring to mind practices of the KGB and other Soviet bloc security networks. Are we sacrificing essential liberties in the fight against terrorism?

The Fourth Amendment and Title III of the Omnibus Crime Bill (as amended by the Electronic Communications Privacy Act) require investigators to show probable cause of criminal activity before a warrant can be issued to conduct physical or electronic searches or surveillance of U.S. citizens. The Patriot Act has redefined the legal safeguards against unreasonable searches and seizures of property or content-based electronic communications. Those worried about the impact of the Patriot Act fear that these protections have been senselessly eroded. Those less concerned about the act’s negative repercussions focus mainly on how the changes facilitate the government’s ability to pursue terrorists. Such discussions have a long pedigree in American legislative and judicial history.

Far from giving carte blanche to foreign intelligence investigations, courts have tried to straddle the line, ruling against warrantless searches when investigations are primarily criminal in nature. As early as 1937, federal courts came down heavily in favor of requiring judicial warrants for the conduct of electronic surveillance in criminal investigations. However, acknowledging the high standard of proof required in criminal investigations and the special nature of national security threats, the courts have been less comfortable making definitive statements about warrant requirements in national security cases. In 1972 a U.S district court proposed that Congress try to resolve this uncertainty by establishing a separate set of standards for warrant applications tailored to the unique needs of foreign-intelligence surveillance.

Following the court’s advice, Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978. Prior to that law, there was little to regulate government surveillance or other activities that did not end in criminal prosecution. A Senate committee found that intelligence and investigative agencies had consistently violated the constitutional rights of U.S. citizens since at least 1954. Proof was clearly documented in a paper trail of reports, memos, and other written communications from these agencies. Citizens perceived as “threats,” including journalists, civil-rights organizers, anti-war activists, and even Martin Luther King, Jr., were subjected to warrantless searches, surveillance, smear campaigns, and threats. On some level, those acting on behalf of the agencies in question probably believed that they were somehow securing the nation from subversive activity; as a matter of personal preference, civil liberties were deemed expendable. Congress eventually passed FISA to prohibit such misguided reactions and to draw a clear statutory line between the executive branch need to conduct surveillance for purposes of national security and the fundamental rights conveyed of U.S. citizens.

Acknowledging both the unique needs of foreign-intelligence investigations and the plentiful evidence of government misbehavior, FISA instituted a number of fundamental changes. Now foreign-intelligence surveillance operations required judicial warrants and attorney general review, greatly reducing the ability of investigators to act unilaterally. A special court, the Foreign Intelligence Surveillance Court (FISC), was created to review warrant requests. Rather than demonstrating probable criminal activity, the government need demonstrate only probable cause “to believe that the target of the surveillance is a ‘foreign power or
agent of a foreign power.’” To receive a FISA warrant the government was required to demonstrate that the “primary purpose” of the request was foreign-intelligence surveillance. Because of the strict “primary purpose” condition, information could only be shared with law enforcement if criminal activity was also involved. Given their sensitive subject matter, FISC decisions and supporting documentation were made secret. Given the less rigorous probable-cause standard, FISA also required the government to submit minimization procedures describing how it would protect U.S. citizens from unnecessary disclosures of any information on them that might have been revealed during the warrant process.3

The Patriot Act dramatically altered FISA. A FISC warrant now can be issued if foreign intelligence is a “significant,” rather than “primary,” purpose of the request. This change allows many more tangentially related activities (and individuals) to be subjects of search and surveillance warrants. The variety of records investigators can seize has also been considerably expanded. Rather than a narrowly defined list of records, the definition has been changed to the sweeping “any tangible thing.” The secrecy requirement has been broadened to include any person or organization contacted in a FISA investigation, effectively imposing an unprecedented restriction on everyday activity. The Patriot Act also greatly expands the variety of government agencies and individuals with whom information from FISA investigations can be shared.

Critics find the changes to FISA troubling for several reasons. Most fundamentally, the original purpose of FISA, to reinforce trampled Fourth Amendment and related protections, has been dealt a severe blow. Now, information gathered through a greatly expanded number of means about an increasing variety of activities can be shared with any government investigative agency, law-enforcement agency, or attorney. In practice, individuals are likely to find themselves under surveillance or facing charges without the ability to see the evidence against them. Innocent third parties can be monitored to collect intelligence information about primary suspects.

The FISA was designed to regulate and minimize the flow of information from intelligence investigations to law-enforcement authorities. The Justice Department devised informal minimization procedures to ensure this outcome. If information was shared inappropriately, criminal cases could be damaged in court. The procedures were formalized in 1995, but many critics thought the procedures were too carefully followed. Fear of inadvertently damaging criminal court cases kept critical information from being transferred among intelligence and law-enforcement agencies. To reverse this trend, the Patriot Act reinforced the sharing provisions.

On March 6, 2002, Attorney General John Ashcroft submitted new minimization procedures to FISC for its approval. These procedures interpreted the sharing provisions quite broadly, including “giving criminal prosecutors access to ‘all information developed’ in FISA cases and allowing criminal prosecutors to consult and provide advice and recommendations to intelligence officials regarding any intelligence case including the initiation, operation, continuation, or expansion of FISA searches.”4 While accepting the sharing provisions, the eleven-member FISC unanimously rejected those aspects of the request that would allow law enforcement officers to use FISA for their purposes.6 The court ruled that the new procedures “appear to be designed to amend the law and substitute the FISA for Title III electronic surveillance and Rule 41 searches,” actions clearly not within the purview of the executive branch of government. The attorney general appealed to the FISC court of review, a three-judge review panel appointed by Chief Justice William Rehnquist, which rejected the lower court ruling. In March 2003, the Supreme Court declined to hear the case.8

In essence, the revisions to FISA transferred fundamental rights away from individual citizens, greatly increasing the authority of intelligence and investigative agencies. The Patriot Act, along with the Review Court’s decision, has undermined the essential purpose of FISA. Law enforcement can now use FISA warrants to conduct criminal investigations, as long as the investigation is tangentially related to an intelligence interest. According to a recent Yale Law Journal article, “A FISA warrant has become little more than a regular Title III warrant issued secretly with no required showing of probable cause of criminal activity.”9 More than one expert has speculated that the changes effectively eviscerate long-established legal protections.

What will happen to U.S. citizens without such protections? The Bush administration has already lost two cases on appeal that challenged the government’s authority to detain individuals without the involvement of the courts.10 However, Attorney General Ashcroft is already planning to further expand the reach of FISA. With Patriot Act II, the Department of Justice has proposed more than 100 additional changes, including granting “complete immunity for federal agents who conduct illegal searches, and the forced expatriation of any U.S. citizen who helps a terrorist organization.”11 The Bush administration is also proposing that federal agents be given the authority to issue subpoenas “without the approval of a judge or grand jury,” allowing the Justice Department “to limit the role of the judiciary still further in terrorism cases.”12 Given this context, Americans must wonder whether we are sacrificing essential liberties in the fight against terrorism. In other words, have the terrorists already won the opening round?
Notes
Sources without page numbers were taken from the Internet.


4. Ibid.

5. Ibid.


9. Ibid.


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