

**Privacy, Patriotism, and Academic Freedom:  
The USA PATRIOT Act's Challenges for Higher Education**

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In times of danger to national security, the United States often responds by attempting to tighten governmental controls over what we regard as potentially dangerous foreign influences in domestic life. These measures typically have two interrelated components: direct restrictions on foreign nationals entering and residing in the United States, and more general limits on freedom, applicable to immigrants and US citizens alike. Such legislative responses to foreign danger have a surprisingly long pedigree. The first such event occurred very early in the nation's history, during the Napoleonic Wars, when Congress attempted to shore up the Adams administration's support for the British cause by enacting the highly controversial measures known as the Alien and Sedition Acts.<sup>1</sup> A similar response occurred again during World War I, when the Espionage Act was used to punish "foreign" elements as well as dissidents objecting to the selective draft laws and American entry into Europe's "Great War."<sup>2</sup> During World War II, a wave of fear regarding national security mixed with ethnic and racial animosity produced legally authorized military orders for internment of persons of Japanese descent along the Pacific coast.<sup>3</sup> The "Red Scare" of the McCarthy era produced prosecutions for "subversive" activities under the Smith Act, along with congressionally orchestrated investigations of alleged Communists

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<sup>1</sup> Act of July 14, 1798, 1 Stat. 596.

<sup>2</sup> Act of June 15, 1917, 40 Stat. 219.

<sup>3</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944).

and Communist sympathizers in government, entertainment, and the media.<sup>4</sup> During the Civil Rights movement of the 1960s, J. Edgar Hoover's FBI conducted clandestine surveillance of civil rights leaders and infiltration of various civil rights organizations, looking among other things for national security threats from abroad. When the Viet Nam war erupted, he turned the same sort of attention on anti-war groups. Eventually, these clandestine surveillance activities were transformed by the Republican Nixon administration into a political tool and used against the Democratic Party itself, a step that ultimately provoked the infamous Watergate scandal.

These developments typically had certain features in common. First, they were usually triggered by real threats to American security from abroad. Second, they reflected waves of xenophobia – fears that foreign operators and agents would take advantage of American liberties, manipulate American governmental processes to serve foreign interests, and endanger the safety, security, and perhaps even the existence of the American polity. Third, they involved measures designed to trim civil liberty, invade privacy, and increase government surveillance and control over potentially dangerous foreign actors and organizations, together with their domestic supporters and sympathizers. Fourth, they “pushed the envelope” on constitutional protection for human rights, including freedom of expression, freedom of association, freedom from unwarranted search and seizure, privacy, and due process. Finally, they involved significant increments in government power, especially executive power, to investigate, detain, and prosecute both foreigners and US citizens whom the government believed represented a threat to American safety.

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<sup>4</sup> See *Dennis v. United State*, 341 U.S. 494 (1951); cf. MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* (1977); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002)

## The USA PATRIOT Act

The most recent major American response to a national security threat from abroad occurred after the tragic events of 9/11/2001, through the enactment of the USA PATRIOT Act. Within weeks after the events that brought about the annihilation of the World Trade Center and an attack on the Pentagon, Congress authorized one of the most sweeping reforms of federal investigative and prosecutorial authority ever undertaken. The reforms built on proposals for increased power to deal with threats of terrorism that had been developing since the 1980s, and that had attained an increasing sense of urgency as a result of an escalating wave of terrorist acts against the United States that went back at least to the bombing of a Pan Am flight over Lockerbie Scotland in the 1980s, and included the first bombing of the World Trade Center, the destruction of a federal building in Oklahoma City, bombing of an American embassy in Kenya, and the destruction of a naval vessel off Yemen. Of course the destruction and loss of life in these earlier instances, horrible as it was, nevertheless paled in comparison to the enormity of 9/11.

It is not necessary to go into detail concerning the provisions of the PATRIOT Act, which are voluminous and often highly technical, but it may be useful to pull out a few highlights and specifics.<sup>5</sup>

Initially, the title of the Act itself speaks volumes about the attitudes of the administration that proposed it and the Congress that enacted it. The name is actually an acronym, for **United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct**

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<sup>5</sup> For descriptions of the Act, see HOWARD BALL, *THE USA PATRIOT ACT* (2004); Cole, *supra* note 4.

Terrorism Act. The acronym clearly has a double meaning. Not only are these tools “required to intercept and obstruct terrorism,” but granting them to the government is a patriotic act. By implication, opposing these measures because of their impact on civil liberty is unpatriotic. As we shall see, this message carries with it the assertion that patriotic citizens must be willing to surrender liberty and sacrifice their rights to a powerful central government if the threat of terrorism is to be addressed. The message seems to be that we must pay for security with freedom, and we are not true patriots unless we are willing to do so.

Among the changes that the Patriot Act entails are key reforms in the way that intelligence is gathered and shared by the federal government. After Watergate, congressional hearings into the intelligence and surveillance process disclosed what were thought at the time to be dangerous excesses in clandestine surveillance and intelligence activity by the FBI (and to a lesser extent the CIA). Hoover’s FBI, in particular, had often used the pretext of potential influences from dangerous elements abroad as an excuse for operations that were really directed at American political dissidents. Congress had responded by enacting reform measures putting strict limitations on CIA activities within the United States, requiring separation of CIA and FBI intelligence operations, and subjecting FBI investigations in particular to substantial judicial control. In the 1970s these steps were thought to be major positive reforms that protected American liberties from the risk of investigative abuse and the danger of a police state.<sup>6</sup>

Twenty-five years later, the supporters of the Patriot Act argued that these restraints were obsolete, and that they made intelligence and surveillance operations both clumsy and

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<sup>6</sup> RICHARD A. BEST, JR., INTELLIGENCE AND LAW ENFORCEMENT: COUNTERING TRANSNATIONAL THREAT TO THE U.S. 13 (2001)

ineffective. The Patriot Act either eliminates the restraints entirely, or it waters them down by rendering judicial oversight a largely rubber-stamp process. In this regard, the Patriot Act has been followed up by further developments, most notably the creation of a new national intelligence director who will exercise responsibility for both domestic and foreign intelligence gathering operations. We are moving rapidly from separation, and a sharp line of demarcation between foreign and domestic investigative powers, toward total integration and elimination of the differences. What we thought in the 1970s should be kept apart we now want completely united.

The evident aim here is to make domestic investigation and surveillance look and function a whole lot more like foreign surveillance.<sup>7</sup> For those of us who grew up during the Cold War, it is not difficult to predict where this trend could take us. The idea of extensive, clandestine, largely unrestrained, few-holds-barred intelligence and counterintelligence activities outside the United States has been a permanent fact of life in our generation. James Bond (or rather his probably less debonaire American counterpart) lives and is forever young. But we have largely assumed, I think, that the same sorts of intelligence practices that we have come to tolerate as an inevitable necessity on the international scene could not be turned on us, here, in our everyday lives. After all, guarantees like the Fourth Amendment seem to prohibit them. I think that is part of what made Watergate seem so shocking. But as our perpetual enemy has

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<sup>7</sup> As then-Assistant Attorney General Michael Chertoff remarked “We are going to have to get used to a new way of thinking . . . . What we are going to have is a Federal Bureau of Investigation that combines intelligence with effective law enforcement.” *quoted in* Jim McGee, “An Intelligence Giant in the Making,” *Washington Post*, November 4, 2001, at A04. *See* David Lombard Harrison, *The USA Patriot Act: A New Way of Thinking, an Old Way of Reading, Higher Education Responds*, 5 N.C. J. L. & TECH. 177 (2004).

morphed from a Soviet or Chinese communist into a Middle Eastern terrorist, the line that Congress drew at the border no longer applies. The enemy, we have come to understand, is not just “out there” somewhere, but here. What happened in the past to protect our security outside our borders must now occur inside as well, and we must be prepared to rethink assumptions about liberty that conflict with that reality.

Other important reforms in the Patriot Act concern the powers that intelligence gathering and surveillance teams may exercise. The changes in investigative technique are too numerous to catalog, but again a few highlights will suffice. For example, the government has significantly expanded powers to gain clandestine access to the contents of personal communications, including both telephonic conversations and electronic messages. The government also has expanded authority to conduct secret searches of private homes and offices, not just of those who are suspected targets of investigations, but of those who might (knowingly or unknowingly) be giving them assistance, or those who might be witnesses to their suspected conspiratorial acts. In some circumstances, government may do so without any judicial oversight at all. In other situations, judicial permission is still required, but the standards for judicial approval have been relaxed in ways that make it much easier to obtain. Just how easy and extensive the searches might be cannot be told, because the judicial proceedings that involve them are secret.

Supporters of the Patriot Act have pointed out that most of these methods are not new. Many go back to the Foreign Intelligence Surveillance Act of 1978, one of the post-Watergate reform measures.<sup>8</sup> What is new is the scope (in terms of number, length, and extent) of the searches being undertaken, their focus on domestic activities inside the US, and the degree to

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<sup>8</sup>50 U.S.C. §§ 1801-29.

which they are being treated as routine components of law enforcement. It would be alarmist to say we have arrived at George Orwell's *1984*, but these measures bear marked similarities to the governmental investigative powers he envisioned. We may not yet have Big Brother, but there is a family resemblance – one might say we have authorized Big Brother's Cousin.

A third major focus of the Patriot Act is immigration. People of all political orientations were shocked to discover after 9/11 just how easy it was for known or suspected terrorists to get into the US, and how little the government did to monitor their activities once they gained entrance to the US. Consequently, much of the Patriot Act is aimed at tightening border controls, making visa requirements stricter, stepping up enforcement against illegal entrants and visa violators, and increasing tracking and surveillance of foreign nationals in the US. In conjunction with the creation of the Department of Homeland Security and the transfer of all immigration responsibilities to that department, the Patriot Act has put control of aliens at the top of the national agenda, at a level of importance it has not occupied since World War II. One of the more controversial features of this piece of the Patriot Act is its authorization for indefinite detention of foreign nationals suspected of potential terrorist activities, and detention of others, who may not themselves be terrorists, as “material witnesses” to terrorist crimes and conspiracies. Under the Bush administration's enforcement policies, some individuals have been held for months, even years, without charges being brought, and on some occasions without even being granted access to counsel, on grounds of being material witnesses to terrorism.

The focus on foreign nationals has also raised serious concerns regarding equality. The government has made no secret of its deliberate focus on Muslim males of primarily Middle Eastern or Northern African nationality or descent. In one way, of course, this makes sense,

since the terrorists who committed the atrocities of 9/11 and other attacks on the US shared these characteristics. But the potential for religious and ethnic profiling is very real, and has provoked a great deal of concern among civil liberties organizations.<sup>9</sup>

### The Patriot Act and Higher Education

The developments in and around the USA Patriot Act have particular significance for higher education in the United States.<sup>10</sup> There are several reasons. Initially, colleges and universities, as visible institutions to which members of the public have regular and relatively easy access, are potential targets of terrorist attacks, leading to strong pressures for heightened campus security. In addition, institutions of higher education conduct a great deal of governmentally supported research, some of it on national-security sensitive matters, some of it (such as biological research) using materials that could be diverted to terrorist plots. Again, these sensitive activities lead to pressure for heightened security measures and monitoring of those with access.

But most importantly, higher education is a magnet for foreign nationals, who come to the US to study.

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<sup>9</sup>See, e.g., Nadine Strossen, *It's a War on Terrorism, Not a War on Immigrants*, CIVIL LIBERTIES (Fall 2003).

<sup>10</sup>See Adrian Arroyo, *The USA Patriot Act and the Enhanced Border Security and Visa Reform Act: Negatively Impacting Academic Institutions by Deterring Students from Studying in the United States*, 16 TRANSNAT'L LAW. 411 (2003); Harrison, *supra* note 7; Jamie Lewis Keith, *The War on Terrorism Affects the Academy: Principal Post-2001 Federal Anti-Terrorism Statutes, Regulations, and Policies that Apply to Colleges and Universities*, 30 J.C.& U. L. 239 (2004); Michael A. Olivas, *The War on Terrorism Touches the Ivory Tower – Colleges and Universities After September 11*, 30 J.C.& U. L. 233 (2004); Nancy Tribbensee, *Law and Order: Campus Victims Unit, Privacy and Security in Higher Education Computing Environments after the USA PATRIOT Act*, 30 J.C.& U. L. 337 (2004) .

Indeed, higher education is a major US export, though we seldom think of it that way, because we don't see the product (learning, knowledge, and ideas) leaving the country. But in fact it does. The difference with other export commodities is that, in the case of higher education, the consumer-importers come here to get it, rather than taking delivery in their native lands. Nevertheless, when they leave, they take with them the learning product that they came here to get. In an age when fewer and fewer commodities are leaving the US in large quantities, the export of education that we do is of ever-increasing importance to our national economy. Of course, we don't have a monopoly on knowledge and ideas, but it is one field in which we have a huge competitive advantage.

One immediate consequence of this growth export industry is the sheer number (and steady growth) of international students coming to the US for the explicit purpose of attending US institutions of higher education. These students, of course, are the very individuals that the Patriot Act and the Department of Homeland Security view as potential terrorists – or at least, they view potential terrorists as likely to be somewhere within that pool. That means that the investigative powers the government possesses under the Patriot Act are likely to be exercised within higher education. At a minimum it means government demands for all kinds of information regarding international students, government requirements for tracking of such students, and government restrictions on which students are allowed to matriculate. In addition, it may mean government surveillance of student activities, government search of student residences and offices, government demands for access to student communications, and even government detention of some students suspected as potential terrorists or “material witnesses.” Colleges and universities must be prepared to deal with these realities.

Of course, higher education not only exports knowledge and ideas, but it imports them as well, and by a similar method. We bring international artists and scholars to our institutions as teachers, as researchers, as speakers, as performers – sometimes for brief visits, sometimes with the expectations that they will remain and become permanent contributors to the intellectual community. The Patriot Act also brings these colleagues and guests under the veil of suspicion: some of them may be terrorists too. As a result, getting permission for them to come will be more difficult; and while they are here, some of them may be subjected to increased government surveillance and control – as might we ourselves, if we spend too much time with them.

In the immediate aftermath of the Patriot Act, higher education faces an administrative challenge meeting its demands. There will be more paperwork and delays on getting visas for students and foreign faculty. There will be reporting obligations. There will be obligations of compliance with government demands for records of all kinds, including potentially access to electronic student and faculty communications. There will be obligations for cooperation with law enforcement authorities conducting searches and seizures in campus offices or housing. There will be compliance with enhanced security requirements for government-sponsored sensitive research.

But these administrative issues are not the main concern. The principal issue is whether, and how, enforcement of the Patriot Act will change higher education. And in that arena, the most pressing issue is the impact that the Patriot Act and its enforcement could have on academic freedom.

#### The Patriot Act and Academic Freedom

In times of threat to national security, freedom of expression is always imperiled. As

Justice Oliver Wendell Holmes, Jr. acknowledged in *Schenck v. United States*, a case upholding Espionage Act prosecution against draft protestors during World War I: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”<sup>11</sup> This threat to freedom of expression may be greatest when the “war” is against an unseen enemy in our midst, and when the war is of a kind that never ends. Those were the circumstances in the Cold War of the late 1940s and 1950s. They produced congressional investigations into “un-American” activities, blacklists of artists and entertainers suspected of Communist sympathies, denials of visas to aliens associated with the Communist party, loyalty oaths for public employees (including academics), required disclosures of past associations, and a host of similar measures aimed at detecting and rooting out subversive influences.

Those were not good times for academic freedom, and we don’t want to go back there. To be sure, many academicians, artists, and entertainers bravely spoke out against these measures. Some of them paid a huge price, however, and many others acquiesced. Speech and inquiry on college campuses were guarded, cautious. Higher education was insular. Students became the “quiet generation.” As we look back, we can see clearly that the government’s measures created an atmosphere that chilled expression and dampened free inquiry. It took the civil rights and antiwar movements of the 1960s and 1970s, and a decade of decisions by a civil-

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<sup>11</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

liberties oriented Supreme Court under Chief Justice Earl Warren, to undo the damage.<sup>12</sup>

The challenge before us today is to ensure that the Patriot Act and other related measures against international terrorism do not have a comparable impact on academic freedom in higher education. Some of the conditions are similar. We have an enemy that is out to destroy us and whom we suspect is operating invisibly among us. We have a war that can never be “over,” for the simple reason (if there were no other) that our enemy eschews formal identity and thus can never formally “surrender.” We have a government committed to ferreting that enemy out through intense investigation and surveillance. We have national fear of outside terrorist influences, and a national willingness to trade civil liberty for greater security. And we have a newly globalized higher education community that is likely to be a focal point for government investigation.

What higher education needs to do is to find a way to comply with the requirements placed on it by the Patriot Act and related anti-terrorist measures, and yet remain an independent and freethinking community of scholars in which faculty and students, whether American or foreign nationals, remain at liberty to engage in wide-ranging discourse and debate, without the chill of fearing that Big Brother (or his cousin) is watching. We also need to find a way of making all foreign nationals, regardless of religion or ethnic background, feel that they are welcome and valued members of the academic community. This may not be easy. Much depends, ultimately, on the restraint (or lack of it) with which the FBI and the Department of Homeland Security exercise their vast new investigative and intelligence gathering powers.

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<sup>12</sup> *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

