

Spring 2006

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Recommended Citation

Kochemirovskiy, Ruslan (2006) "Arguments Within an Argument: Examining The USA PATRIOT Act," *ESSAI*: Vol. 4, Article 29.
Available at: <http://dc.cod.edu/essai/vol4/iss1/29>

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Arguments Within an Argument: Examining The USA PATRIOT Act

by Ruslan Kochemirovskiy

(Honors English 1102)

The Assignment: This assignment was the final research paper for English 1102 which required an argument based thesis, a minimum of twelve sources, including scholarly journals, and documentation by means of MLA. 8-12 pages were specified.

More than two centuries ago in his address to the national resolve, Benjamin Franklin condemned the policy of sacrificing liberty in the name of security: “Those who would give up essential liberty, to gain a little temporary safety, deserve neither liberty nor salary” (Davis 8). Later in our history, the great and eloquent CBS broadcaster and newsman, Edward R. Murrow, who is viewed as a turning point influence in the McCarthy era, while questioning the legacy of communist-witch-hunt investigations that overwhelmed the country due to State’s intention to protect nation from “Reds” infiltration, believed that “[T]here must be a place to protect the state and the right of individual at the same time” (Stockwell 2). Similar are today’s concerns of civil libertarian groups in response to centralization of power in executive branch and the rights-restricting measures of the USA PATRIOT Act signed into law by the President of the United States in the early aftermath of 9/11 terrorist attacks. The Act shifted power away from the Congress and the courts and thus made concerns justifiable. However, before examining arguments of both supporters and critics of new legislation and further drawing a conclusion, it is important to recognize roles of the President and the Constitution in times of crisis.

It is widely acknowledged by the public and accepted by presidents that the paramount duty of the latter is to protect their nation and its citizens from hostile attacks. In her article “The War Power And Its Limits,” published in *Presidential Studies Quarterly* in September 2003, Nancy Kassop, professor of political science and international relations, contends that “[N]othing matters more than this profound obligation” (2). However, during the times of national threat an increased demand of executive branch to expand its powers can come to a point where the role of the Constitution might be marginalized, and thus a legitimacy of executive authority, as defined by the Constitution, can be questioned. In contrast, during normal times, the need for “drastic policies” (Kassop 2) would be inconceivable, and, therefore, constitutional law prevails at these times. In this manner, such situations raise a controversial issue whether constitutional law can be altered in a case of national emergency.

In their article “Accommodating Emergencies” published in *Stanford Law Review* journal in December 2003, professors of Law at University of Chicago Eric A. Posner and Adrian Vermeule, initiate their reservations about acceptable roles of the Constitution during uncertain times with two broad views: “[the] accommodation’ [view] and [the] ‘strict enforcement’ [view]” (1). The former view holds that it is vital for power to be concentrated within the federal government, specifically in the executive branch, during national crisis. Therefore, during an emergency “the [C]onstitution should be relaxed or suspended” (Posner and Vermeule 1). A core assumption of this theory is “[that] the risks to civil liberties inherent in expansive executive power...are justified by the national security benefits” (2). In spite of that, the second view conveys a different perspective the Constitution may take during emergencies.

Indeed, the “strict enforcement view,” as its name suggests, states that constitutional law has to remain the same during national crisis as in less urgent times. An underlying reason for that is an aspect of “compelling interest” of executive power to justify the use of constitutionally impermissible

means during peace times to achieve the ends, such as prevention of terrorist attacks, during the times of emergency (Posner Vermeule 2). Hence, a central assumption of this view: there should be a proper balance between the government's interests in national security and civil liberties "as [they] always need to be" (2).

Having established two major viewpoints of proper roles of the Constitution during an emergency, it is important to proceed to constitutional law of the United States. As Professor of Law at New York Law School and President of American Civil Liberties Union, Nadine Strossen, notes in her article "Safety and Freedom..." published in *Harvard Journal of Law & Public Policy* in Fall 2005, the Constitution of America authorizes Congress to suspend only "the writ of habeas corpus" (2) in only two specific cases: "[Cases of] Rebellion or Invasion"; and only when "the public Safety may require it" (2). Hence, apart from these circumstances, the Constitution does not provide any "textual warrant for [any] further limits on rights" (2) in a situation of national emergency. For instance, if executive power were to restrict the rights of individual such as freedom and privacy, then the government, in the words of Nadine Strossen, would need to satisfy "strict judicial scrutiny," that its policies are necessary and are least restrictive (2). Consequently, if these means are to be demonstrated by the government, then its limits on rights in the name of national emergency are justified. In this way, it becomes possible to test the constitutional soundness of the USA PATRIOT Act, and, in turn, it permits us to proceed to an analysis of changes in the laws as enforced in the Act.

Quickly, without an essential debate, bypassing regular committee considerations and hearings, the 342-page USA PATRIOT Act, which stands for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, as Nancy Kassop observes in her article, "rushed its proposals through...both houses of Congress" with massive support and with "lightning speed" (3). As emotions of the tragic 9/11 events demanded and as its title unfolds, the Act's primary purpose is intended to reveal and prevent terrorist attacks within the United States by means of "appropriate tools." However, a candidate for J.D. at Northwestern University School of Law, Manas Mohapatra, asserts in the *Journal of Criminal Law and Criminology* that its tools or provisions are a long-awaited "wish list" of federal investigators which has rather broader applications than only prevention of terrorist-related activities (3).

Indeed, the new legislation relaxes standards for law enforcement officials to obtain Foreign Intelligence Surveillance Act *significant* purpose warrants for wiretaps and searches which involve less evidence than the traditional, *primary* purpose warrants required in domestic criminal cases. For instance, one of the Act's provisions permits law enforcement authorities to use National Security Letters issued by FBI officials instead of warrants authorized by a judge. Thus, with these relatively low standards of proof warrants the Act permits federal agents to access wide range of personal information, such as medical, library, educational, financial, and travel records. In addition, the new law amends Privacy Act and Family Educational Rights by allowing law enforcement authorities to request and obtain student information "in conjunction with a terrorism investigation" (Hockeimer 2). It also grants intelligence authorities to secretly search suspects' homes without any initial notification if the latter has "an 'adverse result' on the investigation" (Kassop 6); what is more, it prohibits "subpoenaed" business from telling *anyone* whose records were requested and investigated by FBI (Swartz "PATRIOT Act's Reach Expanded" 1). As Barbara Dority, the president of Humanist of Washington, makes the case in her article "Your Every Move" published in *The Humanist*, the PATRIOT Act further broadens a definition of domestic terrorism describing it as "act[s] dangerous to human life that [is] in violation of the criminal laws of the U.S. of any state that appear to be intended to intimidate or coerce a civilian population" (5). And, finally, under new legislation, the Attorney General, himself, if has *reasonable grounds*, can request a detention of any non U.S. citizen for up to 7 days (Kassop 6).

Such provisions of the PATRIOT Act reveal dismantling of the 'wall' between criminal and intelligence agencies allowing both to share obtained information. To fully understand some possible

consequences of the breakdown of this ‘wall,’ it is vital to distinguish between the qualities of information collected by intelligence agents as opposed to law enforcement agencies. The former Attorney General of the United States Richard L. Thornburgh, who served under Presidents Ronald Reagan and George H.W. Bush administrations, reports in his article “Balancing civil liberties and homeland security...” that the latter (law enforcement agency) seeks “legally admissible” information to prove the guiltiness of a criminal after he/she committed a crime; while the former (intelligence agent) looks for and collects any information to prevent a future crime (3). By permitting these two types of information to be shared, the PATRIOT Act creates a possibility for intelligence-gathers to use their information – with a low probable cause standard due to ease of requesting and receiving a warrant – towards the ends of criminal prosecutions. Except for elimination of the ‘wall’ between criminal and intelligence agencies, the Act also undermines historical purpose of FISA, as Cathy Zeljak points out in “The USA Patriot Act and Civil Liberties (Part I)” article published in *Problems of Post-Communism*. FISA was intended to resolve long term uncertainty between courts demand for high standards of proof for criminal investigations and national security threats by dividing warrant standards for foreign intelligence surveillance and criminal investigations. In other words, explains Cathy Zeljak, FISA was passed to “draw a clear statutory line between the executive branch need to conduct surveillance for purposes of national security and the fundamental rights conveyed of U.S. citizens” (1).

In this way, it can be affirmed that on the one hand the PATRIOT Act exemplifies a significant shift of power from the courts to Department of Justice and from the Congress to executive branch when investigating terrorism. Yet, on the other hand the PATRIOT Act “allege[s] infringements on civil liberties and other constitutional rights,” warns the former Attorney General Richard L. Thornburgh (3). Consequently, the government’s justification of its rights-restricting measures of the Act – which, as outlined above, go beyond what the Constitution permits – is needed. Indeed, Nadine Strossen writes in her article that post-9-11 restrictions limit some of First Amendment freedoms (2). Therefore, to justify limitations of the PATRIOT Act the government authorities need to satisfy a constitutional soundness test, as it was noted earlier. Hence, an examination of arguments of supporters of the Act will reveal whether its provisions are justifiable or not.

Soon after the PATRIOT Act had been passed, George W. Bush declared that it would allow law enforcement officials to “‘identify, to dismantle, to disrupt, and to punish...[modern] terrorists before they strike’” (qtd. in Davis 1). In other words, President Bush reassured that Department of Justice’s prevention of terrorist-related activities became a greater priority than prosecution of crimes. Besides that in one of the debates the President expressed his opinion that all those tools offered to intelligence and law enforcement authorities are critical for protection of the American people, and that the Congress has a responsibility not to block them (Stolberg Lichtblau 2). Furthermore, the recently appointed U.S. Attorney General Alberto Gonzales proposed to add more restrictions “to ‘keep America safe’” (Gilbert 3), and with similar reservations a few months after 9-11 his predecessor Ashcroft alarmingly stated: “‘we’re going to do what we need to do to protect the American people’” with respect to political and religious freedoms (qtd. in Davis 2). In this way, it can be inferred from such statements of government’s representatives that instead of providing reasoning behind their arguments, they mainly appealed to methods of persuasion to convince the public of the soundness of the PATRIOT Act’s provisions. For instance, President Bush clearly applied such approach when bringing to an end a debate about extension of some of the Act’s clauses: “[T]he senators who are filibustering the Patriot Act must stop their delaying tactics so that we are not without this critical law even for a single moment” (qtd. in Stolberg Lichtblau 2). Thus, if applied to constitutional soundness test, the government satisfies only “strict judicial scrutiny” by indicating that the purpose of the PATRIOT Act is to protect national security. Analogous are the justifications of other supporters of the Act’s controversial provisions.

One of them is a consultant at the Investigative Project in Washington D.C., Andrew McCarthy, who also led the prosecution of Sheik Omar Abdel Rahman and the rest of the group of terrorists in connection with bombings of World Trade Center in 1993. In his article “The Patriot Act Without Tears: Understanding a Mythologized Law” published in *National Review*, McCarthy defends the “dismantling” (2) of intelligence ‘wall’ by noting that its presence made the government helpless in fighting against terrorism. To prove his point, McCarthy presents an obvious example: terrorists commit not only bombings but also identity thefts and immigration frauds, which are impossible for intelligence to reveal under FISA. And the fact that PATRIOT Act modernizes investigating tools by adjusting to contemporary technologies makes it easier and more effective for intelligence to fight against terrorism. Thus, the author concludes: it is “invaluable” that the PATRIOT Act permits capturing more information (3).

Subsequently, McCarthy labels “sneak-and-peek” (5) warrants as benign. The key reason for that is its ability to delay notification, which if not sanctioned can “cause endangerment of life, facilitation of flight, destruction of evidence...” and as a result may jeopardize an investigation (5). In his article McCarthy also addresses some of critics’ arguments. To illustrate, McCarthy observes that “sneak-and-peek” type of warrants or wire tap law is not a “novel encroachment on privacy”; on contrary, both of them are “well-established” tools that require prior court approval and that have been used for a long time (5). While the latter argument is valid, it is not consistent with fears of critics.

The opponents argue that “sneak-and-peek” warrants are an assault on privacy rights not because they were not aware of it in the past, but because new legislation permits intelligence and law enforcement officials to obtain them with greater ease than ever before. Hence the core of their apprehensions is that the government will abuse “sneak-and-peek” easy-to-get type warrants to achieve other than the terrorist related ends and, therefore, will strike at their privacy rights. In this case, McCarthy’s claim can be termed as an excuse rather than an argument.

Assessment of proponents’ arguments inevitably uncovers the following tendency: the government authorities and supporters of the PATRIOT Act justify its rights-restricting provisions by showing that it is in the name of national security. This, in fact, can be strongly confirmed by noting that the United States has not yet experienced any terrorist attacks since September 11th of 2001. In their arguments the advocates, however, don’t demonstrate that such measures are necessary and appear to be the least restrictive alternative. Therefore, the rights limiting provisions of the PATRIOT Act are not justified by the government and, consequently, are not consistent with the Constitution. For this reason, the arguments of critics become more relevant, and thus a need to consider them for further understanding – whether the government has actually abused the means of the PATRIOT Act – is required.

Since the fall of 2001 many courts have struck down some of the Act’s provisions as unconstitutional. Specifically, U.S. District Judge Victor Marrero in New York ruled that increased surveillance power under the PATRIOT Act “broadly violated the U.S. Constitution” (Swartz “Patriot Act Provision Ruled” 1). According to Judge Marrero, it violates the First and Fourth Amendments which protect citizens from unreasonable searches and their right to free-speech infringed by the Act’s ban on recipients’ disclosure of the National Security Letters (1). In another case, Judge Audrey B. Collins of Federal District Court in Los Angeles struck down the Act’s provision on “material support for terrorist groups” indicating that the latter was “too broad and vague” (1). In a more recent case the U.S. Court of Appeals for the Eleventh Circuit unanimously rejected officials’ claims to “invade the privacy and free speech rights of participants...[of] demonstration against torture and other human rights abuses” (Strossen 5). The court subsequently stated that the war on terror is not likely to “truly” end, and, therefore, “we cannot simply suspend or restrict civil liberties” (5). Similarly, in one of her cases Justice Sandra Day O’Connor has put that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s

citizens” (qtd. in Strossen 3).

In this way, the courts’ rulings directed to invalidate some of the PATRIOT Act’s provisions imply at least two things: their (courts’) importance to protect civil liberties, despite that their powers were transferred to Department of Justice, and unconstitutionality of some of the Act’s clauses. However, this does not follow that executive power abused or misused some of the Act’s provisions; while an exemplification of certain instances would, on the other hand, provide us with such information. Before that it is valuable to observe a related argument of the opponents.

Responding to the proponents’ claim that no abuses have been documented, critics report that under the PATRIOT Act it is impossible to reveal such cases. As professor of law at Northwestern University Manas Mohapatra explains, this is because “the Justice Department has repeatedly refused to divulge information on individuals detained warrants secured under the PATRIOT Act” (11). Nonetheless, Barbara Dority in her article published in *Humanist* discloses that less than half a year after the legislation had been passed, the Justice Department lectured on how to apply new wiretapping measures beyond terror cases (3). Dority also cites a study conducted by General Accounting Office which concludes that as of 2003, three-quarters of convictions “classified as ‘international terrorism’” dealt with “more common non-terrorist crimes” (4). On top of this, the author declares that “more than 750 immigrants were jailed for many months” while none of them was finally charged with any crime (4). Hence the reservations of critics that PATRIOT Act gives authorities a power to abuse civil liberties seems to be likely.

One such case involved a Canadian citizen, Maher Afar. Afar was arrested by U.S. immigration authorities and held in prison for ten month without being given a chance to speak with a lawyer and then was finally released when authorities got convinced that he had no ties to terrorism (Mohapatra 13). In his article Manas Mohapatra analyzes that this occurred because he was mistakenly blacklisted as a “possible international terrorist” by CIA agents (13). However, the author’s essay reveals that intelligence can not only make mistakes in its low standard of proof reservations but also can employ the power granted by provisions of the PATRIOT Act towards other means. Indeed, earlier in his essay, Mohapatra cites the case occurred in Las Vegas where federal agencies used the Act’s anti-money laundering provision to request and “access the financial information of strip club owner” Michael Galardi and a number of other politicians “in a public corruption probe” (2).

In this way, some cases and studies exemplified by scholars in their essays suggest that the PATRIOT Act’s provisions permit authorities to take advantage of its clauses in cases not related to terrorism. Moreover, their research unveils that there is a greater risk of charging innocent people with terrorist-related activities, violating peoples’ privacy and liberty, and damaging their reputation. With this in mind, the Act, however, prevents individuals from knowing whether their rights and privacy were violated. As is it was earlier noted, on behalf of the executive authorities there is no justification of such measures, and because there is some evidence, as provided above, indicating misuse and abuse of power granted by the PATRIOT Act (even with all its surrounding secrecy) this analysis leads to the following thesis and, in fact, conclusion of this essay: the USA PATRIOT Act is an unjustified abuse of executive power.

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