

"Within six months of passing the PATRIOT Act," said Dan Dodson, official spokesman for the National Association of Criminal Defense Attorneys, "the Justice Department was conducting seminars on how to stretch the new wiretapping provisions to extend them beyond terror cases."⁷

In May 2002, the Foreign Intelligence Surveillance Court, which had granted every government request for two decades, had enough of John Ashcroft's attempts to circumvent the Constitution, and unanimously denied a Department of Justice request to use the authority under the PATRIOT Act to investigate criminal activity. The court ruled the federal government must not "direct or control the use of FISA procedures to enhance criminal prosecutions" not directly related to terrorist threats.⁸

The FISA Court of Appeals, which had never met, overturned the lower court's decision five months later, affirming the government's belief that the USA PATRIOT Act allows investigation into criminal activity if obtaining foreign intelligence is of "significant purpose" as opposed to the more rigorous "primary purpose" originally required by FISA.⁹

The American Bar Association (ABA) was so concerned about possible misuse of the PATRIOT Act that its Section on Individual Rights and Responsibilities issued a report in February 2003 that specifically addressed the federal government's intent and its possible constitutional violations:

There is now a significant danger that if the government can show a "measurable" foreign intelligence purpose in a given situation, it will elect to use FISA procedures rather than the more exacting standards of Title III [of the Omnibus Crime Control and Safe Streets Act of 1968], even in a case where the overriding purpose is to bring a criminal prosecution. This situation puts at risk core guarantees of our Constitution, including the Fourth Amendment's protections from unreasonable searches, associational rights protected under the First Amendment, and the Fifth Amendment privilege against self-incrimination.¹⁰

Based upon the preliminary report, the ABA House of Delegates, in a strongly worded resolution, urged Congress to consider an amendment to the PATRIOT Act that would "ensure that FISA is used only for bona fide foreign intelligence-gathering purposes, as contemplated by the Act, and not to circumvent the Fourth Amendment requirements applicable to domestic law enforcement investigations." It further asked Congress "to conduct regular and timely oversight . . . to ensure that government investigations undertaken pursuant to [FISA] comply with the First, Fourth, and Fifth Amendments to the Constitution."¹¹

In May 2003, the Department of Justice finally admitted it used the Act to pursue non-terrorist activities.¹² Mark Corallo, trying to justify the Act's use, claimed that "certain provisions could be used in regular criminal investigations."¹³ John Ashcroft argued there was no distinction between using the tools provided by the PATRIOT Act to conduct criminal investi-

gations or to pursue terrorist threats. Contradicting Ashcroft, Sen. Patrick Leahy (D-Vt.), former chair of the Senate Committee on the Judiciary, stated that upon approving the PATRIOT Act, "We sought to amend FISA to make it a better foreign intelligence tool. But it was not the intent . . . to fundamentally change FISA from a foreign intelligence tool into a criminal law enforcement tool."¹⁴ Bob Barr, who had been a representative from Georgia at the time of 9/11, said he voted for the PATRIOT Act "with the understanding the Justice Department would use it as a limited, if extraordinary power, needed to meet a specific, extraordinary threat. Little did I, or many of my colleagues, know it would shortly be used in contexts other than terrorism, and in conjunction with a wide array of other, privacy-invasive programs and activities."¹⁵

Nevertheless, the Department of Justice circumvented the intent of the PATRIOT Act and cited Section 314 as its justification to launch "Operation G-Sting," an investigation and subsequent arrest of the owner of a Las Vegas strip club who may have given bribes to local officials and been involved in moneylaundering. The PATRIOT Act permits investigations into about two hundred crimes related to money-laundering. The use of the PATRIOT Act in the surveillance and subsequent arrest of the strip club owner "has absolutely nothing to do with terrorism, which is why it's so troubling," said Gary Peck, executive director of the ACLU of Nevada.¹⁶

The FBI said the PATRIOT Act "was used appropriately and was clearly within the legal parameters of the statute."¹⁷ "If that's true," argued the *Las Vegas Review-Journal*, which has been out front in coverage of PATRIOT Act issues, "then major portions of this law need to be promptly repealed, unless the [Supreme Court] can get at them and overrule them first."¹⁸

"The Attorney General didn't tell Congress he needed the PATRIOT Act to raid nudie bars," said Laura W. Murphy of the ACLU in November 2003.¹⁹ "The law was intended for activities related to terrorism and not to naked women," added Sen. Harry Reid (D-Nev.).²⁰ Rep. Shelley Berkley (D-Nev.), who had voted for the PATRIOT Act, said, "It was never my intention that the PATRIOT Act be used for garden-variety crimes and investigations."²¹ It certainly wasn't Congress's intent it be used against American citizens. Whatever the intent, the Department of Justice was using the PATRIOT Act against American citizens not suspected of terrorism.

In July 2004, at the end of the Democratic National Convention—in what some saw as a suspicious coincidence to detract from the Democrats' message, and to bulk its reasons why the PATRIOT Act needed to be continued—the Department of Justice announced it had used the PATRIOT Act to charge fifteen persons, American and Canadian citizens, none of whom could be remotely considered to be terrorists, with smuggling marijuana. The fifteen were charged with bulk-cash smuggling for having

But upon reviewing the case itself, *Kennedy v. Mendoza-Martinez*, I found that Justice Arthur Goldberg had made this statement but then ruled in favor of the civil liberties position in the case, which was about draft evasion. He elaborated:

It is fundamental that the great powers of Congress to conduct war and to regulate the nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.

The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. . . . In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the revolution.¹

I have approached the events of the past month and my role in proposing and reviewing legislation relating to it in this spirit. I believe we must redouble our vigilance. We must redouble our vigilance to ensure our security and to prevent further acts of terror. But we must also redouble our vigilance to preserve our values and the basic rights that make us who we are.

The Founders who wrote our Constitution and Bill of Rights exercised that vigilance even though they had recently fought and won the Revolutionary War. They did not live in comfortable and easy times of hypothetical enemies. They wrote a Constitution of limited powers and an explicit Bill of Rights to protect liberty in times of war as well as in times of peace.

There have been periods in our nation's history when civil liberties have taken a back seat to what appeared at the time to be the legitimate exigencies of war. Our national consciousness still bears the stain and the scars of those events: The Alien and Sedition Acts; 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,

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including Dr. Martin Luther King Jr., during the Vietnam War. We must not allow these pieces of our past to become prologue....

Now some may say, indeed we may hope, that we have come a long way since those days of infringements on civil liberties. But there is ample reason for concern. And I have been troubled in the past six weeks by the potential loss of commitment in the Congress and the country to traditional civil liberties.

As it seeks to combat terrorism, the Justice Department is making extraordinary use of its power to arrest and detain individuals, jailing hundreds of people on immigration violations and arresting more than a dozen "material witnesses" not charged with any crime. Although the government has used these authorities before, it has not done so on such a broad scale. Judging from government announcements, the government has not brought any criminal charges related to the attacks with regard to the overwhelming majority of these detainees.

For example, the FBI arrested as a material witness the San Antonio radiologist Albader al-Hazmi, who has a name like two of the hijackers and who tried to book a flight to San Diego for a medical conference. According to his lawyer, the government held al-Hazmi incommunicado after his arrest, and it took six days for lawyers to get access to him. After the FBI released him, his lawyer said, "This is a good lesson about how frail our processes are. It's how we treat people in difficult times like these that is the true test of the democracy and civil liberties that we brag so much about throughout the world." I agree with those statements....

Even as America addresses the demanding security challenges before us, we must strive mightily also to guard our values and basic rights. We must guard against racism and ethnic discrimination against people of Arab and South Asian origin and those who are Muslim.

We who do not have Arabic names or do not wear turbans or head-scarves may not feel the weight of these times as much as Americans from the Middle East and South Asia do. But as the great jurist Learned Hand said in a speech in New York's Central Park during World War II, "The spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias...." Was it not at least partially bias, however, when passengers on a Northwest Airlines flight in Minneapolis three weeks ago insisted that Northwest remove from the plane three Arab men who had cleared security?