

Renewing the Patriot Act While America Sleeps

Written by John Whitehead
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"Of course, there is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country that allowed the police to search your home at any time for any reason; if we lived in a country that allowed the government to open your mail, eavesdrop on your phone conversations, or intercept your email communications; if we lived in a country that allowed the government to hold people in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, then the government would no doubt discover and arrest more terrorists. But that probably would not be a country in which we would want to live. And that would not be a country for which we could, in good conscience, ask our young people to fight and die. In short, that would not be America." – Senator Russ Feingold (D-WI), voicing his concerns over Congress' passage of the USA Patriot Act (October 25, 2001)

Russ Feingold, a staunch defender of the rule of law and the only senator to vote against the ominous USA Patriot Act, recently lost his bid for re-election to the U.S. Senate to a Tea Party-backed Republican. From the start, Feingold warned that the massive 342-page piece of legislation would open the door to graver dangers than terrorism – namely, America becoming a police state. He was right.

The Patriot Act drove a stake through the heart of the Bill of Rights, violating at least six of the ten original amendments – the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments – and possibly the Thirteenth and Fourteenth Amendments, as well. The Patriot Act also redefined terrorism so broadly that many non-terrorist political activities such as protest marches, demonstrations and civil disobedience were considered potential terrorist acts, thereby rendering anyone desiring to engage in protected First Amendment expressive activities as suspects of the surveillance state.

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The Patriot Act justified broader domestic surveillance, the logic being that if government agents knew more about each American, they could distinguish the terrorists from law-abiding citizens – no doubt an earnest impulse shared by small-town police and federal agents alike. According to Washington Post reporter Robert O'Harrow, Jr., this was a fantasy that had "been brewing in the law enforcement world for a long time." And 9/11 provided the government with the perfect excuse for conducting far-reaching surveillance and collecting mountains of information on even the most law-abiding citizen.

Suddenly, for the first time in American history, federal agents and police officers were authorized to conduct black bag "sneak-and-peak" searches of homes and offices and confiscate your personal property without first notifying you of their intent or their presence. The law also granted the FBI the right to come to your place of employment, demand your personal records and question your supervisors and fellow employees, all without notifying you; allowed the government access to your medical records, school records and practically every personal record about you; and allowed the government to secretly demand to see records of books or magazines you've checked out in any public library and Internet sites you've visited (at least 545 libraries received such demands in the first year following passage of the Patriot Act).

In the name of fighting terrorism, government officials were permitted to monitor religious and political institutions with no suspicion of criminal wrongdoing; prosecute librarians or keepers of any other records if they told anyone that the government had subpoenaed information related to a terror investigation; monitor conversations between attorneys and clients; search and seize Americans' papers and effects without showing probable cause; and jail Americans indefinitely without a trial, among other things. The federal government also made liberal use of its new powers, especially through the use (and abuse) of the nefarious national security letters, which allow the FBI to demand personal customer records from Internet Service Providers, financial institutions and credit companies at the mere say-so of the government agent in charge of a local FBI office and without prior court approval.

To their credit, some Americans began to protest the fact that the Patriot Act had given government agents carte blanche to investigate average Americans for what we used to call the right to free speech. Take the case of 60-year-old Barry Reingold. While at the gym one afternoon shortly after 9/11, this Oakland, California resident expressed a negative view of the U.S. government's handling of the war in Afghanistan. Other gym members, overhearing Reingold's remarks, notified the FBI. A few days later, FBI agents visited Reingold at home, wanting to know more about his locker room chat. Although the FBI insists that it does not investigate people for their political views, Reingold recalls the agents stating, "Someone's reported to us that you've been talking about what happened on 9/11 and terrorism and oil and

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Afghanistan."

Reingold was far from the only American to be subjected to a cross-examination over his personal views about the government. Even so, despite the fact that more than 400 local, county and state resolutions were passed in opposition to the Patriot Act, that spirit of resistance proved to be fleeting. Once again, Americans lapsed into a somnambulant trance and turned a blind eye as Congress, at the urging of the Bush Administration, renewed several of the Patriot Act's more controversial provisions, which were set to expire, or sunset, on December 31, 2005. The Patriot Reauthorization Act (PAREA) took government intrusion into the lives of average Americans to a whole new level. For example, one "administrative authority" provision within PAREA, which allows the FBI to write and approve its own search orders, represents a direct assault on the Fourth Amendment's prohibitions against unreasonable search and seizure. By approving what critics termed "carte blanche for a fishing expedition," Congress empowered the FBI to conduct warrantless searches on people without having to show any evidence that they may be involved in criminal activities. This provision also lifted one of the last restrictions on special warrants for the FBI – namely, that the information be related to international terrorism or foreign intelligence.

Despite campaign promises to the contrary, Barack Obama has proven to be little better than George Bush in terms of civil liberties. For example, on February 27, 2010, just a little over a year after taking office, Obama quietly signed into law three controversial provisions of the Patriot Act that were set to expire. The "roving wiretaps" provision allows the FBI to wiretap phones in multiple homes without having to provide the target's name or even phone number – merely the possibility that a suspect "might" use the phone is enough to justify the wiretap. The "lone wolf" provision allows intelligence gathering of people not suspected of being part of a foreign government or known terrorist organization. And Section 215 allows court-approved seizure of records and property in antiterrorism operations. Now, thanks to legislation recently introduced by Rep. Mike Rogers (R-MI), those Patriot Act provisions are again up for renewal, and it's highly likely that Obama and Congress will once again give them the green light.

The American government, never a staunch advocate of civil liberties, has been writing its own orders for some time now. Indeed, as the McCarthy era and the wiretapping of Martin Luther King Jr. illustrated, the government's amassing of power, especially in relation to its ability to spy on Americans, predates the passage of the Patriot Act in 2001.

What the Patriot Act and its subsequent incarnations did was legitimize what had previously

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been covert and frowned upon as a violation of Americans' long-cherished privacy rights. Thus, what began with the passage of the USA Patriot Act in the fall of 2001 has snowballed into a massive assault on our constitutional freedoms, our system of government and our fundamental philosophies and way of life, as a recent report from attorney Emily Berman of the Brennan Center for Justice makes clear.

Pointing to guidelines implemented by Attorney General Michael Mukasey in December 2008 that loosened restrictions on the FBI's investigative powers, Berman notes that the changes granted "the FBI license to employ intrusive techniques to investigate Americans when there is no indication that any wrongdoing has taken place. This means that FBI agents can collect and retain vast amounts of information, much of it about the innocent activities of law-abiding Americans. And it can then retain that information indefinitely and share it with other government agencies." Berman continues:

"In the absence of meaningful limitations on the FBI's authority, agents or informants may attend religious services or political gatherings to ascertain what is being preached and who is attending. They may focus their attention on particular religious or ethnic communities. They may gather and store in their databases information about where individuals pray, what they read, and who they associate with. All with no reason to suspect criminal activity or a threat to national security. And then they may keep that information in their databases, regardless of whether it indicated any wrongdoing.

"We also know that without sufficient limits and oversight, well-meaning efforts to keep the homeland safe – efforts which rely heavily on the collection and analysis of significant amounts of information about Americans – can adversely impact civil liberties. Indeed, history teaches that insufficiently checked domestic investigative powers frequently have been abused and that the burdens of this abuse most often fall upon disfavored communities and those with unpopular political views. Investigations triggered by race, ethnicity, religious belief, or political ideology may seem calibrated to address the threat we face, but instead they routinely target innocent people and groups. Beyond the harm done to individuals, such investigations invade privacy, chill religious belief, radicalize communities and, ultimately, build resistance to cooperation with law enforcement."

To those who have been paying attention, this should come as no real surprise. After all, the history of governments is that they inevitably overreach. Thus, enabled by a paper tiger Congress, the president and other agencies of the federal government have repeatedly laid claim to a host of powers, among them the ability to use the military as a police force, spy on Americans and detain individuals without granting them access to an attorney or the courts. And

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as the government's powers have grown, unchecked, the American people have gradually become used to these relentless intrusions into their lives.

In fact, since 9/11, we've been spied on by surveillance cameras, eavesdropped on by government agents, had our belongings searched, our phones tapped, our mail opened, our email monitored, our opinions questioned, our purchases scrutinized (under the USA Patriot Act, banks are required to analyze your transactions for any patterns that raise suspicion and to see if you are connected to any objectionable people), and our activities watched. We've also been subjected to invasive patdowns and whole-body scans of our persons and seizures of our electronic devices in the nation's airports (there were 6,600 such seizures in airports alone between October 2008 and July 2010). We can't even purchase certain cold medicines at the pharmacy anymore without it being reported to the government and our names being placed on a watch list. And it's only going to get worse.

Most Americans have been lulled into thinking that the pressing issues are voting in the next election or repealing health care. This is largely due to the media hoopla over the Tea Party, the recent elections and the health care law, and the continuous noise from television news' talking heads. But the real issue is simply this – the freedoms in the Bill of Rights are being eviscerated, and if they are not restored and soon, freedom as we have known it in America will be lost. Thus, Congress should not renew the USA Patriot Act, nor should President Obama sign it into law. If he does so, he might just be putting the final nail in our coffin.

Unfortunately, even many of those civil libertarians who took Bush to task and vocally criticized his civil liberties abuses have been virtually silent in face of President Obama's continuation of Bush programs that undermine the Bill of Rights. For example, The Public Record, a nonprofit news organization based in California, asked prominent civil and human rights leaders "to explain their relatively passive position on the renewal of the Patriot Act. Most did not respond. One who did requested that his name not be used because he is still hoping to energize some of the silent voices." Here's what he had to say:

"Many of my colleagues have just given up on the Patriot Act, either expressly or implicitly (in terms of the mindshare, energy, and resources dedicated to the issue). They don't seem to understand or recall just how foundational this supposedly 'emergency' law was in setting the stage for the infringements that came later.

"Sheer exhaustion plays a role, but the fact that it's been nearly a decade means that

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generational change is even starting to have an impact, as have all the other irons in the fire – so many other traumatizing events have come up to distract and rightfully demand attention (torture, even broader surveillance, illegal war, assassinations), and a corrosive new so-called realism (cynicism, actually) about the politics of terrorism and the complicity of our fear-driven media and political class, combined of course with a reluctance to undermine our first black president and whatever incremental progressive achievements he can make.

“So the situation's pretty bleak out there, and will only turn around, in my view, if there is much greater bottom-up, local, and peer-to-peer, community-to-community activism.”

It's time to wake up, America.

*Constitutional attorney and author John W. Whitehead is founder and president of The Rutherford Institute. His new book *The Freedom Wars* (TRI Press) is available online at www.amazon.com.*

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