CATO HANDBOOK FOR CONGRESS

Policy Recommendations for the 108th Congress

CATO INSTITUTE
Washington, D.C.

12. USA PATRIOT Act and Domestic Detention Policy

Congress should

- tighten the PATRIOT Act's requirements for advance judicial approval and judicial review;
- impose a shorter-term sunset clause on all provisions of the PATRIOT Act;
- exclude ordinary criminal activities from coverage of the PATRIOT Act;
- establish rules that govern detention of citizens and noncitizens suspected of terrorist links; and
- ensure that domestic detainees have access to counsel and judicial review.

USA PATRIOT Act

Government is legitimately charged with defending life, liberty, and property against both domestic and foreign predators. First among those obligations is to protect life. With America under attack, and lives at risk, civil liberties cannot remain inviolable. But that does not mean civil liberties can be arbitrarily flouted without establishing, first, that national security interests are compelling and, second, that those interests can be vindicated only by encroaching on individual rights. Some parts of the PATRIOT Act do not pass that test.

Proponents of the new bill surely understood that many of its provisions were incompatible with civil liberties. Yet rather than modify the offending provisions, the president and Congress decided to promote the bill as an expression of patriotism. Hence the acronym—USA PATRIOT—and its bloated title, Uniting and Strengthening America by Providing Appropriate

Tools Required to Intercept and Obstruct Terrorism. The sales pitch worked. Fearful of being labeled disloyal after the atrocities of September 11, 2001, the House endorsed the bill 357 to 66, followed by a 98-to-1 romp through the Senate, with only Russ Feingold (D-Wis.) in opposition.

From its initial draft to its final adoption, the PATRIOT Act zipped through in six weeks—less time than Congress typically spends on routine bills that raise no constitutional concerns. Congress's so-called deliberative process was reduced to this: closed-door negotiations, no conference committee, no committee reports, no final hearing at which opponents could testify, not even an opportunity for most of the legislators to read the 131 single-spaced pages about to become law. Indeed, for part of the time, both the House and Senate were closed because of the anthrax scare; congressional staffers weren't able to retrieve their working papers.

The negligible legislative record will make it difficult for courts to determine the intent of Congress. And because legislative intent matters to some judges—for example, Supreme Court Justices Stephen Breyer and David Souter—the PATRIOT Act might ultimately be invalidated as unconstitutionally vague. Ironically, Congress's rush job, which facilitated passage of the bill, could be the cause of the bill's downfall. The same law that was promoted as an act of patriotism might even provide a rationale for releasing madmen who committed horrific acts against the United States.

Yet the more acute objections to the new statute are substantive, not procedural. They fall into three main categories. First, any law with the potential to dramatically alter conventional notions of individual freedom should fastidiously guard against abuse. The doctrine of separation of powers has been a traditional buffer against such abuse. Requiring advance judicial authorization of executive actions, followed by judicial review to ensure that those actions have been properly performed, shields our liberties from excessive concentrations of power in a single branch of government.

Under the PATRIOT Act, however, the locus of power is unmistakably the executive branch. In some cases, law enforcement officials have access to business and personal records without advance judicial notice or subsequent judicial review. In other cases—voicemail retrieval is an example—advance approval is necessary, but the requisite court order can be obtained with a minimal showing of relevancy. That same low standard governs traces of Internet surfing and e-mail. Equally objectionable, under sec. 213 of the act, secret ''sneak and peek'' searches of physical property can be conducted without knowledge of the property owner until a ''reason-

able'' time after the search has occurred. No knowledge means no opportunity to contest the validity of the search, including such obvious infractions as rummaging through office drawers when the warrant authorizes a garage search, or even searching the wrong address.

Second, the new rules are defended as a necessary instrument of antiterrorism. If so, why do many of the provisions apply not only to suspected terrorist acts but also to everyday national security investigations and even ordinary criminal matters? In effect, our government has used the events of September 11 to impose national police powers that skirt time-honored constraints on the state. The executive branch will not always wield its new powers in the service of ends that Americans find congenial.

To illustrate, the PATRIOT Act expands the Foreign Intelligence Surveillance Act (FISA)—a Carter-administration program that created a special federal court to approve electronic surveillance of citizens and resident aliens alleged to be acting on behalf of a foreign power. Previously, the FISA court granted surveillance authority if foreign intelligence was the primary purpose of an investigation. No longer. Under sec. 218 of the PATRIOT Act, foreign intelligence need only be a ''significant'' purpose of an investigation. That sounds like a trivial change, but it isn't. Because the standard for FISA approval is lower than ''probable cause,'' and because FISA now applies to ordinary criminal matters if they are dressed up as national security inquiries, the new rules could open the door to circumvention of the Fourth Amendment's warrant requirements. The result: rubber-stamp judicial consent to phone and Internet surveillance, even in regular criminal cases, and FBI access to medical, educational, business, and other records that conceivably relate to foreign intelligence probes.

Third, laws that compromise civil liberties must be revisited periodically to ensure that temporary measures, undertaken in response to a national security emergency, do not endure longer than necessary. Such laws must contain sunset clauses; that is, the law should expire automatically within a short time of enactment—thus imposing on government the continuing obligation to justify its intrusions. In this instance, the Bush administration rejected any sunset provision whatsoever. Congress demurred and insisted on including such a provision, but it applied only to new wiretap and surveillance powers, not to the whole bill. Moreover, the sunset date was fixed at December 31, 2005—more than four years after passage of the legislation. Plainly, a shorter time frame—say, two years—would have been appropriate. If the emergency persisted, Congress and the president could reenact the law.

Detention of Noncitizens in the United States

The PATRIOT Act also raises questions about detention of noncitizens in the United States. Under sec. 412 of the act, the attorney general can detain, for seven days, noncitizens suspected of terrorism. After seven days, deportation proceedings must commence or criminal charges must be filed. Originally, the Justice Department had asked for authority to detain suspects indefinitely without charge. Congress could not be persuaded to go along. But the final bill, for all practical purposes, allows expanded detention simply by charging the detainee with a technical immigration violation. If a suspect cannot be deported, he can still be detained if the attorney general certifies every six months that national security is at stake.

Underlining the magnitude and scope of that problem, the *Wall Street Journal* reported on November 1, 2001, that seven Democrats had filed Freedom of Information Act requests for a detailed accounting from Attorney General John Ashcroft on the status of roughly 1,200 detainees, mainly in New York and New Jersey. The lawmakers mentioned that some detainees had reportedly ''been denied access to their attorneys, proper food, or protection from . . . physical assault.'' Some of them were allegedly being held in solitary confinement even though they hadn't been charged with any criminal offense. According to a representative of the New York Legal Aid Society, several Arab detainees had been limited to one phone call per week to a lawyer and, if the line was busy, they had to wait another week. On November 25, the *New York Times* cited a senior law enforcement official who said that just 10 to 15 of 1,200 detainees were suspected al-Qaeda sympathizers. The government had not found evidence linking a single one of them to the September 11 attacks.

Whether or not those reports proved accurate, it was time for the government to supply some answers. Here's what the *Washington Post* had to say in an October 31, 2001, editorial criticizing the Justice Department for resisting legitimate requests for information on the detainees: ''The questions are pretty basic. How many of the 1,000-plus are still in custody? Who are they? What are the charges against them? What is the status of their cases? Where and under what circumstances are they being held? The department refuses not only to provide the answers but also to give a serious explanation of why it won't provide them.''

Eight months later, the Justice Department still had not identified the remaining detainees. A department spokesman said only that fewer than 400 were still in custody—74 for immigration violations, 100 who had been criminally charged, 24 held as material witnesses, and 175 awaiting

deportation. They had been denied legal counsel, access to their families, and details of pending charges, if any. In effect, nearly 400 detainees remained in legal limbo as the first anniversary of September 11 rapidly approached.

Ultimately, the Supreme Court may have to clarify how the civil liberties/ national security tradeoff will unfold. Two terms ago, in *Zadvydas v. Davis*, the Court held that immigrants who have committed crimes cannot be detained indefinitely; they must be deported within a reasonable period or released. Moreover, said the Court, temporary and even illegal immigrants, not just U.S. citizens, are entitled to due process. Still, the Court noted that different rules may apply to immigrants who are suspected of terrorism or considered national security risks.

Thus, the law is murky, and the legislation passed in the aftermath of September 11 adds new elements of uncertainty. Nonetheless, the controlling principle is unambiguous. Any attempt by government to chip away at constitutionally guaranteed rights must be subjected to the most painstaking scrutiny to determine whether less invasive means could accomplish the same ends.

Detention of U.S. Citizens

Yaser Esam Hamdi is also in legal limbo. He was raised in Saudi Arabia, captured in Afghanistan, sent to Guantanamo, then transferred to a Norfolk, Virginia, military brig after the Defense Department learned that he was a U.S. citizen, born in Louisiana. Hamdi is being detained indefinitely, without seeing an attorney, even though he hasn't been charged with any crime. José Padilla, who allegedly plotted to build a radiological ''dirty bomb,'' is a U.S. citizen too. He was arrested at Chicago's O'Hare airport after a flight from Pakistan, then transferred from civilian to military custody in Charleston, South Carolina. Like Hamdi, Padilla is being detained by the military—indefinitely, without seeing an attorney, even though he hasn't been charged with any crime. Meanwhile, Zacarias Moussaoui, purportedly the 20th hijacker, is not a U.S. citizen. Neither is Richard Reid, the alleged shoe bomber. Both have attorneys. Both have been charged before federal civilian courts.

What gives? Four men: two citizens and two noncitizens. Is it possible that constitutional rights—like habeas corpus, which requires the government to justify continued detentions, and the Sixth Amendment, which ensures a speedy and public jury trial with assistance of counsel—can be denied to citizens yet extended to noncitizens? That's what the Bush administration would have us believe. Citizen Hamdi's treatment is legiti-

mate, insists Attorney General John Ashcroft, because Hamdi is an ''enemy combatant'' and there is ''clear Supreme Court precedent'' to handle those persons differently, even if they are citizens.

Ashcroft's so-called clear precedent is a 1942 Supreme Court case, *Ex Parte Quirin*, which dealt with Nazi saboteurs, at least one of whom was a U.S. citizen. ''Enemy combatants,'' said the Court, are either lawful—for example, the regular army of a belligerent country—or unlawful—for example, terrorists. When *lawful* combatants are captured, they are POWs. As POWs, they cannot be tried (except for war crimes); they must be repatriated after hostilities are over; and they have to provide only their name, rank, and serial number if interrogated. Clearly, that's not what the Justice Department had in mind for Hamdi.

Unlawful combatants are different. When unlawful combatants are captured, they can be tried by a military tribunal. That's what happened to the Nazi saboteurs in *Quirin*. But Hamdi has not been charged, much less tried. Indeed, the president's executive order of November 2001 excludes U.S. citizens from the purview of military tribunals. If the president were to modify his order, the *Quirin* decision might provide legal authority for the military to try Hamdi. But the decision provides no legal authority for detaining a citizen without an attorney solely for purposes of aggressive interrogation.

Moreover, the Constitution does not distinguish between the protections extended to ordinary citizens on one hand and unlawful-combatant citizens on the other. Nor does the Constitution distinguish between crimes covered by the Fifth and Sixth Amendments and terrorist acts. Still, the *Quirin* Court justified those distinctions—noting that Congress had formally declared war and thereby invoked articles of war that expressly authorized the trial of unlawful combatants by military tribunal. Today, the situation is different. We've had virtually no input from Congress: no declaration of war, no authorization of tribunals, and no suspension of habeas corpus.

Yet those functions are explicitly assigned to Congress by Article I of the Constitution. It is Congress, not the executive branch, which has the power ''To declare War'' and ''To constitute Tribunals inferior to the supreme Court.'' Only Congress can suspend the ''Privilege of the Writ of Habeas Corpus . . . when in Cases of Rebellion or Invasion the public Safety may require it.'' Congress has not spoken—except by enacting the PATRIOT Act. And there, we do find authorization for detention of persons suspected of terrorism—but only *noncitizens* and only for *seven days*, after which they must be released unless criminal charges are filed or deportation proceedings commenced.

No charges were filed in Hamdi's case. That's why a federal public defender sued on his behalf in May 2002, demanding that he be charged or released. A district court judge in Norfolk ordered the Justice Department to explain Hamdi's detention and agreed that he had a right to counsel. Predictably, the Justice Department appealed. In its legal brief to the U.S. Court of Appeals for the Fourth Circuit, the government insisted, ''There is no right under the laws and customs of war for an enemy combatant to meet with counsel concerning his detention.'' Moreover, asserted the Justice Department, ''The court may not second-guess the military's enemy combatant determination. Going beyond that determination would . . . intrude upon the Constitutional prerogative of the Commander in Chief.''

That astonishing statement amounts to an explicit declaration by the executive branch that it may unilaterally abrogate habeas corpus, even for a U.S. citizen. Furthermore, the Justice Department announced that it would extend its new doctrine to ''enemy combatants . . . captured . . . on the battlefield in a foreign land; . . . captured overseas and brought to the United States [or] captured and detained in this country.'' In July 2002 the Fourth Circuit remanded the Hamdi case to the district court to reconsider ''the implications [including] what effect petitioner's unmonitored access to counsel might have on the government's ongoing gathering of intelligence.'' The chief judge of the Fourth Circuit, J. Harvie Wilkinson, ordered the lower court to be deferential when considering the Justice Department's position. Still, Wilkinson affirmed the need for judicial review. He warned, ''With no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel.''

Perhaps that warning will persuade the administration that it may not set the rules, prosecute infractions, determine guilt or innocence, then review the results of its own actions—unless of course the administration has statutory or constitutional authority. Even persons convinced that President Bush cherishes civil liberties and understands that the Constitution is not mere scrap paper must be unsettled by the prospect that an unknown and less honorable successor could exploit some of the dangerous precedents that the Bush administration is attempting to put in place.

Conclusion

If civil libertarians have a single overriding concern about the PATRIOT Act and our detention policies, it is this: the Bush administration has concentrated too much unchecked authority in the hands of the executive

branch—making a mockery of the doctrine of separation of powers that has been a cornerstone of our Constitution for two and a quarter centuries. We cannot, for example, permit the executive branch to declare unilaterally that a U.S. citizen may be characterized as an enemy combatant, whisked away, detained indefinitely without charges, denied legal counsel, and prevented from arguing to a judge that he is wholly innocent.

That does not mean the Justice Department must set people free to unleash weapons of mass destruction. But it does mean, at a minimum, that Congress must get involved, exercising its responsibility to enact a new legal regimen for detainees in time of national emergency. That regimen must respect our rights under the Constitution, including the right to judicial review of executive branch decisions. Constitutional rights are not absolute. But they do establish a strong presumption of liberty, which can be overridden only if government demonstrates, first, that its restrictions are essential and, second, that the goals it seeks to accomplish cannot be accomplished in a less invasive manner. When the executive, legislative, and judicial branches agree on the framework, the potential for abuse is diminished. When only the executive has acted, the foundation of a free society can too easily erode.

Suggested Readings

Lynch, Timothy. ''Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism.'' Cato Institute Policy Analysis no. 443, June 26, 2002.

Quirin, Ex Parte. 317 U.S. 1 (1942).

Shapiro, Stephen J., et al. ''*Inter Arma Silent Leges*: In Times of Armed Conflict, *Should* the Laws Be Silent?'' Association of the Bar of the City of New York, Committee on Military Affairs and Justice, December 2001.

Sonnett, Neal R., et al. ''Preliminary Report: Task Force on Treatment of Enemy Combatants.'' American Bar Association, August 8, 2002.

Taylor, Stuart. ''Jailed with No Key.'' *Legal Times*, July 22, 2002.

—Prepared by Robert A. Levy