

The Other War
The Bush Administration and the End of Civil Liberties
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Counterpunch

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Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.

--President George W. Bush, September 20, 2001

It didn't take President Bush to tell Americans that the world changed on September 11, 2001. But it took Bush, Attorney General John Ashcroft, and an unquestioning Congress to change the legal foundation of what it means to be "free" in America. The president declared from the start that it would take more than military might to wage the fight. This war would require a new arsenal of laws and regulations at home. And he got them. If the September 11 suicide hijackers hated us for our freedoms, as the president also said, today there is less to hate.

The legal firepower behind the war on terror consists of two pieces of legislation, the Antiterrorism and Effective Death Penalty Act of 1996 [Summary, text of law] and the USA Patriot Act of 2001, as well as a host of executive orders and federal agency regulations. Ashcroft, Bush, and numerous federal courts have decreed that freedoms must be curtailed in the name of fighting terror. But that formulation suggests they will be temporary. Given the nature of terrorism, and of politics, that is extremely unlikely.

Bush, after all, has said repeatedly that this is to be a war of many years' duration, a life's work. It will not stop until every terrorist threat the US cares to identify is vanquished. It is a global war without territorial boundaries and without a known cast of enemies, save one -- evil. And it's being fought at home, too, in churches and town squares, courtrooms and libraries.

At the center of this new body of terror and homeland security laws lies a vague and amorphous definition of its central term: What is terrorism? Government agencies and departments use varying standards. But the USA Patriot Act defines terrorism as "acts dangerous to human life that are a violation of criminal law" [§ 802(a)(5)(A)] that "appear to be intended to influence the policy of a government by intimidation or coercion" [§ 802(a)(5)(B)(ii)]. This definition is so broad that practically any act of civil disobedience could be construed to violate the law. (A political demonstration taking place in the path of

an ambulance, for example, could be termed "dangerous to human life.")

As many Arab-Americans have discovered, individuals making contributions to Islamic-based charities that turn up with "alleged terrorist ties" may wind up terror suspects themselves. Under the Patriot Act, any organization that engages in legitimate as well as illegitimate activities can be presumed a terrorist organization for *all* purposes. And the prohibited activity that lands a group on the government's list need not consist of violent acts directed at people; anything that is intended to destabilize a government or "influence" its policy by coercion can be termed terrorism. Flooding a congressional office with e-mails critical of government policies, and jamming a server in the process -- is that an act of terror? Some organizations that use the Internet to ask people to e-mail members of Congress fear that it might be so construed.

As well they should. For the war on terror now encompasses a breathtaking range of new government powers here at home. More than ever before, the mere fact of dissent could make you a target in the war on terror.

The 1996 Antiterrorism and Effective Death Penalty Act

To all my fellow Americans . . . I say, one thing we owe those who have sacrificed is the duty to purge ourselves of the dark forces which gave rise to this evil. They are forces that threaten our common peace, our freedom, our way of life.

--President Bill Clinton, April 23, 1995, speaking of Oklahoma City.

Most critics of the terror war's assault on civil liberties mark its beginning with the Clinton administration's Antiterrorism and Effective Death Penalty Act of 1996. But the US government's propensity for spying on its own citizens on the professed grounds of national security goes back much further, and it's not just a relic of the Hoover days. As recently as the 1980s, the FBI conducted surveillance of Americans involved in a variety of causes. Activists who supported rebel groups in El Salvador, attended rallies protesting American aid to the Salvadoran military, signed petitions, or possessed reading material associated with the Committee in Solidarity with People of El Salvador (CISPES) were targeted for activities labeled as "terrorist" or "leftist".

These investigations went on for more than two years, until they were finally halted by congressional hearings and the exposure of documents obtained under Freedom of Information Act requests. Congress denounced the scope of the anti-CISPES investigations, and in 1994 enacted a law protecting First Amendment activities from FBI investigations. That law was expressly repealed in the Antiterrorism Act of 1996.

The 1996 Antiterrorism and Effective Death Penalty Act was the Clinton Administration's comprehensive response to both political and personal violent crime. Making the death penalty "effective" meant making it harder to appeal convictions of capital offenses. In terms of fighting terrorism, the law was a reaction to bombings of the World Trade Center in 1993 and the Oklahoma City federal building in 1995. Like the Patriot Act, it too, passed the Senate easily -- 91-8. (Clinton also cited the suspicious crash of TWA Flight 800 and the bombing at Atlanta's Olympic Village in 1996 as further proof of the dangers.) According to its critics, including Georgetown University Law School Professor David Cole, the law never yielded any significant protection against terrorism -- everything a "terrorist" does was

already illegal -- although it did lead to substantial incursions on constitutional rights, such as:

- Allowing the government to deport immigrants based on undisclosed evidence;
- Making it a crime to support even the lawful activities of an organization labeled as a terrorist group by the State Department;
- Authorizing the FBI to investigate the crime of material support for terrorism based solely on activities protected under the First Amendment, notably specifically allowing agents to attend religious services at Muslim mosques "undercover";
- Freezing assets of any US citizen or domestic organization believed to be an agent of a terrorist group, without specifying how an "agent" was identified;
- Expanding the powers of the secret court that administers the Foreign Intelligence Surveillance Act (FISA), where federal judges sit in secret to consider -- and mostly rubber-stamp -- Justice Department requests for widespread surveillance of "terrorists." The surveillance methods in question include pen registers and "trap-and-trace" logs, methods that can capture incoming and outgoing telephone calls;
- Repealing the law that barred the FBI from opening investigations based solely on activities protected under the First Amendment -- such as the anti-CISPES investigations -- and allowing such surveillance to go forward if the individuals were believed to be associated with any person or organization labeled as "terrorist;"
- Allowing the Immigration and Naturalization Service to deport (mostly Muslim) citizens upon the order of INS officials. The evidence typically was not disclosed to the deportees, and the decision of the official was not subject to challenge in a federal court.

The USA Patriot Act of 2001

How will we fight and win this war? We will direct every resource at our command -- every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war -- to the disruption and to the defeat of the global terror network.

--President Bush, September 20, 2001

With little debate, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001 was passed just six weeks after the September 11 attacks. Though several elected officials expressed trepidation at what appeared to be a dismantling of the first, fourth, fifth, and sixth amendments to the Constitution, only one member of the Senate, Russell Feingold (D-Wisc.), had the courage to vote against it.

The media was slow to pick up on the controversial provisions of the act, which, within its more than 275 pages, amended dozens of existing criminal and civil statutes. It wasn't until mid-2002, when the Justice Department began to hand down indictments under the act, that people started to take notice.

The act expanded guilt by association to the point that the most tenuous connection to a "terrorist organization" (as designated by the Secretary of State) can now lead to charges. Several groups of people have been indicted for operating terrorist cells in Portland, Buffalo, Detroit, and Moscow, Idaho. The trial in the Detroit case began in the third week of March and is expected to last for six weeks or more. Some charges against Muslim charities have led to plea bargains to drop terrorist charges in exchange for pleas to minor tax or fraud charges. The government's successes in the courtroom have not, to date, matched John Ashcroft's bravado in announcing the indictments in public press conferences. But the chilling effect of being arrested for crimes of terror cannot be underestimated, as many

American citizens and resident aliens have learned.

Some of the more drastic incursions on civil liberties resulting from these Patriot Act provisions:

- It is a crime for anyone in this country to contribute money or other material support to the activities of a group on the State Department's terrorist watch list. Organizations are so designated on the basis of secret evidence, and their inclusion on the list cannot be challenged in court. Members of any such targeted organization can be deported even if they have not been involved in any illegal activities. The government freely admits that some of the groups it will designate are broad-based organizations engaged in lawful social, political, and humanitarian activities as well as violent activities.
- The FBI can monitor and tape conversations and meetings between an attorney and a client who is in federal custody, whether the client has been convicted, charged, or merely detained as a material witness. New York City attorney Lynne Stewart (the court-appointed representative of Sheik Abdel Rahman, who was convicted in the 1993 World Trade Center bombing) has been indicted for aiding and abetting terrorism based on conversations with her client. Her trial is set for January 2004, and the prosecution is clearly intended as a warning: Attorneys representing people charged with terrorism-related crimes will be watched as closely as the defendants.
- Americans captured on foreign soil and thought to have been involved in terrorist activities abroad may be held indefinitely in a military prison and denied access to lawyers or family members. No federal court can review the reason for the detention. Such is the plight of Yaser Hamdi, detained in a Navy brig in Norfolk, Virginia, whose family and attorney made valiant efforts to gain access to him. The Fourth Circuit Court of Appeals overturned a federal trial judge's order that Hamdi be allowed to meet with the federal public defender.
- The FBI can order librarians to turn over information about their patrons' reading habits and Internet use. The librarian cannot inform the patron that this information has been provided. Librarians, on the whole, are outraged at their new role; some have taken to posting signs in the library warning users not to use the Internet, others to destroying their logs of Internet users. One librarian said to a *Washington Post* reporter, "This law is dangerous. . . . I read murder mysteries -- does that make me a murderer? I read spy stories -- does that mean I'm a spy?"
- Foreign citizens charged with a terrorist-related act may be denied access to an attorney and their right to question witnesses and otherwise prepare for a defense may be severely curtailed if the Department of Justice says that's necessary to protect national security. [§ 412] Jose Padilla, the American Muslim fingered by Ashcroft last year as a would-be "dirty bomb" builder, is a case in point.
- Resident alien men from primarily Middle Eastern and Muslim countries must report for registration. And hundreds of the ones who have reported have been detained and arrested for minor immigration infractions. It recently came to light that immigration authorities are refusing to let the men appear with their attorneys, a refusal that is a violation of Bureau of Citizenship and Immigration Services (BCIS, formerly the INS) regulations.
- Lawful foreign visitors may be photographed and fingerprinted when they enter the country and made to periodically report for questioning.
- The government can conduct surveillance on the Internet and e-mail use of American citizens without any notice, upon order to the Internet service provider. Internet service providers may not move to quash such subpoenas. [§ 209 and § 210; analysis].

- The Transportation Security Administration (TSA) can search any car at any airport without a showing of any suspicion of criminal activity.
- The TSA can conduct full searches of people boarding airplanes and, if the passenger is a child, the child may be separated from the parent during the search. An objection by a parent or guardian to the search will put the objector at the risk of being charged with the crime of obstructing a federal law enforcement officer and tried in federal court. Travelers in Portland and Baltimore have reported such arrests.
- The TSA is piloting a program to amass all available computerized information on all purchasers of airline tickets, categorize individuals according to their threat to national security, and embed the label on all boarding passes. The Computer Assisted Passenger Prescreening System (CAPPS II) program is designed to perform background checks on all airline passengers and assigns each passenger a "threat level." Passengers will not be able to ascertain their classification or the basis for the classification.
- The TSA distributes a "no-fly" list to airport security personnel and airlines that require refusal of boarding and detention of persons deemed to be terrorism or air piracy risks or to pose a threat to airline or passenger safety. This is an expansion of a regulation that since 1990 has looked out for threats to civil aviation. Names are added daily based upon secret criteria. Several lawsuits that challenge these regulations are now pending, some from irate passengers who were mistaken for people on the list.

[If you have been barred from flying, see the ACLU "No Fly" List Online Complaint Form See also: "Documents Show Errors in TSA's "No-Fly" Watchlist, April 2003" from the Electronic Privacy Information Center.]

- American citizens and aliens can be held indefinitely in federal custody as "material witnesses," a ploy sometimes used as a punitive measure when the government does not have sufficient basis to charge the individual with a terror-related crime. The 1984 material witness law allows the government to detain citizens at will for an arbitrary period of time to give testimony that might be useful in the prosecutions of others. A Jordanian man picked up a few days after September 11 was held more than nine months before being released. And last week a federal judge in Oregon ordered that Mike Hawash, a software engineer and long-time naturalized American citizen who has been held in solitary confinement in a federal prison for more than a month, be questioned by April 29, 2003. It is notable, however, that the judge has already conducted a secret hearing that determined Hawash's detention to be lawful.
- Immigration authorities may detain immigrants without any charges for a "reasonable period of time." The BCIS need not account for the names or locations of the detainees, and what constitutes a "reasonable period of time" is not defined.
- American colleges and universities with foreign students must report extensive information about their students to the BCIS. [§ 507 and § 508; analysis]. BCIS in turn may revoke student visas for missteps as minor as a student's failure to get an advisor's signature on a form that adds or drops classes. College personnel cannot notify students to correct the lapse in order to save them from deportation. To a very large extent, campus police and security personnel have become agents of the immigration authorities.
- Accused terrorists labeled "unlawful combatants" can be tried in military tribunals here or abroad, under rules of procedure developed by the Pentagon and the Department of Justice. All it takes to be named an unlawful combatant is the affidavit of a Pentagon employee, who is not required to provide the rationale for his or her decision, even to a federal judge. (In the case of Yaser Hamdi, the federal appellate court ruled that it has no authority to look behind this affidavit and question the determination.) Unlawful combatants are also denied counsel and contact with family members. In fact, hundreds of "unlawful combatants" are still being held in Guantanamo Bay, Cuba, without attorneys,

without family contact, and under conditions said by some to be tantamount to physical and psychological torture. A federal court ruled in March that these persons had no access to the federal courts since they were on Cuban, not American, soil.

- A warrant to conduct widespread surveillance on any American thought to be associated with terrorist activities can be obtained from a secret panel of judges, upon the affidavit of a Department of Justice official. If arrested as a result of the surveillance (as was the case with the attorney, Lynne Stewart), the defendant has no right to know the facts supporting the warrant request.
- The FBI can conduct aerial surveillance of individuals and homes without a warrant, and can install video cameras in places where lawful demonstrations and protests are held. Facial recognition computer programs are used to identify persons the FBI deems suspicious for political reasons. An ACLU employee in South Carolina was recently indicted for the federal offense of being in a "restricted area" at the Columbia, South Carolina airport in October 2002, when President Bush made a political campaign appearance. (The South Carolina AG, who happens to be the son of retired Senator Strom Thurmond, authorized the indictment.)

Most of these restrictions on liberty were not part of the letter of the Patriot Act; they were shaped by means of rules and regulations adopted in agencies and departments of government with little notice to the public. That's because the Patriot Act granted sweeping new powers to agencies like the Department of Justice, the FBI, and BCIS to go their own way in prosecuting the war on terror.

Will the Clinton/Bush expansion of federal powers help much in protecting the country from terrorism? That is an imponderable, since we can't know what might have happened by now, or what might happen going forward, in their absence. But the arrests hyped by Ashcroft so far don't suggest that his new powers are yielding much. One of the most notorious cases involved Jose Padilla, an American-born Muslim arrested for allegedly plotting to build a dirty bomb. Padilla is still being held without charges, and many believe it's because the government has no real case against him. (The file on Padilla is secret, obviously, but some news accounts have suggested his sole crime was attempting to download "dirty bomb" construction plans from the Internet.)

Several people charged with terrorist-related acts have pled guilty to some charges, such as visiting an al Qaeda training camp (as defendants in Buffalo have recently done), or to lesser non-terrorist-related offenses (money laundering instead of financing terrorist activities), in order to avoid the risk of conviction and longer sentences. The Justice Department seeks grand jury indictments of the "kitchen-sink" variety -- throw in everything remotely chargeable, and then declare victory when the defendant pleads to one or two charges.

What we do know about these laws is that they allow government agents to be more aggressive and, when they wish, more abusive. Most of the people indicted in Buffalo and Portland have been charged with being terrorist sympathizers because they were in the presence of people themselves labeled as terrorist sympathizers (visiting their homes, for instance) or because they had contributed to a non-profit organization that the government has decreed to have a connection to terrorism somewhere in the world. Attorney Lynne Stewart was indicted for the "crime" of zealously representing a convicted terrorist she was court-appointed to defend.

The proposed Domestic Security Enhancement Act of 2003

There is no Patriot Act II. That said, it doesn't mean that we aren't constantly thinking and discussing how to make things better, safer. . . . So if there are some leaks . . . it's about what we've been thinking.

--Attorney General John Ashcroft, March 4, 2003

On February 7, 2003, the nonprofit Center for Public Integrity obtained a leaked draft of what is being called Patriot Act II. John Ashcroft immediately went on the defensive, taking pains to call it a mere trial balloon -- something to get the debate moving. The version posted on the center's site belies such talk; it indicates that the draft was delivered to Vice President Cheney and House Speaker Dennis Hastert.

[The above link is to the January 2003 draft of the 'Patriot II' act. In the following, links reference the ACLU's Section-by-Section Analysis of DOJ draft "Domestic Security Enhancement Act of 2003," aka "PATRIOT Act II" (which themselves link to the draft), released on 14 Feb 2003. Excepts are where a section is not included in the ACLU analysis (so the link accesses the draft directly).]

Against a backdrop of perpetual war, it's hard to imagine that Congress will put up much of a fuss over Patriot II. Who could vote against better domestic security? Here are some of the more unsettling proposals:

- Broadens the definition of Americans who could be under surveillance without a warrant, and mandates further coordination between state, local, and federal law enforcement for the purpose of conducting surveillance. Translation: The feds can instruct your local police to keep an eye on you. [§ 101, § 102, § 107, § 122, § 125]
- Creates new crimes and punishments relating to nonviolent activities linked to terrorist groups, which could include making charitable contributions to a group on the State Department's terrorist list. The list includes organizations that provide humanitarian aid to Muslims across the world. Under Patriot I, the government needs to show that the contributor knowingly "aided and abetted" terror, a tall order since most people who give to Islamic charity and relief organizations are motivated by humanitarian rather than political goals.
- Expands surveillance powers to grant easier government access to bank accounts, home computers, telephones, and credit card accounts based upon subpoenas issued by the Department of Justice. The entities subpoenaed to obtain information about you could not refuse to provide the information (an expansion of current powers under Patriot I). Evidence obtained that would link a person to terrorism or terrorist groups (as defined by the State Department) would not be disclosed except to a court (individuals would have no right to know why they were charged) and pretrial detentions would be mandatory. You would have little possibility of defending the charges.
- Makes some nonviolent acts punishable by the death penalty if they are linked to broader "terrorist activities."
- Empowers the federal government to conduct its own autopsies of victims of terrorism and "other deadly crimes," presumably any type of murder.
- Amends the Freedom of Information Act to curtail even further the public's ability to obtain information about people detained or charged. If you were arrested for a crime of terror, your accuser could remain nameless.
- Forces any terrorism suspect to give a DNA sample to the federal government, the results of which could then be shared with state and local law enforcement.

- Grants government the power to strip away the citizenship of any American involved in the lawful activities of an organization deemed to have terrorist ties. Such people could be held indefinitely, or deported to any country that agreed to take them.
- Increases federal powers over immigrants by means that include: expedited deportation proceedings, the criminalization of even minor paperwork violations (such as a student's failure to report that he or she dropped a course), and even more limited judicial review of immigration rulings.

Just in case Patriot II doesn't make it into law, Congress is scheduling hearings to extend Patriot I beyond 2005, when some of its more controversial measures are set to expire.

How Much Is Too Much?

"We will . . . defend freedom, and justice, no matter what the cost."

Attorney General John Ashcroft, April 9, 2002

"Freedom" has been part of the post-September 11 mantra. The terrorists hate our freedoms. We have to defend our freedoms. We toppled Saddam Hussein's regime so that Iraqis might claim their God-given freedom. Weighed against the Bush administration's legal actions at home, this line of rhetoric is ironic, to say the least.

Patriot I was enacted in an atmosphere of panic, paranoia, and patriotism. Ashcroft mounted quite an offensive when he laid it out before Congress. If you dared to criticize in that hour of peril, you were by definition soft on terrorism. The press now admits that it rolled over for Patriot I; the handful of journalists who questioned its provisions got hate mail and death threats for their trouble. But it left even some Republicans thinking Ashcroft had gone too far.

Though there isn't much they can do about it. We may have Congress to thank for the Patriot Act itself, but Ashcroft's executive orders and the regulations hastily promulgated by the agencies under his control are where the real action has been. In 2002, more than 1,200 secret warrants were issued by Ashcroft's Justice Department, FBI field offices, and the secret Foreign Intelligence Surveillance Court (FISA) to conduct surveillance on all manner of personal activities and records. Indeed, people recently arrested for "crimes" allegedly uncovered as a result of such secret surveillance have been stunned to learn that the Patriot Act specifically disallows any judicial review of the legality of the warrant or of the evidence obtained as a result. Secret detentions, secret evidence, secret trials. What's next? Secret executions?

The administration engaged in much finger-pointing recently when Cuba secretly tried some of its political dissidents. The trials were in secret, appeals were summarily denied, and harsh sentences were meted out. Cuba claims the dissenters were a threat to its security, echoing Ashcroft's justification for his Justice Department's heavy-handed tactics. Already in this country we have closed trials and, for the first time in American history, closed arguments in a federal appeals court. The Fourth Circuit Court of Appeals in Richmond, Virginia, a federal court that sometimes makes the U.S. Supreme Court look liberal, is closing to the public the appeal of Zacharias Moussaoui, who, according to the Justice Department, was involved in planning the September 11 terrorist strikes.

The government is appealing U.S. District Court Judge Leonie Brinkema's ruling that the

Justice Department must give Moussaoui and his lawyers access to the government's star witness against him. Judge Brinkema says that the Justice Department is cloaking its case in such a shroud of secrecy that a fair public trial, as required by the 6th Amendment, will be difficult if not impossible. The Justice Department has suggested that if it loses on appeal -- not likely, given the Fourth Circuit's propensity to rule for the government -- it may remove Moussaoui to Guantanamo, Cuba and try him in a military tribunal. And no US court can touch him then.

Some parents of Afghan prisoners in Guantanamo filed a lawsuit challenging their sons' continued detention; it was tossed out by a District of Columbia federal judge. Lawyers for the plaintiffs argued that the detention was a violation of the Geneva Convention on the treatment of POWs. But the administration has termed them (like Yasir Hamdi) unlawful combatants: They were not wearing the uniform of any recognized country, and thus they are not entitled to the protections of international law. The Court, in one of the all-too-many post-September 11 rulings fraught with catch-22 reasoning, said that the detainees are not in the United States, but in a foreign country, and hence the doors of U.S. courthouses are closed to them. The decision places a Guantanamo prisoner in legal limbo, even though he is imprisoned all the while by the American government on a US military installation.

Those who expect that elected officials and the courts will one day decide to restore our liberties have not spent much time looking at history. The Supreme Court has traditionally taken a hands-off approach to curbs on presidential power in wartime -- and this, after all, is to be a war of many years' duration. Chief Justice Rehnquist wrote a prescient book on this subject; Justice Antonin Scalia has said, in essence, that the Bill of Rights is not a contract at all, just a rough guide that courts were free to treat as circumstances required. This sentiment was recently echoed by Justice Stephen Breyer as well.

The Supreme Court will likely hear the first cases to test the limits of the Patriot Act and other attacks on freedom in its 2003-2004 term. In the meantime, President Bush is handily convincing the Senate to approve his right-wing judicial nominees one after another. Once his judges don their robes, the federal judiciary will be, by some estimates, 65 percent or more conservative Republican. The Supreme Court has become so predictably political that the loss of just one liberal justice -- or frequent swing vote Sandra Day O'Connor -- will tip the court all the way to the right. And since Congress has amiably ceded its duty to uphold the Constitution in the laws it enacts, we will be left with exactly one branch of government, the executive.

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