

Losing the War for Civil Liberties

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It used to be that Americans packed for air travel with a mental checklist of personal items needed for their holiday or business engagement: which clothes to bring, shoes, cameras, etc. Today, however, in the backwash of the Sept. 11 attacks on the U.S. mainland, a new and more detailed (often ridiculous) list of concerns must be considered.

No eyebrow tweezers, for instance, no fingernail files or clippers, no toothpicks, no rat-tail combs, no letter openers or anything that even resembles a knife, and just two (count 'em, two) throw-away lighters. Every one of these items, apparently, is considered a security threat and, if noticed by the new federal airport-security force, will land a passenger at the end of the conveyer belt for a public shakedown and perhaps worse.

While time-consuming, embarrassing, annoying and sometimes frightening, the new airline-security measures pale in comparison to a number of other (more invasive) provisions federal lawmakers authorized in the immediate aftermath of the terrorist attacks on the World Trade Center and the Pentagon. Civil libertarians charge that the new security measures sacrifice political freedom in the name of national security while contributing little or nothing to the war on terror.

Either way, the terrorists win. A little more than one month after the Sept. 11 terrorist attacks, public enemy No. 1, Osama bin Laden, predicted that "freedom and human rights in America are doomed. The U.S. government will lead the American people -- and the West in general -- into an unbearable hell and a choking life." During the year following the bin Laden attacks, sweeping new government powers indeed have been authorized that civil libertarians say threaten the freedoms Americans are told this nation's enemies hate.

Many of these powers were authorized in a flush of panic by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, or USA PATRIOT Act [see "Police State," Dec. 3, 2001]. Passed before members of Congress even could read it, this law provides sweeping powers to state and federal law-enforcement officials to combat terrorism. The problem, critics say, is that under these new powers every American citizen is a possible suspect of terrorism. On the right, *Insight* is on record as opposing this law from the moment of its passage. On the left, the American Civil Liberties Union (ACLU) has worked tirelessly to resist assaults on civil liberties arising from the Sept. 11 attacks and has focused on the act.

Indeed, ACLU Executive Director Anthony Romero tells *Insight*, "We've been enormously concerned that the war on terrorism has fundamentally eroded civil liberties in the country. You have a system of checks and balances that has been upset by Attorney General John Ashcroft; you have actions taken by the Justice Department that have been veiled in a cloak of secrecy; and you have wholesale abridgement of the Bill of Rights even in cases

involving American citizens. All of our efforts have been focused on the effort to keep in place a system of checks and balances."

The ACLU has been relentless in publicizing what its leaders say they regard as the most egregious of the new security measures under the USA PATRIOT Act, including but not limited to the following:

- The law allows for indefinite detention of noncitizens who are not terrorists on minor visa violations.
- It minimizes judicial supervision of telephone and Internet surveillance by law-enforcement authorities in antiterrorism investigations and in routine criminal investigations unrelated to terrorism.
- The act expands the ability of the government to conduct secret searches -- even in criminal investigations unrelated to terrorism. (+, ++, +++, +++++)
- It gives the attorney general and the secretary of state the power to designate domestic groups as terrorist organizations.
- The new law grants the FBI broad access to sensitive medical, financial, mental-health and educational records about individuals without having to show evidence of a crime and without a court order.
- The act allows searches of highly personal financial records without notice and without judicial review, based on a very low standard that does not require the showing of probable cause of a crime or even relevance to an ongoing terrorism investigation.
- It creates a broad new definition of "domestic terrorism" that could allow a police sweep of people who engage in acts of public protest and subject them to wiretapping and enhanced penalties.
- And this law allows the sharing of sensitive information in criminal cases with intelligence agencies, including the CIA, National Security Agency, Immigration and Naturalization Service and the Secret Service.

"The searches and seizures that have us the most concerned," continues Romero, "are the 'Sneak and Peek' warrants that allow the government to come into a citizen's home and search their personal effects, take photographs, download information off their computers and not inform them of the search until after the fact. The problem with this is that sometimes law enforcement gets it wrong. They may have the wrong name, the wrong address, or the judge might have signed the wrong warrant."

According to Romero, "The problem is that we haven't asked the most basic threshold question that we needed to ask before we started adding all the law-enforcement intelligence powers -- how did Sept. 11 happen? Were law enforcement and intelligence officials using their extensive powers to their fullest extent prior to Sept. 11 and, if not, why not? We need to know what broke down before we can figure out the remedy. Unfortunately, Congress

didn't address those issues. It's only now that they're looking at those issues."

The ACLU executive director adds: "Americans don't fully realize what has happened to some core American principles and basic workings of our democracy. Most Americans don't realize that American citizens are being held on American soil without access to lawyers and no charges having been brought against them. This fundamentally puts the Bill of Rights on its head -- there's no such thing anymore as the presumption of being innocent until proved guilty. This is just fundamentally un-American."

Civil libertarians, both on the left and the right, insist that the USA PATRIOT Act violates the First Amendment guarantee of freedom of speech; the Fourth Amendment prohibition of unreasonable searches and seizures; the Fifth Amendment right to due process; the Sixth Amendment guarantees of speedy and fair trial; the Eighth Amendment prohibition of cruel and unusual punishment; and the 13th Amendment prohibition against punishment by servitude without conviction.

John Whitehead, founder and president of the Rutherford Institute, a leading advocate of civil liberties and human rights, tells *Insight* that "the problem with a lot of the USA PATRIOT Act and some of the presidential Executive Orders is that the 99.9 percent of the people in this country who are not terrorists will be impacted by these laws. How can you suddenly introduce broadly encompassing laws which allow the government to search your e-mails, check your library books, do 'Sneak and Peek' searches of your home, turn your neighbor into a spy through the TIPS [Terrorist Information and Prevention System] program, etc., without hearings or so much as asking how these laws will stop terrorism?"

Whitehead says that, if this law stands, "The Fourth Amendment will have been totally blown. What the Fourth Amendment says is that you have to individualize suspicion, a judge has to carefully look at it and it has to be reasonable. Today, everything is considered suspicious." But, says Whitehead, "I'm hopeful that we'll look back in 10 years and say this was all crazy stuff. Back in the 1940s we put Japanese-Americans in prison camps, in the 1950s we had the McCarthy era and in the 1960s there was government harassment of the hippies and Martin Luther King. Today, most of us look back and say all that was wrong, so there is hope."

According to Whitehead, "Freedom and security are not mutually exclusive, but the only thing between us and tyranny is the Constitution of the United States. Do I think we've lost civil liberties? Yes. Have we set the groundwork for a police state? Yes. The question is whether we can reverse it. To do so will take a courageous administration led by a president of great intellect -- and a Congress that not only reads the bills it passes but which looks carefully at legislation and compares it with the clear meaning of the Constitution rather than the direction of the latest opinion polls."

The TIPS program to which Whitehead referred was created by the Department of Justice (DOJ) as a "national information-sharing system," which enlists the support of workers in the community to report "suspicious" activity to the government. Neighborhood groups also were recruited as in Cuba to report on "unfamiliar" people in the community or those whose behavior is "suspicious" or "not normal." The tipsters were to include the local cable guy, trash collectors and others. But the idea of assigning neighbor to watch neighbor finally

raised such a flap that the DOJ scaled back its snoop network to limit the hot-line tattletales to workers involved in the "transportation, trucking, shipping, maritime and mass-transit industries."

Dave Kopel, research director for the Independence Institute, a nonprofit policy-research organization, tells *Insight* that "the misnamed USA PATRIOT Act has plenty of search-and-seizure provisions that are not limited to terrorism even under the new, very broad definition. These would allow secret searches of your house -- warrantless searches without regard to whether it's a terrorism offense." Kopel says, "The FBI with the active assistance of the DOJ and White House pulled a real bait and switch on the American people. They said we've got to have these emergency powers for fighting terrorism, and what they really got was a whole lot of nonemergency powers for nonterrorist purposes. It's not a police state yet, but we're closer to it, and there has to be continued vigilance among the people. TIPS has received a lot of negative public reaction and they've scaled it back some. But the problem with the USA PATRIOT Act is that it has little to do with fighting terrorism."

According to Kopel, "We're safer from terrorists because we've bombed the hell out of al-Qaeda and the Taliban, but that didn't have anything to do with these new laws. We had the ability to do that before the new legislation. Today we have a much higher level of intrusiveness without greater security. It would be one thing to change your birthright of liberty for greater security -- at least you're making that trade-off. Essentially, though, with the USA PATRIOT Act they have cracked down on personal liberty without providing greater security."

Rep. Ron Paul (R-Texas), a libertarian who is one of only three Republican lawmakers to have voted against the USA PATRIOT Act, and an outspoken critic, tells *Insight*: "The so-called PATRIOT Act condones and institutionalizes everything and has really opened up a Pandora's box." He says, "I think there is a strong determination on the part of government to know everything about everybody, and fighting terrorism is the excuse, not the reason. All of these laws have been in the mill for years, and everything now is in place for what some people describe as a police state. I think we're on the verge of a very, very tough police state in this country -- and it will only end when Americans are fed up. So far people are terrified to say anything. Hopefully, we'll wake up before it's too late."

Whether the growing restrictions on civil liberties are temporary measures necessary to win the war on terrorism or a long first step toward a police state has become a matter of opinion -- which may be scary enough. But, given the new restrictions on civil liberties, the president's promise "not to allow this enemy to win the war by changing our way of life or restricting our freedoms" already seems to have been more rhetorical than realistic.

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