

# **The USA PATRIOT Act Was Planned Before 9/11**

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Many people do not know that the USA PATRIOT Act was already written and ready to go long before September 11th. Recent criticism of Bush's admission that he had received warnings only weeks before September 11th has made it more important to understand the origins of the USAPA.

The USA PATRIOT Act -- the so-called "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," a.k.a. the USAPA -- was enacted in the immediate wake of 9/11, riding a wave of fear that spread over the nation. This Act has caused much concern amongst civil rights advocates. The Administration, however, responded to such concerns by calling critics unpatriotic. Now, the White House has had a similar response to critics of Bush's recent admission of early warnings.

White House spokesman Ari Fleischer said Friday: "I think that any time anybody suggests or implies to the American people that this president had specific information that could have prevented the attacks on our country on September 11, that crosses the lines."

Dick Cheney came out on Thursday with the statement that Democratic criticism of Bush's handling of pre-Sept. 11 terror warnings was "thoroughly irresponsible." Cheney added an ominous remark to his "Democratic friends . . . that they need to be very cautious not to seek political advantage by making incendiary suggestions."

Cynthia McKinney responded: "If committed and patriotic people had not been pushing for disclosure, today's revelations would have been hidden by the White House," she says. "Ever since I came to Congress in 1992, there are those who have been trying to silence my voice. I've been told to "sit down and shut up" over and over again. Well, I won't sit down and I won't shut up until the full and unvarnished truth is placed before the American people."

House Minority leader Dick Gephardt said: "Our nation is not well served when the charge of 'partisan politics' is leveled at those who simply seek information that the American people need and deserve to know."

Oddly, following Democratic criticism of Bush's admission, came the weekend news that the White House now anticipates an even terrorist greater attack on American soil. Intrepid investigative journalist Michael Ruppert, best known for his reports claiming government's prior knowledge of 9/11, states that *Fox TV* cancelled his Saturday appearance on the Geraldo Rivera Show due to these reports.

These may be mere coincidences. *Time Magazine* just released a lengthy article by Michael Elliott, "How the U.S. Missed the Clues," in which he states: "Last summer the White House

suspected that a terrorist attack was coming. But four key mistakes kept the U.S. from knowing what to do."

Whether the Administration could have anticipated 9/11 or not, the proponents of the USAPA were waiting to go long before that day. Similar antiterrorism legislation was enacted in the 1996 Antiterrorism Act, which however did little to prevent the events of 9/11, and many provisions had either been declared unconstitutional or were about to be repealed when 9/11 occurred.

James X. Dempsey and David Cole state in their book, *Terrorism & the Constitution: Sacrificing Civil Liberties in the Name of National Security*, that the most troubling provisions of the pre-USAPA anti-terrorism laws, enacted in 1996 and expanded now by the USAPA, "were developed long before the bombings that triggered their final enactment."

Dempsey is the former assistant counsel to the House Judiciary Subcommittee on Civil and Constitutional Rights and Deputy Director at the Center for Democracy & Technology, and Cole is professor of law at Georgetown University and an attorney with the Center for Constitutional Rights.

Looking back at the 1996 Antiterrorism Act, Dempsey and Cole declare that "the much-touted gains in law enforcement powers" under that Act, "produced no visible concrete results in the fight against terrorism." They add that the principles espoused in the Act "were shown in case after case to be both unconstitutional and ineffective in the fight against terrorism." And importantly, the authors comment that the United States government has not shown that the expanded powers it has asserted in the USAPA are necessary to fight terrorism.

Dempsey and Cole trace the origins of the national security trend back to the "intolerant approaches of the 1950s," when association with Communist or anarchist groups was made a ground for exclusion and deportation. Congress removed the guilt by association law in 1990, but it was revived only six years later by law enforcement proponents in the 1996 Antiterrorism Act, immediately following the Oklahoma City Bombing.

More specifically, however, Dempsey and Cole show that it was the Reagan Administration which initially proposed some of the most troubling provisions which eventually became part of the USAPA. When Reagan proposed these provisions, Congress rejected them on constitutional grounds. The first Bush Administration then made similar proposals, which were again rejected by lawmakers. Congress twice refused to enact the secret evidence provisions proposed by Bush I. (Indeed, just prior to 9/11, Congress was about to pass a law repealing the secret evidence provisions of the 1996 Antiterrorism Act.)

The troublesome provisions proposed by Reagan and the first Bush included the resurrection of guilt by association, association as grounds for exclusion or deportation, the ban on supporting lawful activities of groups labeled terrorist, the use of secret evidence, and the empowerment of the Secretary of State to designate groups as terrorist organizations, without judicial or congressional review.

Despite the Reagan and Bush proposals and one-sided hearings, there was broad-based

opposition to such legislation. According to Dempsey and Cole, "several members of the House Judiciary Committee, both Democrat and Republican, questioned the need for the legislation." Lawmakers repeatedly asked why new legislation was needed and how it would help. Administration witnesses literally refused to answer lawmakers' questions, finally causing Representative John Conyers to exclaim, "I've never seen this much law created as a result of prosecutions that we agree worked very effectively!"

"The legislation languished and seemed headed for defeat," say Dempsey and Cole. Until Oklahoma City. The Oklahoma City bombing, for which there exists a significant body of evidence of a shadow government operation, was used as justification for the enactment of the very provisions lawmakers had previously found most constitutionally troublesome.

Included in the resulting 1996 Antiterrorism Act, although it had nothing to do with terrorism at all, was Republican Senator Orrin Hatch's long-sought provision to limit the right of habeas corpus. Habeas corpus is the procedure whereby a person convicted by a state court can challenge that conviction in a federal court. The thing is, terrorism cases are brought in federal, not state, courts. "Senator Hatch wanted to make it more difficult for federal courts to order retrials of prisoners where state courts had violated the U.S. Constitution," according to Dempsey and Cole.

The USAPA clearly furthers the goals of making it more difficult for anyone to review or appeal government wrongdoing. It allows for indefinite detention of suspected (not "proven") alien terrorists, without probable cause of a crime, without a hearing or an opportunity to defend or challenge the evidence against them, when they have not even been proven to be a threat and have already established a legal right to remain here. The only process allowed the suspected alien is the "right" to go to federal court and sue the government for its actions.

The USAPA expands the Secretary of State's power to designate terrorist groups without any court or congressional review and allows for secret searches without probable cause. Dempsey and Cole state that these changes "go far beyond what was needed to respond to terrorism." Indeed, they point out that in many instances, "the changes are not limited to terrorist investigations at all, but apply across the board to all criminal investigations."

A good example of the kind of change brought about under the USAPA, which illustrates the underlying and pre-existing agenda of its proponents, is section 218, which amends a single phrase in the 1978 Foreign Intelligence Surveillance Act (FISA). The purpose of FISA was to allow intelligence agencies to gather information about foreign powers without the restrictions imposed on them by the Constitution. The reasoning for this was that the purpose of foreign intelligence gathering is not to detect crimes but to gather information about foreign agents.

Under FISA, when an agent wanted to obtain authority to conduct electronic surveillance or secret physical searches, a designated official of the executive office had to certify that "the purpose" for the surveillance was to obtain foreign intelligence information. Section 218 of the USAPA modifies that clause so that intelligence gathering need not be "the purpose," -- in other words, it need no longer be the primary purpose, -- but may be only "a significant purpose" of the surveillance.

This means that if an official can certify that obtaining foreign intelligence is a significant purpose of a surveillance action (the other purpose clearly being criminal investigation), he can avoid the requirement that he first show probable cause of criminal activity. It means the FBI, the CIA, or any other intelligence agency, can surveil you without probable cause, as long as they say the surveillance has something to do with a foreign intelligence investigation of some sort (which may otherwise not even involve you directly).

Because courts have consistently refused to "second guess" FISA surveillance certifications, there is effectively no judicial review of such activities. This small change has enormous ramifications. For all practical purposes, the section 218 USAPA amendment of FISA allows government to completely avoid Fourth Amendment probable cause requirements for searches and seizures of American citizens (not just immigrants).

The Congressional Research Service (CRS) of the Library of Congress notes: "From the beginning, defendants have questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold . . ." (Terrorism: Section by Section Analysis of the USA PATRIOT Act CRS Report for Congress, 12/10/01)

In 1980, the 4th Circuit court stated in the landmark case of *U.S. v. Truong Dinh Hung* that "the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons." Another circuit court declared in 1991 that "the investigation of criminal activity cannot be the primary purpose of [FISA] surveillance." In other words, courts have pretty consistently thrown out intelligence information gathered under FISA where it has been established that foreign intelligence gathering was not the primary purpose of the surveillance.

It is clear that intelligence agencies have wanted to change this law for some time. It is clear that they have been frustrated by the "primary purpose rule." However, it is not merely the result of intelligence agency wishes or a matter of history that this restriction has now been overridden. History shows that Congress has consistently resisted enacting these types of changes. History also shows that the Reagan and Bush I Administrations repeatedly attempted to push such laws through. Oklahoma City proved that only a "real" terrorist attack would convince Congress.

Furthermore, it is obvious that the proponents of this amendment know it is an end-run around the Fourth Amendment. They have had many years to think about it and have repeatedly shown their willingness to enact carefully crafted, unconstitutional laws. They know the amendment allows intelligence to conduct criminal investigations on American citizens without adherence to basic constitutional protections. Furthermore, under the information sharing provision of section 203 of the USAPA, information gathered in this way can now be shared with other intelligence and law enforcement agencies, for whatever uses they want. Most significantly, it is clear that the events of 9/11 gave the proponents of this amendment the opportunity they needed to slip it by Congress.

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