Good term paper about the usa patriot act: success of failure

Society, Terrorism

Shortly after the terrorist attacks in New York City and Washington, D. C. on September 11, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. As a result of real concerns over the security of the nation as well as more than a little mass hysteria over America's vulnerability in the new age of global terror, the 342-page long USA PATRIOT Act, as it is popularly known, sailed through Congress a mere 45 days after the attacks with little debate or analysis but with broad bipartisan support. Indeed, in the Senate, the bill was approved by a vote of 98 to 1, while in the House, the bill received 357 votes for it to a mere 66 votes against it (DOJ, n. d.). The USA PATRIOT Act was signed into law by President Bush on October 26, 2001. While most of the act is permanent law, originally Congress planned to allow sixteen provisions of the law including Sections 206, 215 and 220 expire or sunset by December 2005. However Congress and the President have extended a number of those provisions will past their original expiration date. The most recent extension occurred in 2011; President Obama approved a four year extension to the provisions that allowed for roving wiretaps, business record searches and surveillance of sole terrorists.

As the name suggests, the USA PATRIOT Act broadly expands the surveillance, investigative and reconnaissance powers of both domestic law enforcement agencies and foreign intelligence agencies. In addition, the USA PATRIOT Act amended a number of existing laws and procedures as well as a number of changes to criminal and immigration laws (DOJ, n. d.). The USA PATRIOT Act is a very large and complex law that was passed with great haste. While it allows a sweeping expansion of government powers, prior to

passage, the USA PATRIOT Act approved without the benefit of the normal checks that have been supplied by testimony from experts, recommendations from the public and lively hearings before congressional panels. To be sure, a number of Senators themselves felt that the bill was rushed to vote without enough time to consider the implication and effect of its provisions (Senator Leahy, 2001). On the other hand, after its passage, the bill gives the state an over-the-top increase in authority that would normally have to be balanced with the Constitution and the courts as well as answer to congressional oversight. Moreover, after nearly fourteen years of implementation, there is little tangible evidence to show that it has been useful in preventing terrorist attacks on American interests or capturing wanted terrorist suspects “ out in the wild” (Herman, 2006). The only clear point from over a decade of USA PATRIOT ACT activity is that it poses a substantial threat not only a person’s personal liberty and privacy but also the democratic principles and the values of an open society that have grown to become fundamental traditions of the nation. In short the USA PATRIOT Act is a failure.

Specifically, the USA PATRIOT Act violates: the First Amendment’s right to free speech; the Fourth Amendment’s right to privacy and prohibition against unreasonable search and seizure by the state and the Fifth Amendments right to due process; and constitutional prohibitions against over broad and vague laws. Moreover, the act thwarts a number of other constitutional prohibitions and judicial oversight that have traditional been used in limiting how much power one branch of government can achieve. The remainder of

this short paper will analyze in more detail the shortcomings of the USA PATRTIOT Act.

Why a new law?

If taken at face value, the purpose of the USA PATRIOT Act was to fight the modern threat of terrorism. This suggests that prior to 2001 attacks; the US lacked the legal means to effectively fight terrorism. The reality is that terrorism is an ancient weapon of the politically weak and has had the legal means to fight it well before September 11, 2001. Moreover, in drafting the act, Congress provided no proof that existing methods available to law enforcement and intelligence services were useless or ineffective in stopping terrorists.

One of the key targets of USA PATRIOT Act regulations is electronic communications. State regulation of electronic communications, however, has existed for nearly a century. In 1934, Congress enacted the Federal Communications Act ostensibly to limit the “ intercepting and divulging of radio or wire communications” (Doyle, 2012). Congress’ proscription against allowing the state to monitor electronic communications softened during World War II and the “ Red Scare” of the 1950s. In 1968, as part of the Omnibus Crime Control Act, Congress amended prior electronic communications regulations with the Federal Wiretap Act (Title III). Under Title III, federal and state law enforcement agents were permitted to perform electronic surveillance so long as they abided by strict limitations such as a finding of probable cause (Doyle, 2012). More importantly, Title III excluded electronic surveillance from any limitations when used for national security purposes. In 1986, Congress further updated the electronic surveillance

through the Electronic Communications Privacy Act (ECPA). The ECPA expanded Title III to include not only electronic surveillance of real-time communications but also electronically stored messages as well as pen register and trap-and-trace devices. In short, prior to the USA PATRIOT Act, the government had extensive authority to monitor electronic communications. Consequently, drafting a new law to allow and expand a power that the state had for nearly 50 years seems redundant and dangerous.

Another goal of the USA PATRIOT Act was to better facilitate the ability of the government to access and obtain foreign intelligence information. In 1978, however, Congress enacted the Foreign Intelligence Surveillance Act (FISA) with many of the same goals in mind as that of the USA PATRIOT Act. FISA, allowed the government to conduct domestic electronic surveillance for collecting foreign intelligence purposes. FISA allows permits surveillance either under presidential authorization to thwart a threat to national security or with a warrant obtained by the specialized court described below. Moreover, FISA made clear that foreign powers and agents of foreign powers as viable targets of surveillance. Under FISA a foreign power refers to, among other actors, “ a group engaged in international terrorism or activities in preparation thereof;” while an agent refers to anyone who “ knowingly engages in sabotage or international terrorism, or activities in preparation thereof” (Logan, 2009). Finally, and perhaps most importantly, FISA established the Foreign Intelligence Surveillance Court (FISC). FISC is a highly secretive court where the government seeks authorization to conduct surveillance under the parameters set forth in FISA. By all accounts, since its

enactment, FISA has been an extremely useful tool against foreign powers and their agents including terrorism and terrorists (Logan, 2009). Accordingly, the expansion of its authority under the USA PATRIOT Act begs the question: why was it needed.

Void for Vagueness

The Constitution requires all law to be clear and absent any confusion that might " inhibit the exercise of constitutionally protected rights" (Humanitarian Law Project v. Ashcroft, 2004). Accordingly, the Constitution prohibits any law that is found to be impermissibly vague. Under the Court's jurisprudence, vagueness requires courts to determine if a law sufficiently clear " so as not to cause a person of common intelligence necessarily to guess its meaning and to differ as to its application" (Humanitarian Law Project v. Ashcroft, 2004). In regards to the USA PATRIOT ACT, there are a number of provisions that are impermissibly vague. For instance, Section 802 of the act amends the definition of domestic terrorism to include acts dangerous to human life that violate the criminal law and appear to be intended to intimidate or coerce a civilian population. A plain reading of that definition suggests a broad range of activities such as protests against the government that when taken to the extreme might pose a national security threat but have traditionally been accepted as a normal and necessary part of a the democratic political process. In short, Section 802 might cause a person of common intelligence to guess at its meaning. Section 808 provides a further illustration of how dangerously vague the law can be. Section 808, further amends the definition of terrorism to include crimes " related to

protection of computers.” Again a plain reading of this definition can include wide number of activities that have little connection to terrorism but that under the law are criminalized. For instance, an anti-virus software that has not been updated to take into consideration the parameters of the newly released Mac OS could be considered a violation of Section 808 in that it failed to provide the protection it was marketed to contain.

First Amendment: Free Speech

Following the Revolutionary War, fear of the power of the government to control the people was such that eight of the original colonies made pledges to guarantee the freedom of the press (Lewis, 2007). Later during the drafting of the Bill of Rights, James Madison opined that a free press and the ability to question the government was tantamount to another branch of government with legitimate authority to check and balance the other branches (Lewis, 2007). To be sure, the importance of the freedom of speech to the Founding Fathers was such that it became the first amendment to the Constitution. Passed with little debate, the First Amendment expanded the freedom beyond just the press to include the right of the people to publicly speak out against, object to and oppose the state. Specifically, the First Amendment holds in relevant part that Congress is prohibited from making any laws “ abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for redress of grievances.” Far from being words on a document, the rights guaranteed by the First Amendment have had power support from the Supreme Court. Indeed, over the course of the nation’s history, the Court

time and again has strenuously supported the freedom of speech, especially during times of war and dissent (Lewis, 2007). For example, in the 1927 case, Whitney v. California, Justice Louis Brandies wrote, “ without free speech and assembly discussion would be futile;” that free speech provides “ adequate protection against the dissemination of noxious doctrine,” and “ that public discussion is a public duty” that should be the “ fundamental principle of the American government.” A few years later in the 1929 case, United States v. Schwimmer, Justice Oliver Wendell Holmes wrote in dissent, “ if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought, not free thought for those who agree with us but freedom for the thought that we hate.” Moreover, in the 1974 case, Procunier v. Martinez, Justice Thurgood Marshall wrote, “ our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”

Yet, despite the fundamentally important position of the freedom of speech, several provisions of USA PATRIOT Act pose direct threats to important aspects of the First Amendment. Under federal law, it is a crime to provide “ material support to any organization classified as terrorist by the Secretary of State. Section 805 (a) (2) (B) of the USA PATRIOT Act amended the definition of material support to include the provision of “ expert assistance or advice.” The Humanitarian Law Project (HLP) is one of many non-profit organizations which work with a broad range of groups some of which take part in unlawful activities, in the work advocate for peace and non-violence. In the 2004 case, Humanitarian Law Project v. Ashcroft, the HLP along with several other plaintiffs files a suit the federal government over Section 805.

HLP provided support for the lawful and nonviolent activities of several organizations which the Secretary of State later classified as terrorist organizations. Accordingly, HLP's lawsuit claimed that Section 805 violated the First Amendment's freedom of association by criminalizing the provision of " expert assistance and advice" without showing that the provision of those services had and connection to furthering an unlawful end. Furthermore, HLP charged that Section 805 violates the First Amendment by allowing for " permissible viewpoint discrimination targeting particular groups and their supporters based on their political views (Cole, 2012). Third, it allows prosecution through " guilt by association" (Cole, 2012). In 2012, the Supreme Court ruled against the HLP and upheld Section 805 on other grounds. However, Justice Breyer in his dissent wrote that the government did not meet its burden under the First Amendment's freedom of speech case law to show that the provision of the services constituted (Cole, 2012). Under Section 505 of the USA PATRIOT Act, the Federal Bureau of Investigation (FBI) can use a document known as a National Security Letter (NSL) to: (1) demand organizations holding personally identifiable information produce customer records at the FBI's command; and (2) refrain from notifying individual under surveillance from knowing that they are under surveillance (Garlinger, 2009). Since its enactment, there have been multiple plaintiffs that have sued the federal government arguing that Section 505 violated the First Amendment by allowing the FBI to " compel the disclosure of private records relating to constitutionally protected speech;" and that it also violated the First Amendment by barring organization that received NSL for telling customers that the FBI had

obtained information on them. While the courts have ordered limits in some of the case, the fact remains that the majority of Section 505 remains viable.

Fourth Amendment: Privacy and the Right against Unreasonable Searches and Seizures

Like the First Amendment, the Fourth Amendment was drafted in response to what the Founding Father saw as the inexcusably oppressive way they and other American colonialists were treated by British authorities, especially in criminal investigations. Writs of assistance were court orders that authorized British officials to conduct searches of ships and warehouses for illegal products. Writs of Assistance were unlimited in scope; and did not have to specifically state what items were being sought or the probable location of the items in question. While the original purpose of a writ of assistance was to facilitate the ability of British customs officials to stop the inflow of smuggled goods; it quickly became a tool of any British official to search the shops, houses and personal property of anyone they wanted. After the war, the Founding Fathers wish to spare the new nation from similarly oppressive policies was the catalyst for drafting the Fourth Amendment. Accordingly, the Fourth Amendment prohibited unreasonable searches and seizures and required that prior to a search or seizure occurring, the government needed to first obtain a warrant from a judge based on probable cause " supported by an oath or affirmation" and specificity of the location or person in question. One of the consequences of the Fourth Amendment's prohibition against unreasonable searches and seizures" has been the creation of a right to privacy insofar that the government it not permitted to know what you are doing in your house, what items you are carrying in your bag or what

information you might be storing on your computer or cell phone.

When analyzing the USA PATRIOT Act against the Fourth Amendment, it is clear that not only returns government authority to conduct searches back to the days of “ writs of assistance” but also dangerously threatens people’s right to privacy. For example, Section 206 of the act permits the government to conduct electronic surveillance on an individual without identifying the person whose communications will be tapped or the location of where the “ targeted information will take place.” As drafted, Section 206 clearly departs from the Fourth Amendment requirement that all searches “ particularly describe the person or place to be searched.” Moreover, with such blanket authority, Section 206 allows the government to conduct surveillance on people that have no connection to terrorist or criminal activity.

The pen register and trap-and-trace device are two of the traditional tools of electronic surveillance. A pen register can record the telephone numbers dialed from a specific telephone line. A trap-and-trace device can record the source of telephone numbers coming into a specific telephone line. Under the Pen Register Act, use of a pen register/trap-and-trace device normally requires a court order (Doyle, 2012). However, under Section 214 of the USA PATRIOT Act, the installation of pen registers/trap-and-trace devices can be made without a court order if “ relevant to an ongoing terrorist investigation.” Moreover, Section 216 of the act expands the scope of pen register/trap-and-trace devices to include the Internet and e-mail. Section 216 also gives the government authority to use the devices for the investigation of any crime no matter where it occurs in the nation. Taken as s whole, Sections 214 and 216 give the government the same broad

investigative authority that British officials had with the writs of assistance. Indeed, with Sections 214 and 216, he government can bypass the probable cause restrictions of the Fourth Amendment, forego judicial oversight and conduct nation-wide electronic surveillance on the plain certification of the government that the sought after information is relevant to an ongoing investigation.

Section 215 of the act provides further illustration of how it violates the Fourth Amendment. Under Section 215, the government is given the authority to seize any " tangible things" relevant to a foreign intelligence, clandestine or terrorist investigation. Section 215 applies even where there is no evidence that the " tangible thing" in connected to a suspected terrorist activity. With such a broad definition, Section 215 limits a court's discretion to oppose an action taken under its authority. To be sure, Section 215 gives the government has wide latitude to conduct investigation against anyone. Again, this openly defies the requirements of the Fourth Amendment that searches be specific and that they are done with judicial oversight.

Works Cited

Cole, D. (2012). The First Amendment's borders: The place of Holder v. Humanitarian Law Project in First Amendment doctrine. Retrieved on October 20, 2014, from http://scholarship. law. georgetown. edu/cgi/viewcontent. cgi? article= 1865&context= facpub

Doyle, C. (2012, Oct. 9). Privacy: An overview of the Electronic Communications Privacy Act. Retrieved on October 19, 2014, from http://fas. org/sgp/crs/misc/R41733. pdf

Garlinger, P. P. (2009). Privacy, free speech, and the Patriot Act: First and Fourth Amendment limits on national security letters. Retrieved on October 20, 2014, from http://www. nyulawreview. org/sites/default/files/pdf/NYULawReview-84-4-Garlinger. pdf

Herman, S. N. (2006). The USA PATRIOT Act and the Sub-majoritarian Fourth Amendment. Retrieved on October 18, 2014, from https://www. aclu. org/files/pdfs/about/herman_usapaf. pdf

Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (2004). Retrieved on October 20, 2014, from http://www. mit. edu/~jfc/HLP2. html

Lewis, A. (2007). Freedom for the thought that we hate. New York, NY: Basic Books.

Logan, C. (2009). The FISA wall and federal investigations. Retrieved on October 19, 2014, from http://www. law. nyu. edu/sites/default/files/ECM_PRO_062708. pdf

Mell, P. (2002). Big Brother at the door: Balancing national security with privacy under the USA Patriot Act. Denver University Law Review, 80, 375-401.

Osher, S. A. (2002). Privacy, computers and the Patriot Act: The Fourth Amendment isn’t dead, but no one will insure it. Florida Law Review, 54(3), 521-547.

Procunier v. Martinez, 416 US 396 (1974). Retrieved on October 20, 2014, from https://supreme. justia. com/cases/federal/us/416/396/case. html

Senator Patrick Leahy (VT). “ USA Patriot Act of 2001.” Congressional Record (October 25, 2001) p. S10991. Retrieved on October 18, 2014 from http://www. gpo. gov/fdsys/pkg/CREC-2001-10-25/pdf/CREC-2001-10-25-pt1-

PgS10990-2. pdf#page= 2

United States Department of Justice – DOJ (n. d.). The USA PATRIOT Act: Preserving Life and Liberty. Retrieved on October 18, 2014, from http://www. justice. gov/archive/ll/highlights. htm

United States v. Schwimmer, 279 US 644 (1929). Retrieved on October 20, 2014, from https://supreme. justia. com/cases/federal/us/279/644/case. html

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act – USPA. Retrieved on October 20, 2014, from http://www. gpo. gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enf. pdf

Whitney v. California, 274 US 357 (1927). Retrieved on October 20, 2014, from http://www. law. cornell. edu/supremecourt/text/274/357