

Fighting Terrorism, Preserving Civil Liberties

On October 2 the Cato Institute held a Policy Forum titled “Fighting Terrorism, Preserving Civil Liberties.” The speakers were Rep. Bob Barr (R-Ga.); Solveig Singleton, senior analyst at the Competitive Enterprise Institute; Stuart Taylor, senior writer at the National Journal; and Jonathan Turley, Shapiro Professor of Public Interest Law at George Washington University. Roger Pilon, vice president for legal affairs at the Cato Institute, moderated the discussion.

Roger Pilon: Not since Pearl Harbor has America been awakened so forcefully as it was by the terrorist attacks of September 11. Despite frequent warnings, several coming from the Cato Institute, too many people in government seemed all but asleep at the switch when the attacks finally came. Nevertheless, the first response of those officials, predictably, was to ask for more authority, presumably to do what they hadn’t done the first time. It’s a familiar pattern: crisis, often flowing from government failure, begets only calls for more government, and all the while the basic problem goes unsolved.

When the dust settles, one hopes that we’ll have a searching examination of just why it was that such a monumental governmental failure took place on September 11. The first and most basic business of government, after all, is to protect us from the kinds of attacks we saw that day.

In the meantime, we have to deal with the immediate demands for more power to prevent such attacks and with the implications for our liberty. For while government’s basic business may be to protect us, it cannot do so by any means it chooses. It must respect our rights while defending them. How can we fight terrorism while preserving our civil liberties?

More generally, how can we stop the all-too-familiar slide from crisis to leviathan? The suspension of habeas corpus during the Civil War, the attacks on free speech during the First World War, the incarceration of Japanese Americans during the Second World War, the seizure of the steel mills during the Korean War all illustrate that slide.

The events of September 11 are already spawning attacks on the idea of limited government. In his 1996 State of the Union address President Clinton said that the era of big government is over. Many are now clamoring to take that back.

In the jurisprudential realm, for example, Linda Greenhouse, the thoughtful Supreme Court reporter for the *New York Times*, wrote just last Sunday that the Supreme Court’s federalism revolution may have been “overtaken by events.” She quotes former solicitor general, Walter Dellinger, on that: “Federalism was a luxury of peaceful times, he said.



Solveig Singleton and Stuart Taylor

Thus, there are larger issues at stake as we think about the kind of legislation now before Congress. The implications are far-reaching, even for fundamental principles like federalism.

Solveig Singleton: I would like to go over my system for ranking the proposals in the PATRIOT Act in order of what I see as their threat to our tradition of limited government. So I have given the proposals that do not pose a fundamental threat a green light, the proposals that represent a significant change from current investigative practices a yellow light, and the proposals that do represent a fundamental threat to our property and our personal rights a red light. A green light does not necessarily mean we should support the proposals or that Congress should pass them without reading them; it just means that they could be passed without posing a fundamental threat to our most important liberties.

I would give a green light to several provisions, contained in secs. 103, 154, and

206 of the PATRIOT (Provide Appropriate Tools Required to Intercept and Obstruct Terrorism) Act, that would allow increased information sharing between agencies: criminal law enforcement agencies; foreign intelligence agencies; and the agencies involved in border patrol, regulating who comes into and goes out of the country. This provision is basically fairly sensible. In addition, it’s going to sunset on December 31, 2003.

Another proposal that formerly rated a red light has, under the new provision, in my view, switched to green-light status because of the substantial improvements that have been made to it in the last few days. This is the provision that would redefine some ordinary crimes as terrorism. People were particularly concerned that ordinary crimes like gun possession or computer crimes would suddenly be considered terrorist acts.

The new amendment specifies that these will be considered terrorist acts only if “calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct.” So the danger of those expansive provisions has been diminished by the amendment.

Now I’ll move on to proposals to which I’ve given a yellow light. One, sec. 101, would allow tracing of Internet traffic without a warrant. Essentially, the new proposal is a significant departure from the current standard, which is probable cause. And the courts should and will take a very close look at that.

I think ultimately that, if the agencies can provide some meaningful assurance that they can intercept only tracing information, without seeing the content of the message, this measure might be helpful to them, and the civil liberties problem would be confined. But for now that gets a yellow light.

Another yellow-light provision is the nationwide search warrants in secs. 108 and 351. The problem there is, on the surface, that agencies are looking for a consolidation, they’re looking for an administrative change, so that they can get one warrant from one federal court instead of having to go to all 50 states, if an e-mail is passing through many states, to get search warrants. So it may in fact help them save

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a lot of time in initiating an investigation, which could be very important.

However, the courts must, and I think rightly, take a very close look at the idea that a single federal court should be allowed to issue a warrant when the property subject to the search may be outside its jurisdiction. I don't see any way of getting around some serious problems with judicial review here.

Now for the red lights, mostly provisions that relate to law enforcement agencies' desire for expanded forfeiture powers. The forfeiture powers that have already been given to those agencies in nonterrorist cases, particularly in connection with the drug war, have already been substantially abused. Law enforcement agencies are arguing that, if suspects haven't been detained yet, they can use their money to flee the country. However, a judicial asset freeze, which provides no temptation of corruption to law enforcement officials the way an asset seizure does, is an effective way of doing exactly the same thing.

There is absolutely no reason law enforcement agencies need to be able to seize assets, as opposed to freeze assets, to prevent somebody from leaving a jurisdiction before trial. And what we have seen with forfeiture has been the police essentially tempted to plant evidence over and over and over again because they want somebody's yacht or his house or his car, and that is simply unacceptable.

Stuart Taylor: Is electronic privacy overrated? We all remember 1984. We all remember what J. Edgar Hoover did to Martin Luther King. But I'm not aware of a whole lot of other people who, as a result of government's abusing information collected in wiretaps or any form of electronic surveillance, have been killed or defamed or imprisoned or otherwise oppressed. What abuses are really threatened if we, at least incrementally, increase government wiretapping powers for the purpose of countering really hardcore terrorism?

Perhaps officials could blackmail targeted groups or leak information that the press could use to defame people. Those are threats, but I would love to know whether the threats are really the huge bogeyman,



Rep. Bob Barr

in the face of the dangers on the other side, that we've all had in the backs of our minds since we read 1984.

Jonathan Turley: As we face the difficult times ahead, we have to remember that the Madisonian democracy was designed to be nimble and flexible. It's a mistake to treat the system as if it were rigid and static. This system was designed at a time when the Framers faced far greater threats than we are facing from al Qaeda. They faced both external and internal threats, and the very existence of the Republic was in doubt. They developed a system that had the flexibility to meet those threats.

We have seen in the last two weeks how well that system functions under pressure. In responding to September 11, the executive branch moved very quickly to state what it needed. Responding from its own institutional perspective, Congress slowed things down, scrutinized them, made changes, and made compromises. The two branches functioned precisely as Madison envisioned.

This does not mean that we should be cavalier or passive in these times. Justice Louis Brandeis warned us that the greatest threats to liberty are men of zeal, who are well meaning but without understanding. To put it another way, in times of crisis our greatest threat has always been ourselves. In its most extreme form, crisis can lead us to remove the liberties that distinguish us from our enemies. We have clearly learned a great deal from history and our response to this threat has been measured and largely moderate.

Most of the current proposals should be largely uncontroversial. Removing the statute

of limitations for terrorism seems like an awfully good idea. The only surprise for most people is that we had a statute of limitations for terrorism.

Al Qaeda is a significant threat because it's hardwired terrorist groups that appear to move with speed and to utilize technology to do incredible damage. Al Qaeda also presents intelligence problems that are different from those of the traditional espionage cases. Al Qaeda clearly has knowledge of the law and knowledge of our capabilities in the counterintelligence and counterterrorism areas.

This is apparent in how they trained and inserted terrorists in this country. Ironically, the people who are beating up Arab Americans seem to forget that none of the attackers were Americans; most of them, or all of them, had to be brought in. Al Qaeda couldn't use homegrown people to carry out those attacks. So we have a situation in which people can enter the country and very quickly unleash a terrorist attack.

We need to keep perspective in this fight. The biggest advantage that we have is a system that is the most nimble and flexible in the world. James Madison didn't create it to inspire; he created it to last. It is our greatest asset.

There are areas of concern, of course. I'm concerned about the Foreign Intelligence Surveillance Act, which allows secret courts in espionage cases. I'm more than a little concerned about the change in the language. Originally foreign intelligence had to be "the purpose" of a FISA investigation, but now the wording has been allowed to drift so that foreign intelligence is "a significant purpose." There is not as much oversight and monitoring under FISA. A secret court sits badly with all of us, so we have to be careful about the powers that we give it.

The greatest problem for us is whether surveillance laws can change who we are, how we act. We don't want to be a fishbowl society. It's not that we have something to hide. It's how we will change if we believe somebody is watching us or can monitor us. So, even though I support this package, I think that we have to be very, very cautious, because there are soft vari-

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ables, even with electronic privacy, that we need to protect.

Questions Asked Rep. Bob Barr

Singleton: My concern is that what's missing from PATRIOT and other previous proposals is an attempt at serious CIA or FBI reform that might improve their intelligence capabilities. The emphasis has been on expanding the legal powers of those agencies, not on improving their basic competence.

What is the evidence that expanded legal powers would actually have been helpful in preventing the types of attacks that took place on the World Trade Center? For example, to what extent have law enforcement agencies actually been able to show that a delay of hours or days waiting for a warrant rendered them unable to prevent the attacks?

Rep. Bob Barr: That's an excellent question; it goes to the heart of the problem. The attorney general was straightforward in hearings before the House Judiciary Committee when he said, "I'm not here to tell you that had any or all of these powers been available to us prior to September 11 that we could have prevented the attack."

The truth is that we need to come to grips with the real problem—not the lack of government power to prevent or deal with the attacks that occurred on September 11 but the lack of proper execution of the powers that the government already has. And that of course is much harder to deal with and much more embarrassing perhaps than just asking for more power.

The federal government already has plenary authority to secure airports subject to federal jurisdiction. The government can already stop people from going into whatever areas it believes need to be secured from unfettered access. The government already has plenary authority, in an international context, to gather foreign intelligence. The government has unfettered authority right now to coordinate as it sees fit the intelligence that it gathers. It has absolute authority to decide how to dis-

seminate that intelligence information once it has been acquired.

The government doesn't need any new authority to do a better job, yet there is nothing in this legislation that addresses those things. I hope that, at a minimum, we will have some continuing oversight to address very serious problems with the federal government's exercise of its existing authority, including that in the intelligence area.

Taylor: The detention provision has been quite controversial. The administration's original proposal has been narrowed considerably; we're not quite sure what it's going to end up being. But my question is a hypothetical one. A Pakistani chemistry major, with a student visa and no immigration problem, at a university in Chicago is picked up. What the FBI knows about him is this: he had downloaded articles about how terrorists might use small planes to start an anthrax epidemic and had shown an intense but unexplained interest in crop dusters. That's all they know. Should they be able to arrest him? How long should they be able to detain him, either under current law or under whatever the law should be?

Barr: Under the bill as originally proposed, they essentially could have detained him indefinitely. Under this latest permutation, they probably would be limited to seven days' detention. I have not been able to determine exactly the parameters of that and what showing would have to be made after the seven days, but seven days seems to be the limit on detention, and then they would have to go into court.

If the government has probable cause to believe that a person is engaged in activity in furtherance of terrorist activity or terrorist activity itself or conspiracy to commit terrorist activity, I have no problem at all with the government's being able to pick that person up, if that person is an alien, and detain him for a reasonable—certainly not more than seven days—period of time so that it can gather evidence and seek to have that person permanently removed from U.S. jurisdiction.

The current proposal goes much further.

The problem isn't just the length of detention; the type of material that would provide a reason for the government to detain you in the first place is very vague and very, very broad in this legislation. And that is something else that we ought to look at.

Question from the Floor

What do you think about a national identity card?

Singleton: The terrorists have shown that they can get access to fake drivers' licenses, to fake passports, and to other fake documents. And I'm very concerned that having a national ID card might create a whole category of "not having the correct paperwork" offenses that really have nothing to do with fighting terrorism. And the police, instead of being able to focus on a threat of violence, would be chasing people just because there might be a typo on their cards or something like that. So I really think that is a bit of a distraction.

Taylor: I would like to hear from the advocates, from whom I haven't heard, exactly what good they think a national ID card would do. I can imagine something like an unforgeable ID card that you would need to use only if you were going into certain places, such as an airplane or the U.S. Capitol. A card that a policeman could ask for on the street because he didn't like your looks I think would add really no safety whatsoever and be offensive for obvious reasons. I can see some value to having an ID card with a thumbprint on it that has to match your thumbprint when you go through a checkpoint. But what would worry me is having to show your card any time somebody demanded that you do so.

Turley: I actually have not heard what significant difference this would make. I think it could make a significant difference in our social fabric. I have not heard any concrete reasons why a national ID card has been suggested. I think that there would be a very strong reaction against it. Although one poll shows that as many as 70 percent of the people would support it, I think that's odd. I would be surprised if there weren't a bigger backlash. ■