

Hearing Before the Senate Judiciary Committee
“Preventing and Responding to Acts of Terrorism: A Review of Current Law”
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Answers to Written Questions

1. Senate Judiciary Committee Member (SJCM) : I appreciate your willingness to appear before the Committee today. While we might not agree on every issue surrounding the PATRIOT Act, I believe we can all agree that government should provide the maximum amount of security for its citizens in the least restrictive means possible. I'm pleased to see that you would even oppose abolishing the PATRIOT Act. But, as all lawmakers know – the devil is in the details. I can't recall a law that has been as universally distorted as the PATRIOT Act. That is why it is vital to this debate that we cut through the hyperbole. Ms. Eyer, in your opinion, why has there been such and enormous discrepancy between myth and reality regarding the PATRIOT Act? And what can we do to remove the distortions and hyperbole from the debate so that we can focus on the vital debate of how to make this country more secure in the least restrictive way possible?

Dani Eyer: I think the greatest single reason for any confusion in the general public concerning the PATRIOT Act is the unwillingness of the Justice Department to be forthcoming about the law and how it has been used. While the Attorney General has engaged in public relations events, he has not answered direct questions about the PATRIOT Act from either the general public or even members of Congress. People's legitimate concerns about provisions of the PATRIOT Act that infringe on civil liberties are only exacerbated when the Department of Justice tries to shroud the entire act in secrecy.

Part of the 'myth versus reality' dichotomy you speak of comes from the Department defending sections of the PATRIOT Act that are not being assailed, while not directly addressing the specific changes being proposed. It is also confusing to the public when government representatives appear at town hall forums and make misleading statements to the public about the Act, as recently happened when the City of Dallas, Texas was debating a city council resolution expressing concern over parts of the PATRIOT Act. U.S. Attorney Matthew Orwig of Texas' Eastern Judicial District said "There's a lot of misinformation about this act. It cannot be used to investigate ordinary crimes or domestic crimes." ¹ This example is just one of many that are chronicled. The ACLU has documented some of these misleading statements made by the Department of Justice and reports are available on our national website. Private citizens may occasionally get confused, and mistakenly think a separate government action that infringes on civil liberties is contained in the Act, but that is understandable when there is such a disregard for engaging critics, or any questioners, by the Administration. However, it is far more

¹ 'Dallas council debates Patriot Act', **The Dallas Morning News**, Dec. 18, 2003.

troubling when completely false statements like the one in Dallas are made by government officials whose job is to understand the law.

The best way to move forward would be first to recognize that many critics of the law aren't asking for repeal, but instead are asking for changes in a few key areas to protect the civil liberties of ordinary Americans. Passage of modest legislation like the SAFE Act would go a long way to assuage the concerns of American citizens without taking away any powers the Department of Justice needs to fight the war on terror.

2. SJCM: Ms. Eyer, you expressed concern over section 215, and stated that it would chill the “extremely sensitive relationship that exists between booksellers or librarians and their customers.” You say that “people who walk into bookstores or library’s carry a burden of insecurity: they worry they are not smart enough, that they might be choosing a book that labels them, that the content of the book may be suspect to some one else, or that some one is watching’.” My understanding differs considerably. As I understand it, Section 215 allows the Foreign Intelligence Surveillance Act court to issue orders obtaining business records only in international terrorism or espionage cases – records can only be obtained by a court order (not through a “subpoena” as many have claimed), and only if the court determines that the FBI is entitled to the information. This is a vital counter-terrorism function. Do I understand you correctly, that you are advocating revoking 215 which would prevent the FBI from contacting a flight training school to find out if Mohammed Atta is taking flight lessons or the local library to see if Jose Padilla has been checking out the *Anarchists Cookbook*?

Dani Eyer: What we are advocating is a return to individualized suspicion in FISA records searches, not abolishing the power altogether. The PATRIOT Act removed the requirement that the government show “specific and articulable facts that the person to whom the records they seek pertain is an agent of a foreign power.” The government now needs merely to state that the records sought are relevant to an ongoing terror investigation. Even assuming that this standard is not so loose as to allow indiscriminate fishing expeditions, the removal of individualized suspicion means that the records of those not even the target of the investigation will be caught up in the information grab. This change would not “prevent the FBI from contacting a flight-training school to find out if Mohammed Atta is taking flight lessons, or the local library to see if Jose Padilla has been checking out the *Anarchist’s Cookbook*”, as you posit. The FBI would get a FISA court order for the records of Mr. Atta or Mr. Padilla, and then obtain the specific records. What the FBI wouldn’t be able to do is go to the library Mr. Padilla was using and demand all of the library records, including those of people for whom the government has no suspicion of wrongdoing.

Importantly, in the two examples you present, even though the government would not be prevented from obtaining those records under the individualized suspicion standards, there are a number of other ways in which the government could obtain them not involving FISA at all. For example, a federal prosecutor could use a grand jury for a subpoena in connection with a criminal inquiry. The records could also be obtained with

a search warrant based on probable cause, either pursuant to FISA or to general criminal law. Finally, the government could simply ask for records on a voluntary basis, after explaining why they were needed.

3. SJCM: Contrary to what your statement implies, this authority is not used indiscriminately. Section 215 merely gives the FBI the same power that federal grand juries have long had in ordinary criminal cases. Can you give me one example where Section 215 has been abused?

Dani Eyer: Let me address your suggestion that “Section 215 gives the FBI the same power that federal grand juries have long had in ordinary criminal cases.” Section 215 differs in critical respects from grand jury subpoenas. Section 215 does not require the approval of a federal prosecutor, and the information that is sought by a section 215 order need not relate to any investigation of criminal activity. A target of a section 215 order – unlike the target of a grand jury subpoena – may not inform anyone that an order has issued. The secrecy of section 215 would prevent targets of government surveillance from raising alarms about the use of the power with members of the press or civil liberties organizations, while such alarms are often raised about overbroad or intrusive criminal subpoenas. Finally, section 215 provides no mechanism for a recipient of an order to seek to quash the order before a judge, while a grand jury subpoena does provide such a mechanism.

The Department of Justice said that it had not used Section 215 as of September 2003. The Department has not responded to inquiries from some U.S. Senators as to whether the power has been used since then. This raises the question of the necessity of Section 215, as the United States government has been conducting the largest terrorism investigation in our nation’s history and has yet to need this contentious provision.

As you know, Section 215 court orders subject the recipient of the order to a gag order as well. This provision makes it nearly impossible to know how exactly the power is being used, and whether it is being used improperly. However, regardless of its specific use or non-use, the mere existence of such a sweeping authority to obtain personal records – including library, bookstore, medical and other personal records – in intelligence investigations, without the ordinary safeguards associated with the criminal process, itself has a chilling effect on First Amendment and other constitutionally protected activity.

Questions for All Witnesses

1. SJCM: First, do you agree that our country is better prepared to stop acts of terrorism today than we were two years ago?

Dani Eyer: It is hard to tell. Undoubtedly, a greater sense of vigilance among ordinary Americans has helped, as has new funding for counter-terrorism efforts. However, in terms of hard statistics, the number of credible terrorist arrests and prosecutions has been low. In the Portland and Buffalo prosecutions, the charges dealt not with conspiracy to commit any impending attack, but stemmed from the defendants' travels to training camps in Afghanistan or charitable donations. Certainly, any support for al-Qaeda is inexcusable, but our prosecutions to date have not caught any "ticking time-bombs."

While the Department of Justice continues to tout its efforts to counter terrorism with impressive-sounding statistics in public forums, those numbers are very misleading. Raw prosecutorial data also shows that, as of December 2003, only five defendants in the close to 900 cases classified as domestic or international terrorism had received sentences of 20 years or more. Only 23 have received sentences of five years or more. Either the DOJ is inflating statistics, and overclassifying cases as terrorism prosecutions, or we need to work on increasing the effectiveness of our federal prosecutors.

We also do not believe that the controversial new surveillance and investigative powers, including the dozen or so provisions to which we object in the Patriot Act, have benefited our safety as much as they have eroded our freedoms. Arguably the most controversial provision of the Patriot Act, Section 215, has by the Justice Department's own admission not been used yet, so it cannot have paid any dividends in added security.

In another example of new post-9/11 security policies of dubious value, the General Accounting Office found recently that the CAPPS II airline security data-mining program had failed to demonstrate any inherent boon to security. For instance, the GAO found that the program's designers had failed to deal with the possibility of false positives, which would both hamper the program's effectiveness and threaten civil liberties.

At base, the ACLU continues to believe that rational, reasonable, properly considered security measures can and should be in place. These programs, however, need not infringe on our values and our laws. They should be implemented with appropriate safeguards to ensure individualized suspicion and to mitigate against abuses. In short, the fight to protect American security is not a zero-sum game. It is one where we can guard our safety while respecting basic American freedoms. We do not believe, however, that those provisions in the Patriot Act to which we object strike that crucial balance.

2. SJCM: Can anyone cite specific examples of what they would consider abuse under the provisions of the PATRIOT Act?

Dani Eyer: First, our objections to certain provisions in the Patriot Act were prompted not by their rampant abuse, but by the *potential* for abuse inherent in new investigative and surveillance that encourage fishing expeditions which treat whole groups of Americans as potential suspects. In the 1950s, 1960s and 1970s, the FBI, the CIA and the U.S. military -- because of a lack of basic checks and balances -- were able to do exactly that: use highly invasive surveillance and investigative tools to spy and harass groups of people, the vast majority of whom were peaceful, law-abiding and patriotic.

During the bad old days of J. Edgar Hoover and COINTELPRO, however, FBI and CIA agents snooped on civil rights and anti-war activists in an extra-legal fashion. There were no laws mediating their conduct. In the late 1970s, the U.S. Congress acted to provide checks against future abuse. Many of these checks have been substantially weakened by the Patriot Act and other White House and Justice Department policy changes (most notably, the revision of the Attorney General Guidelines limiting when and how FBI agents can initiate full-bore domestic and foreign policy investigations).

By removing these reforms of the late 1970s -- for instance, by easing FBI access to court orders under the Foreign Intelligence Surveillance Act of 1978 -- the problematic provisions of the USA Patriot Act act like legal landmines. Once the furor over the bill has died down, many will remain permanent fixtures of the American legal landscape, waiting for exploitation by the unscrupulous.

As for specific abuses, we believe that the overuse of administrative measures like National Security Letters, which are issued without any oversight role for the courts, poses serious problems. Already, the Las Vegas Review-Journal has reported that over last year's holiday season the FBI likely used NSLs to seize the travel and hotel records of close to 300,000 visitors. The FBI took this action even though, by their own admission, there had been no specific terrorist threat.

When talking about Patriot Act abuses, it is important to realize that American civil liberties are not something that can be endangered so long as government officials assure us they will not step out of line. Rather, we keep in place procedural and legal checks and balances that act to stop abuse before it occurs. The Patriot Act's troubling provisions, however, proceed from the opposite assumption: that government agents should be given the power to abuse our rights, under the assumption that they will simply not do so.

We need to implement modest revisions of the Patriot Act to restore these checks and balances against abuse.

3. SJCM: What specific changes, if any, would you recommend to change the PATRIOT Act to ensure that liberties are preserved while enabling law enforcement to combat terrorism?

Dani Eyer: The Justice Department has, from the beginning of this debate, sought to obscure, rather than illuminate, the legitimate civil liberties concerns raised by parts of the USA PATRIOT Act. The Department's statements in defense of the USA PATRIOT Act have been largely non-responsive to the complaints of civil liberties organizations. The example of the nationwide search warrants provision, at section 219 of the Act, are a case in point. Civil liberties groups do not object in principle to a nationwide search warrant power; rather, our concern is that the existence of such a power could provide a temptation for the government to engage in judge-shopping, i.e., choosing to apply for a warrant in a particular jurisdiction only because a judge is known to easily approve warrant applications. These concerns could be addressed by a sensible amendment to section 219 to ensure that a nexus exists between the investigation and the particular judge who is chosen to review nationwide search warrant applications.

The debate over the government's actions, and their impact on civil liberties, would be greatly aided by a more targeted discussion that focuses on the specific areas in which civil liberties are threatened.

In that vein, we strongly support the Security and Freedom Ensured (SAFE) Act introduced by Sen. Larry Craig. The SAFE Act addresses a number of the troublesome provisions laid out above, specifically:

- The expanded power to obtain business records under FISA (section 215) and to issue "national security letters" (section 505) – all without any evidence linking the records to a foreign agent,
- The "sneak and peek" provision (section 213) which threatens to turn an exception to the Fourth Amendment's "knock and announce" rule into a routine, rather than extraordinary, method of law enforcement,
- The poorly drafted "roving wiretap" provision, which manages to allow an intelligence wiretap where neither the name of the target nor the facility the target is using is specified, and which omits the sensible "ascertainment" requirement for intelligence roving wiretaps that is already required for criminal roving wiretaps, and

Other general concerns that we have which are not addressed by the SAFE Act include:

- (1) Section 214, relating to the use of pen registers for foreign intelligence purposes.
- (2) Section 216, relating to the use of pen registers in criminal cases.
- (3) Section 218, relating to the Foreign Intelligence Surveillance Act .

- (4) Section 411, relating to new grounds for deportation.
- (5) Section 412, relating to mandatory detention of certain aliens.
- (6) Section 507, relating to educational records.
- (7) Section 508, relating to collection and disclosure of individually identifiable information under the National Education Statistics Act of 1994.
- (8) Section 802, relating to the definition of domestic terrorism.

The ACLU certainly agrees that many of the administration's most troubling actions are not authorized by the USA PATRIOT Act. Some of these actions are also rescinded or limited by the Benjamin Franklin True Patriot Act (H.R. 3171).

Other USA PATRIOT Act provisions, such as those regarding money laundering, may also pose dangers for civil liberties. These provisions have not been the focus of the ACLU's advocacy and warrant further study.

4. SJCM: Do you believe that the struggle balancing civil liberties with national security is a zero-sum game?

Dani Eyer: As mentioned, we do not believe the fight to balance civil liberties is a zero sum game. Moreover, we also worry that the implementation of poorly considered measures that are suppressive of our liberties are actually not very effective. For instance, a civilian advisory committee to the Pentagon on its "Total Information Awareness" data-mining system urged new protections for use of these technologies not just for the sake of protecting liberty, but in order to ensure efficacy. "Good privacy protection in the context of data-mining is often consistent with more efficient investigation," the advisory commission said, as reported in the New York Times on May 17, 2004.

The same thing applies with the USA Patriot Act. For instance, many sections of the Patriot Act promise to reduce or remove individualized suspicion from the collection of intelligence in our counter-terrorism efforts. However, as the 9/11 commission proceedings demonstrated on several occasions, intelligence failures prior to the attacks occurred not because of a lack of collection capability, but because of insufficient analytical capacity. In other words, there was too much hay on the stack while we were looking for the needle. The problem parts of the Patriot Act, however, fail to ameliorate this problem, but threaten to throw far more hay on the stack.

As Americans, we pride ourselves on our innovative spirit. The fight against terrorism is no exception. We can find ways in our counter-terrorism efforts to give law enforcement and the military the tools they need to interdict and punish terrorists without compromising our values as a free nation.

5. SJCM: Would you suggest any changes to the PATRIOT Act's Section 206, the so-called "roving wiretaps" provision? If so, please let me ask you for alternative suggestions. I feel we need to equip law enforcement and other agencies with 21st Century terrorists and not organized crime of fifty years ago. Search warrants were always meant to go beyond the mere tapping of telephone wire. We know that terrorists regularly communicate by various means including land lines, cell phones, email, and are the first to exploit the newest technology for their own means. How can we effectively trace terrorists unless we allow a wiretap warrant to follow the suspect instead of being limited to one of the many means the suspect will use to coordinate an attack?

Dani Eyer: The amendments to section 206 of the PATRIOT Act contained in the SAFE Act accomplish precisely what you have asked for. Under 50 U.S.C. *1805(c)(1)*, an order approving an electronic surveillance shall specify (A) the identity, if known, or a description of the target of the electronic surveillance; and (B) the nature and location of each of the facilities or place at which the electronic surveillance will be directed, if known. Under these guidelines, it is possible for an order for electronic surveillance to be issued without identifying a specific target or facility.

The SAFE Act would eliminate this ambiguity by requiring either the target or the facility be identified, making it an either-or requirement. It would still permit roving wiretaps, however. Additionally, the SAFE Act would add a requirement identical to the requirement for roving surveillance under the criminal law, that if the location or facility was unknown when the court order was issued, surveillance may only be conducted at a facility when the target's presence is ascertained.