

# The Patriot Act: An Over Reaction to Terrorism

By Jeffrey Needle

Justice William J. Brennan spoke eloquently in 1987 to the Law School of Hebrew University concerning the preservation of civil liberties in times of national security crises. See William Brennan, *Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, published contemporaneously with this article. As Justice Brennan acknowledged, it is relatively easy for a democratic society during times of peace and tranquility to espouse and enforce an expansive interpretation of fundamental constitutional rights. He recognized that it was during times of security crises that the society's true dedication to those rights are most seriously challenged. In his speech to the Law School of Hebrew University, Justice Brennan briefly chronicled this country's history of sacrificing basic constitutional rights in the name of protecting the public from perceived threats to security which later proved to be exaggerated at best. It took no great act of clairvoyance to perceive that future security crises would again challenge the fabric of fundamental constitutional freedoms, and that some combination of rational and irrational fear would again cause politicians and judges to abandon the ideals that distinguish this country as a free society. Justice Brennan understood that rational discussion concerning the balance between perceived security threats and constitutional freedoms is extremely difficult during times of crises. Accordingly, he advocated for the development of a jurisprudence of civil liberties in times of crises at a time when no apparent crises existed. The absence of that jurisprudence is now only too conspicuous.

The perceived security crisis is now upon us. The attack on the World Trade Center on September 11, 2001, like the bombing of Pearl Harbor on December 7, 1941, represents a threat to national security and the public safety. The threat is undeniably real and comes not from any particular country, but from an international conspiracy of terrorism.

It is axiomatic that the repeal of all fundamental civil liberties would result in the capture and conviction of a greater number of potential terrorists, and as a result that society would in some measure be safer from terrorist threats. The repeal of those rights and liberties, however, would also result in the violation of basic human rights of millions of people who are guilty of absolutely nothing. It was to protect those people that the Bill of Rights was adopted. The primary danger to the quality of freedom comes not from international terrorists. It comes from government officials

who are only too willing to sacrifice fundamental constitutional rights in the name of protecting the public from a danger which they assure us justifies the abrogation of those rights. Once lost, however, constitutional rights are extremely difficult to recover even after the danger has subsided.

The Government has responded nationally to the perceived threat of terrorism with legislation which significantly enhances the government's authority and diminishes the quality of constitutional freedoms. Countless numbers of entirely innocent people will be victimized. If history is any guide, the legislature has restricted the scope of constitutional freedoms far beyond the actual need, which is known only to selected government officials and is impossible for the general public to verify. The self-inflicted damage to constitutional freedoms may last for decades.

### **The Patriot Act**

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub.L. No. 107-56, 115 Stat. 272, was enacted on October 26, 2001 in the immediate aftermath of the attack on the World Trade Center. The Act is extremely complex and contains no less than 157 sections and is 342 pages long. It specifically amends the following statutes: The Wiretap Statute (Title III), The Electronic Communications Privacy Act, The Computer Fraud and Abuse Act, The Foreign Intelligence Surveillance Act, The Family Education Rights and Privacy Act, The Pen Register and Trap and Trace Statute, Money Laundering Act, Immigration and Nationality Act, Money Laundering Control Act, Bank Secrecy Act, Right to Financial Privacy Act and Fair Credit Reporting Act. The entire text can be found at Findlaw. See <http://news.findlaw.com/cnn/docs/terrorism/hr3162.pdf>.

One of the most commonly heard comments is that the Patriot Act was enacted without hearings and without sufficient time to study the legislation. Many legislators didn't have sufficient time to learn its content, to say nothing of the possible applications of the law. As a result, the legislation was enacted without ever identifying exactly which threats it was intended to cure or how the additional governmental powers would make a difference. A sunset provision provides that only certain portions of the legislation are automatically repealed on 2005, unless renewed by Congress. Senator Orrin Hatch, Chair of the Judiciary Committee, with the backing of the White House, is now lobbying to eliminate the sunset provision and make the Patriot Act permanent. See Seattle Times, April 11, 2003. In addition, the Justice Department, the White House and members of Congress are proposing additional legislation,

The Patriot Act II, which would grant federal authorities additional new powers to monitor, track, profile and even revoke U.S. citizenship. *Id*; See The Patriot Act II - <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12224&c=207>.

A comprehensive review of all provisions of The Patriot Act is beyond the scope of this article. Among other areas, the Act greatly expands the power of the government to conduct searches in a wide variety of ways, including the elimination of the historic wall between domestic and foreign surveillance activities with the reduction of domestic safeguards, use a pen registers or a trap and trace devices, and roving wiretaps.

The principle statute governing electronic surveillance in criminal investigations is Title III of the Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, which provides standards to limit the scope of surveillance and judicial oversight to insure that those standards are respected. The so-called "sneak and peak" provision of the Patriot Act amended Title III to allow the FBI to secretly enter a residence while the owner is away and take, alter or copy things without informing the owner for days, weeks, or even months. It applies not only to aliens suspected of terrorism, but also applies to the homes of American citizens. Incredibly, it also applies to drug cases, tax fraud, providing false information on student loan applications, or any other federal crime. It is not subject to the sunset provision. See Section 213. Thus, the emergency atmosphere generated by the September 11 attacks was used to make a permanent and fundamental change in law enforcement procedures having nothing to do with terrorism.

Generally, the government can obtain a person's private records from a bank, credit bureau, telephone company, hospital, or library only if there is reason to believe that the particular person was engaged in some criminal activity. In international terrorism cases, for example, the government formerly needed some reason to believe that the person whose records it was seeking was a member of a foreign terrorist group. The Patriot Act eliminated this individualized suspicion. Under the Patriot Act, the FBI can obtain the entire database of a credit card company. It can require a public library to produce the records on everybody who ever used the library, or who used it on a certain day, or who checked out certain kinds of books. It can obtain similar information at any book store, bank, telephone company, hotel or motel, hospital, and any university - merely based on the assertion that the information is "sought for" an investigation to protect against international terrorism or clandestine intelligence activities. See Section 215. In order to gain this access, it is only necessary for the government to certify to a judge - with no need for evidence or proof - that such a search meets the statute's broad criteria. The judge has no discretion to reject the

application. Surveillance orders can be based in part on a person's First Amendment activities, such as the books they read, the Web sites they visit, or a letter to the editor they have written. A person or organization forced to turn over records is prohibited from disclosing the search to anyone. As a result of this gag order, the subjects of surveillance never find out that their personal records have been examined by the government.

The Foreign Intelligence Surveillance Act (FISA), 50 U.S.C.A. §1801 (1978), created an exception to the Fourth Amendment's requirement for probable cause when the purpose of a wiretap or search was to gather foreign intelligence. The rationale for the exception was that since the search was not conducted for the purpose of gathering evidence for a criminal prosecution, the standards for gathering information could be loosened. The Patriot Act has expanded this once narrow exception to cover wiretaps and searches that collect evidence for domestic criminal cases. Under the Patriot Act, the FBI can secretly conduct a physical search or wiretap on American citizens to obtain evidence of crime without proving probable cause, as the Fourth Amendment explicitly requires. The Patriot Act allows searches when "a significant purpose" is to obtain intelligence. Section 218. The Act allows the government to circumvent the Constitution's probable cause requirement even when its main goal is ordinary law enforcement.

The above provisions in The Patriot Act clearly diminish Fourth Amendment constitutional rights. There are many others. See <http://www.epic.org/privacy/terrorism/usapatriot>.

In addition to the privacy related issues, the Act creates a federal crime of "domestic terrorism" that broadly extends to "acts dangerous to human life that are a violation of the criminal laws" if they "appear to be intended . . . to influence the policy of a government by intimidation or coercion," and if they "occur primarily within the territorial jurisdiction of the United States." See Section 802. This definition could easily be used to describe many forms of civil disobedience.

The Patriot Act also gives the Attorney General unprecedented new power to determine the fate of immigrants by authorizing the indefinite detention of non-citizens. The Attorney General can order detention based on a certification that he or she has "reasonable grounds to believe" a non-citizen endangers national security. Section 412. For a more comprehensive on the effect of immigrants, see Findlaw, [http://writ.news.findlaw.com/commentary/20011005\\_ramasastri.html](http://writ.news.findlaw.com/commentary/20011005_ramasastri.html).

## Conclusion

The erosion of constitutional freedoms is always justified in the name of a perceived threat to public safety. But the perceived threat is routinely exaggerated at best and the erosion of constitutional rights routinely excessive. When will the threat of terrorism subside significantly enough to justify the restoration of the constitutional freedoms, and who gets to decide? If the decision is left to public officials whose authority has been substantially enhanced by new legislation, we can be absolutely certain that the restrictions on constitutional freedoms will endure much longer than the threat to public safety.

---

Biography: Jeffrey Needle is trial lawyer in Seattle. He is former Chair of the ATLA and WSTLA Civil Rights Section.