

CHAPTER 2

What Price Security? The USA PATRIOT Act and America's Balance Between Freedom and Security

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Introduction

It is a melancholy reflection that liberty should be equally exposed to danger whether the government have too much power or too little.

—James Madison in a letter to Thomas Jefferson,
October 17, 1788.¹

On September 11, 2001, terrorists crashed jetliners into the two World Trade Center towers in New York City and the Pentagon in Washington, DC. These attacks were successful in many ways. Of course, there was the immediate devastation of some 3,000 people killed, with thousands more wounded. Billions of dollars in property damage also resulted from the attacks. In the weeks that followed, more effects were evident. Americans truly were terrorized and traumatized, realizing that they were not safe in their own homeland. While the lives of those closest to the tragedies were changed radically, virtually all Americans felt some emotional effect from the attacks. In addition, the American economy, already beginning to falter, was dealt a severe blow. Certainly, if the terrorists' goal was to punish America, their success was significant.

However, the terrorists may have accomplished an even greater long-term victory, with implications for the future of all Americans. As a reaction to the September 11th attacks, Congress rapidly passed the USA PATRIOT Act on October 24, 2001, and President Bush signed it into law

two days later.² This act provided broad new powers to various agencies of the federal government, particularly in the area of gathering information which might lead to arrest of terrorists or might prevent future terrorist acts. Among other issues, the USA PATRIOT Act addresses intelligence gathering related to communications, funding, and other activities of possible terrorists.

The weighty question is, to what degree does this new act infringe on the freedoms of American citizens? Does this act allow the federal government to intrude in an unacceptable manner into the private lives of Americans? Does it diminish the civil liberties that Americans hold dear? Does it represent a shift toward increasing security while taking away freedom? If this act has resulted in a loss of freedom and reduced civil liberties for Americans, then have not the terrorists accomplished an even greater long-term victory as a result of their attacks? Have we conceded a portion of victory to the terrorists by sacrificing freedom to increase security?

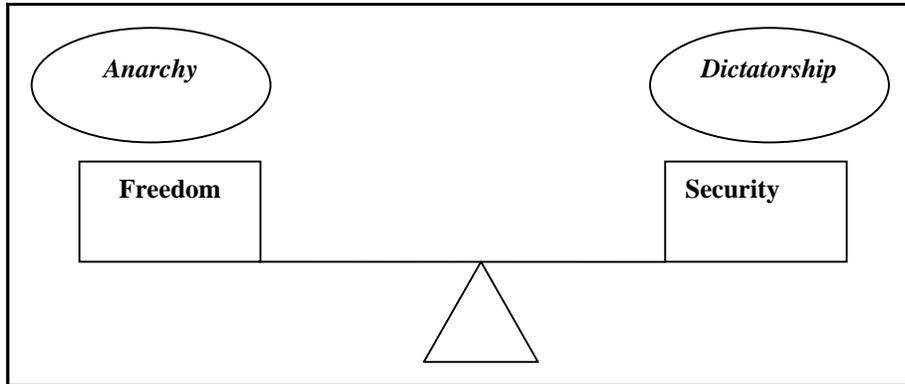
The Balance Between Security and Freedom

They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

—Benjamin Franklin

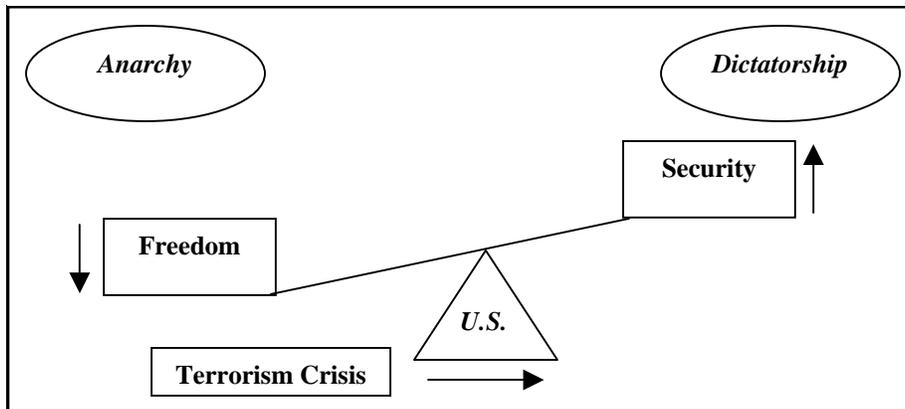
Freedom and security may be viewed on a continuum, with the assumption that, as one is increased, the other may decrease. A nation that has total freedom may be characterized by anarchy, with minimum security for individuals in the state. Every person is free to do as he pleases, with no restrictions by the state. In such a nation, one person may use his freedom to the detriment of other people, resulting in anarchy. On the opposite end of the spectrum, a state may best be able to ensure maximum security only by severely limiting the freedoms of individuals. The state may seek to protect its citizens by controlling their lives. Such a state may ultimately constitute a dictatorship. This totalitarian state is the type of state pictured in George Orwell's novel *1984*.

A model of this continuum for a nation reflecting a healthy balance between security and freedom would be as follows:

Figure 2.1 Healthy Balance Between Security and Freedom

Source: Author's model.

However, as freedom is increased, security is decreased and the nation moves toward anarchy. Conversely, as security is increased, freedom is decreased, and the nation moves toward dictatorship. Thus, one might argue that America has historically found a healthy balance between freedom and security. However, due to reactions to the recent crisis of terrorism, the fulcrum in America has moved toward security. Consequently, as security has increased, freedom has decreased, and America may be moving toward an unhealthy balance. The model would be adjusted to reflect this movement as follows:

Figure 2.2 Unhealthy Balance Between Security and Freedom

Source: Author's model.

Has America experienced an unhealthy shift in the balance between freedom and security as a result of the reactions to the terrorism of September 11, 2001? Champions of civil liberty argue that such a shift has taken place and that America is moving toward dictatorship. An examination of the USA PATRIOT Act in the light of America's historical perspective may prove useful in determining whether this fear is plausible.

The Origins of Freedom

Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!

—Patrick Henry, March 23, 1775

In 1776, America's founding fathers wrote in the *Declaration of Independence* that "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness..." With this statement, the founding fathers expressed the heritage that was to be American—a heritage of liberty bestowed by the Creator himself. Infringement of this liberty was the reason given for the thirteen colonies revolting against the King of England and declaring their independence as the United States of America. The *Declaration of Independence* was enacted on July 4, 1776, and signed by representatives of the thirteen states, who pledged their lives, their fortunes, and their sacred honor to support this document and the liberty it proclaimed.

This principle of preeminent liberty was codified by the founding fathers in the governing document which they wrote to establish the basic law for America, *The United States Constitution*. The *Constitution* was completed on September 17, 1787. The preamble to the *Constitution* states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and *secure the Blessings of Liberty to*

ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. (*Emphasis added*).

The objective of the *Constitution* was to establish the overall system of government that would defend the security of the people and provide domestic peace and welfare. However, the greater goal of the *Constitution* was the securing of liberty. The purpose of the law was so that liberty might be protected. Thus, a healthy balance was established between security and liberty in the *Constitution*.

In order to clarify the liberties which the founding fathers believed to be the unalienable rights of all Americans, the U.S. Congress added the first ten amendments to the *Constitution*, and these amendments were ratified on December 15, 1791, just four years after the signing of the *Constitution*. The *Bill of Rights*, as these ten amendments have commonly been called, provides for specific rights and freedoms to be guaranteed to Americans. The first amendment rights include freedom of religion, freedom of speech, freedom of the press, freedom to assemble peacefully, and freedom to petition the government for redress of grievances. The second amendment provides the right to bear arms. The fourth amendment provides “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The fifth amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law.” Amendment nine recognizes that there are rights which even the *Constitution* may not enumerate. This amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Thus, the forefathers established the importance of civil liberties, with the principle that the *Constitution* and the body of law were there for the protection of the rights of the citizens.

Over the course of America’s history, the body of law established by the U.S. Congress and interpreted by the courts has sought to maintain a proper balance between security and liberty. If security is threatened by a crisis, Congress may enact a law which represents a shift toward security at the cost of reduced freedom. This shift toward security may also be effectuated by a Presidential Executive order or other actions of the executive branch. However, if a law is too intrusive on liberty, it is likely that the Supreme Court will invalidate the law, moving the fulcrum back

toward freedom, even at the cost of potential reduction in security. Congress may also pass laws expanding or guaranteeing freedom, moving the balance toward freedom with possible reductions in security. Certainly, the fulcrum has shifted from time to time in one direction or the other. Historians might disagree as to the degree the fulcrum has shifted toward freedom or toward security, but examples of movement in both directions can be cited.

In 1928, writing the majority decision in *Olmstead v. U.S.*, Justice Louis Brandeis introduced the “right to privacy,” which had not been specifically listed in the *Constitution*. Brandeis wrote, “To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” Brandeis considered the right to privacy as “the right to be left alone—the most comprehensive of rights, and the right most valued by civilized men.”³ With this Supreme Court decision, the fulcrum moved toward increased freedom. Yet, the decision made it more difficult for the federal government to gather information that might ensure security. The right to privacy has subsequently been regarded to be as fundamental as the other civil liberties specifically enumerated in the *Bill of Rights*.

There are also examples of the fulcrum moving toward security at the cost of freedom. One of the most glaring examples was the treatment of Japanese-American citizens during World War II. After the Japanese attacked Pearl Harbor on December 7, 1941, the U. S. experienced great fear, particularly in the west, where citizens thought Japan would attack next. On February 14, 1942, President Roosevelt issued Executive Order 9066, which ordered Japanese residents to be taken from their homes and placed in camps supervised by the War Relocation Authority. Over 120,000 Japanese were placed in austere conditions in these camps, even though two-thirds of these Japanese people were American citizens. There was no evidence of a threat, or even disloyalty, by any of these Japanese people. Yet the Executive Order was not canceled until 1944, and the camps were not completely closed until March 1946.⁴ The U.S. Supreme Court upheld these incarcerations. The fulcrum had shifted toward supposed security for Americans in general, but had resulted in a total loss of freedom for thousands of Japanese-Americans.

In January 2001, Tampa, Florida, used face-recognition cameras to scan the crowds at the Super Bowl. Faces were to be matched by computer with faces of known criminals, hopefully leading to arrest of those criminals. After the Super Bowl, the cameras were moved to the Ybor City region of Tampa, where police continued to try to identify criminals.⁵ Civil libertarians protested this technique as an invasion of privacy, but the cameras were only removed after they proved ineffective in leading to apprehension of criminals. Consideration is being given to use of similar face-recognition technology in airports and seaports to try to identify terrorists attempting entry into the U.S. Opponents argue that this technology deprives Americans of the right to privacy, moving the fulcrum toward security at the cost of freedom.

American history includes many other examples of movement in one direction or the other. U.S. Representative Jerrold Nadler said that the U.S. has often limited civil rights during war time, including the 1798 Alien Sedition Act, the 1917 espionage act and Palmer raids, COINTEL during the Vietnam War, and McCarthyism during the Cold War. He also noted that America has had to apologize for each of these cases.⁶ Over time, America has continued to seek a healthy balance between freedom and security. Crisis has usually been the impetus for any moves toward security. Such is the case with the USA PATRIOT Act of 2001 and other federal government actions following the September 11, 2001, terrorist attacks.

The USA PATRIOT Act

We're likely to experience more restrictions on personal freedom than has ever been the case in this country.

—Supreme Court Justice Sandra Day O'Connor,
after a visit to Ground Zero, the site of the terrorist
attacks on the World Trade Center in New York.⁷

The USA PATRIOT Act is actually 167 pages of documents, which primarily modify existing laws on a variety of subjects. The title is an acronym for “*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.*” The act’s primary focus is to grant the federal government increased powers for surveillance and intelligence gathering on individuals residing in the

United States. These individuals may include both citizens and non-citizens. Other provisions of the act cover a variety of issues related to the war on terrorism.

With the anthrax scare in full swing and many lawmakers shut out of their offices, the act passed Congress with virtually no debate. According to Senator Russell Feingold, the only senator voting against the bill, most senators were very unaware of the details of the act.⁸ U.S. Representative Jerrold Nadler said that the version of the bill approved by the House Judiciary Committee had been thrown out, with House Republican leaders and Attorney General John Ashcroft crafting a new version. Although only two copies of the lengthy new bill were printed at 10:00 a.m., the bill passed the House three hours later by an overwhelming majority vote of 356 to 66.⁹ In fact, the bill could only be understood by comparing it to the several other laws it amended. Critics of the bill contend that the federal executive department used this opportunity to railroad through many intrusive practices Congress had refused to allow in the past. Senator Feingold said, “There is no doubt that if we lived in a police state it would be easier to catch terrorists. That would not be America.”¹⁰

The act addresses a number of different areas in order to provide tools for the government to combat terrorism within the United States. Title I discusses antiterrorism funding and philosophical issues. Title I, Sec 102 (b) states: “It is the sense of Congress that the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety.”¹¹ Thus, Congress stated their intention to maintain the balance between security and freedom. However, critics of the act argue that, in spite of those stated intentions, the act severely infringes on civil liberties of all Americans.

Title II of the act provides for enhanced surveillance procedures. Authority to intercept wire, oral, and electronic communications is expanded if these communications may be related to terrorism or computer fraud and abuse. This title includes 25 separate sections, providing significant new authority for the government to monitor all forms of communication, including postal mail, e-mail, voice mail, telephone, and computer communications. Search warrants will be easier to obtain, more powerful, broader in scope, and will provide for warrants to be valid for longer periods of time. Typical language of this title is

“The...Federal Bureau of Investigation...may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities.”¹²

One statute revised by the USA PATRIOT Act is the Foreign Intelligence Surveillance Act (FISA) of 1978. Congress passed FISA after learning that the Federal Bureau of Investigation (FBI) had performed extensive surveillance on American citizens during the previous two decades. FISA severely restricted domestic surveillance, establishing guidelines for when and how wiretaps could be performed on American citizens. FISA was an example of Congress moving the fulcrum toward liberty at the possible cost of security. The USA PATRIOT Act significantly loosens some of the restrictions of FISA, moving the fulcrum back toward security at the potential cost of freedom.

For example, the USA PATRIOT Act allows “roving” wiretaps that can follow a person wherever he goes, including a neighbor’s computer, a library computer, his home or office computer, or any phone he may use. Critics argue that the new provision may violate the Fourth Amendment to the *Constitution*, which prohibits unreasonable searches and requires that warrants “particularly describ[e] the place to be searched, and the persons or things to be seized.” Under the USA PATRIOT Act, national search warrants may be requested, whereas previously, separate warrants had to be obtained for every jurisdiction. The USA PATRIOT Act also changed the Electronic Communications Privacy Act (18 U.S.C. sec 2703) so that nationwide search warrants can be issued for voice mail and e-mail. The only probable cause that is required is a reasonable suspicion that a person may be acting for a foreign power. Search warrants are powerful, and can be enforced immediately, even against resistance.¹³

Wiretapping authority is also broadened by the USA PATRIOT Act. FISA allowed wiretaps only if a federal judge determined that the target individual had probably committed a serious crime, with those crimes specifically listed. The USA PATRIOT Act added a number of crimes related to terrorism and cyber-crime to the list justifying wiretapping. In addition, an internet service provider may be required to gather information such as web sites visited or e-mail headers.¹⁴ Critics argue that, once such broad access is allowed to an individual’s communications, there is no way to ensure that the agency only gathers information relevant

to an investigation, or that information will not be used to harm individuals who are not involved in terrorism. Therefore, the right to privacy may have been significantly lessened by the USA PATRIOT Act.

Title III of the USA PATRIOT Act addresses “International Money Laundering Abatement and Anti-Terrorist Financing.” The act contends that money laundering totaling over \$600 billion annually permits funding of terrorism and international crime. This portion of the act is designed to “increase the strength of...measures to prevent, detect, and prosecute international money laundering and the financing of terrorism.”¹⁵ The act includes new authority to gather information, seize funds, and levy heavy criminal penalties, including fines and prison time, for money laundering. Areas of concern for civil liberty activists include new requirements for financial institutions such as banks to gather additional information and report more information to government agencies. Securities brokers and dealers are required to report activities that they judge to be “suspicious.”¹⁶ Many of the new provisions represent changes to the “Bank Secrecy Act,” removing some of the privacy Americans have historically had in their financial transactions and arrangements.

Title IV of the USA PATRIOT Act provides measures to protect the borders of the United States. The State Department and the Immigration and Naturalization Service (INS) are provided more access to the criminal records of persons attempting to enter the United States. The U.S. Attorney General is given two million dollars for an “integrated automated fingerprint identification system for ports of entry and overseas consular posts.” The act includes an extensive definition of terrorism and provides for mandatory detention of any suspected terrorist. The criteria for detention is “reasonable grounds” to believe that the person “is engaged in any...activity that endangers the national security of the United States.”¹⁷

Title V aims to remove obstacles to investigating terrorism. Section 504 provides for more coordination and sharing of information between intelligence and law enforcement officials. Section 505 provides broader authority to obtain telephone bills and records and financial records. Sections 507 and 508 give authority to collect educational records. In each case, information previously considered private can be more readily obtained by federal agencies.¹⁸

Title VI provides financial benefits for victims of terrorism, public safety officers, and their families and does not appear to contain any civil

liberty issues. Title VII expands information sharing between federal, state, and local law enforcement agencies. The act provides \$150 million to the Bureau of Justice Assistance to establish and operate “secure information sharing systems to enhance the investigation and prosecution abilities of participating enforcement agencies in addressing multi-jurisdictional terrorist conspiracies and activities.” Critics fear a “big brother”-type government gathering all kinds of information on its citizens and using this information for wrong purposes.¹⁹

Title VIII strengthens criminal laws against terrorism. Statutes of limitation are removed for certain terrorism offenses. Maximum penalties are increased. Domestic terrorism, cyberterrorism, bio-terrorism, terrorism conspiracies, and terrorism as racketeering are addressed. Even harboring of terrorists and providing material support for terrorists are discussed, with new penalties including fines and up to ten years in prison.²⁰

Title IX discusses improved intelligence against terrorism, amending the National Security Act of 1947 to make clear the responsibilities and authorities for various federal agencies in dealing with terrorism. The Director of Central Intelligence is given broader authority to gather intelligence that possibly relates to terrorist activities. Requirements for reporting to Congress on intelligence gathering activities are softened.²¹

Title X includes a number of miscellaneous provisions, including efforts to provide some protections for civil liberties. Section 1001 says that the “Inspector General of the Department of Justice shall designate one official who shall review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice.”²² Section 1002 expresses the sense of Congress that “in the quest to identify, locate, and bring to justice the perpetrators and sponsors of the terrorist attacks...the civil rights and civil liberties of all Americans, including Sikh-Americans, should be protected.”²³

Reactions to the USA PATRIOT Act

I don't think the American public has even begun to grasp the kind of sacrifices we've been called to make in civil liberties in this war on terrorism.

—Vermont Law School Professor Stephen Dycus²⁴

Since the USA PATRIOT Act became law, many voices have been raised in criticism of the act, alleging that Americans have suffered serious loss of civil liberties. A statement by Nancy Chang, senior litigation attorney at the Center for Constitutional Rights in New York, is representative of the level of concern. Ms. Chang said:

To an unprecedented degree, the Act sacrifices our political freedoms in the name of national security and upsets the democratic values that define our nation by consolidating vast new powers in the executive branch of government. The Act enhances the executive's ability to conduct surveillance and gather intelligence, places an array of new tools at the disposal of the prosecution, including new crimes, enhanced penalties, and longer statutes of limitations, and grants the Immigration and Naturalization Service (INS) the authority to detain immigrants suspected of terrorism for lengthy, and in some cases indefinite, periods of time. And at the same time that the Act inflates the powers of the executive, it insulates the exercise of these powers from meaningful judicial and Congressional oversight.²⁵

Ms. Chang believes that the act gives the federal government "unchecked surveillance powers" related to e-mail, Internet, and personal and financial records. She sees the act as violating both First and Fourth Amendment rights, as well as virtually dismantling the right to privacy.²⁶

The Electronic Frontier Foundation (EFF) expresses similar concerns, saying, "The civil liberties of ordinary Americans have taken a tremendous blow with this law, especially the right to privacy in our on-line communications and activities." EFF says that many of the provisions are aimed at nonviolent cybercrimes that do not involve terrorism at all. Specific concerns include increased surveillance, overly broad provisions, and "spying" on Americans by the CIA and the FBI. EFF is also concerned about the lack of accountability to Congress, which may lead to misuse of the new powers.²⁷

On November 18, 2002, a three judge federal panel upheld provisions of the USA PATRIOT Act allowing expanded wiretap and other information collecting and sharing by the Justice Department and U.S.

Intelligence Agencies. This decision by the panel stopped efforts of the Foreign Intelligence Surveillance Court to restrict surveillances by the FBI and the Justice Department. After the latest decision, Attorney General John Ashcroft quickly increased surveillance on terrorist suspects. Civil liberties advocates assailed the decision as allowing the government to eavesdrop on telephone conversations, read private e-mail, and search private property, even if there is no evidence of wrongdoing by the targeted individual.²⁸ The American Civil Liberties Union (ACLU) argued that the ruling violates rights to free speech and due process and said that the ruling would give the government free reign for “intrusive surveillance warrants.”²⁹

The ACLU has joined with the American Bookseller’s Foundation for Free Expression, the Electronic Privacy Information Center, and the American Library Association’s Freedom to Read Foundation to file suit against the Department of Justice (DOJ). These organizations allege that the DOJ refuses to release information concerning what actions it has taken under provisions of the USA PATRIOT Act. Of particular concern is the seizing of records from bookstores and libraries even when no criminal activity has been demonstrated. DOJ says it cannot release the information due to possible detriment of national security. The plaintiffs want to build a case that information is being gathered unnecessarily and used improperly.³⁰

Attorney General Ashcroft has said, “I don’t have the power to erode the Constitution. I wouldn’t do it if I could.” However, Ashcroft also said, “We don’t need any leads or preliminary investigations” to send undercover agents into public meetings or public places, including churches or mosques “under the same terms and conditions of any member of the public.”³¹ The government only needs a “reasonable indication,” rather than the previous standard of probable cause.³² The chairman of the House Judiciary Committee, James Sensenbrenner disagreed, stating, “We can have security without throwing respect for civil liberties into the trash heap. We don’t have to go back to the bad old days when the FBI was spying on people like Martin Luther King.” Roger Pilon of the Cato Institute went further, stating, “This is now an executive branch that thinks it’s a law unto itself.”³³

Some Congressmen are not satisfied with the Executive Branch’s actions under the USA PATRIOT Act. Senator Richard Durbin said the

bill represented a “leap of faith, born of fear. This administration, this Department of Justice, has abused that faith.” Senator Patrick Leahy, chairman of the Senate Judiciary Committee, has threatened subpoenas if the Justice Department does not give the requested information. House Judiciary Committee Chairman James Sensenbrenner has echoed the threat of subpoenas.³⁴

Supporters of the USA PATRIOT Act contend that the expanded authorities are needed to protect the security of Americans. They are not opposed to civil liberties but, “Dead people have no civil liberties at all.”³⁵ *The Village Voice* has quoted Attorney General Ashcroft as saying, “To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies.”³⁶ (Please see note). Associate Deputy Attorney General David Kris told the Senate Judiciary Committee, “What is at stake is nothing less than our ability to protect this country from foreign spies and terrorists.”³⁷

Supporters of the act point out that we are at war, and the old standards no longer apply. With the crisis surrounding U.S. security, reasonable suspicion is a more realistic standard than the probable cause standard, which refers to mere criminal activity, not terrorism. Supporters cite the case of one terrorist, Zacarias Moussaoui. The government was actually arguing over whether to search Moussaoui’s computer, even though he was not even in the country legally and could certainly not be considered a U.S. person.³⁸

Writing in *The American Criminal Law Review*, Jennifer M. Collins notes that the events of September 11 changed reality. Ms. Collins notes that there has been a strong separation between law enforcement and the foreign intelligence community for the fifty years of the CIA’s existence. Now, however, Ms. Collins cautiously argues that the ongoing danger of terrorism justifies “lowering the wall of separation between the grand jury and other agencies of the government to improve coordination and the sharing of national security information—with the goal of safeguarding the nation’s security and its citizens.”³⁹

One recurring theme of supporters of increased government authority is that, without adequate power, the government cannot protect the very liberty Americans hold dear. Laurence Tribe, Harvard Law School, said that, “civil liberties are not only about protecting us from our government.

They are also about protecting our lives from terrorism.” Supporters also cite the example of President Abraham Lincoln’s emergency actions during the Civil War. When Lincoln suspended the writ of habeas corpus, he justified the action with the statement, “Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?”⁴⁰ Supporters argue that, without the additional authorities given to government by the USA PATRIOT Act, the government will not have the tools of power to defend the lives, much less the freedom, of Americans.

Conclusion

For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? Do that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.

—The Holy Bible, King James Version, Romans 13:3-4

The USA PATRIOT Act certainly represents a shift toward security even at the cost of potential loss of freedom. However, the majority of Americans appear willing to accept this shift. In a February 2002 Greenberg poll, sixty-two percent of those responding agreed, “Americans will have to accept new restrictions on their civil liberties if we are to win the war on terrorism.” In late September 2001, a NBC/Wall Street Journal poll found seventy-eight percent of respondents approving surveillance of internet communications. Sixty-three percent of respondents to a Harris poll approved camera surveillance on streets and public places. In 1998, Chief Justice William Rehnquist recognized that a national crisis can shift the balance between freedom and security toward security, “in favor of the government’s ability to deal with the conditions that threaten the national well-being.”⁴¹

However, as time passes and the events of September 11, 2001, begin to diminish, the minds of the American people may change. A November 2001 Investor’s Business Daily poll found 58 percent of respondents

worried about losing “certain civil liberties in light of recently passed anti-terrorism laws.” By March 2002, a Time/CNN poll found 62 percent of respondents concerned that “the U.S. Government might go too far in restricting civil liberties.”⁴² Americans in general may be willing to accept some loss of freedom so long as the government uses the new powers to consistently target the “evil doers” of terrorism. However, if Americans believe their own personal civil liberties have been unnecessarily or overly limited, active opposition is likely to increase.

Does America still have a healthy balance between freedom and security? At this point, the fulcrum has shifted toward security with the potential loss of a degree of the freedom previously enjoyed by Americans. Whether this shift toward security will have significant permanent effect obviously remains to be seen. If America follows historical patterns, the people will force the fulcrum back toward freedom once the threat to security is perceived as sufficiently reduced. In the meantime, to the extent that any degree of freedom is lost for Americans, the terrorists will have achieved some measure of victory.

Notes

1. “The Question of a Bill of Rights,” Letter to Thomas Jefferson, October 17, 1788, from James Madison. On-line. Internet, 2 December 2002. Available from http://www.constitution.org/jm/17881017_bor.htm.
2. Mary Minow, “The USA PATRIOT Act,” *Library Journal*, vol. 127, October 1, 2002, 52-55.
3. “Your Right to Privacy.” On-line. Internet, 25 November 2002. Available from <http://www.righttoprivacy.com/>.
4. Roy Webb, archivist, “Japanese-American Internment Camps During World War II.” On-line. Internet, 25 November 2002. Available from <http://www.lib.utah.edu/spc/photo/9066/9066.htm>.
5. “Face Recognition,” Electronic Privacy Information Center. On-line. Internet, 25 November 2002. Available from <http://www.epic.org/privacy/facerecognition/>.
6. Jane Adas, “New York Congressman Nadler Calls USA PATRIOT Act Extreme Danger to Civil Rights,” *The Washington Report on Middle East Affairs*, vol. 21, August, 2002, 57-58.

7. Nick Gillespie, "What Price Safety?: Freedom for Safety," *Reason*, vol. 34, October, 2002, 24-26.
8. Minow, 52-55.
9. Adas, 57-58.
10. Alisa Solomon, "Things We Lost in the Fire," *The Village Voice*, vol. 47, September 11-September 17, 2002, 32-36.
11. *USA PATRIOT Act*, H.R. 3162, October 24, 2001, 10.
12. *Ibid.*, 25.
13. Minow, 52-55.
14. *Ibid.*, 52-55.
15. *USA PATRIOT Act*, 37.
16. *Ibid.*, 71.
17. *Ibid.*, 103-106.
18. *Ibid.*, 119-126.
19. *Ibid.*, 132.
20. *Ibid.*, 132-149.
21. *Ibid.*, 150-154.
22. *Ibid.*, 154.
23. *Ibid.*, 155.
24. Gina Holland, "Government Surveillance Powers Scrutinized," *The Montgomery Advertiser*, November 20, 2002, 5A.
25. Nancy Chang, "The USA PATRIOT Act: What's So Patriotic About Trampling on the Bill of Rights?" November, 2001, Center for Constitutional Rights. On-line. Internet, 26 November 2002. Available from <http://www.ccr-ny.org/whatsnew/usa-patriot-act.asp>.
26. Chang, accessed 26 Nov. 02.

27. "EFF Analysis of the Provisions of the USA PATRIOT Act," Electronic Frontier Foundation. On-line. Internet, 26 November 2002. Available from http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html.

28. Holland, 5A.

29. Curt Anderson, "Ruling Expands Wiretap Powers," *The Montgomery Advertiser*, November 19, 2002, 6A.

30. Steven Zeitchik, "Groups Sue over Patriot Act," *Publishers Weekly*, vol. 249, October 28, 2002, 16.

31. Nat Hentoff, "Citizens Resist War on the Bill of Rights," *Free Inquiry*, vol. 22, Fall 2002, 13-14.

32. Joe Feuerherd, "September 11: A Year Later—Congress Questions Patriot Act Policies," *National Catholic Reporter*, vol. 38, September 6, 2002, 7.

33. Hentoff, "Citizens Resist War on the Bill of Rights," 13-14.

34. Jess Bravin, "Leahy Warns Justice Department on New Powers," *The Wall Street Journal*, September 11, 2002, A4.

35. Minow, 52-55.

36. Nat Hentoff, "The Sons and Daughters of Liberty," *The Village Voice*, vol. 47, July 2, 2002, 34. (note that this quote is reported by *The Village Voice*, which may be a biased source. The context of the alleged quote is not provided in *The Village Voice* article.)

37. Bravin, A4.

38. Richard Lowry, "A Better Bureau," *National Review*, vol. 54, July 1, 2002, 28-30.

39. Jennifer M. Collins, "And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community under the USA PATRIOT Act," *The American Criminal Law Review*, vol. 39, Summer, 2002, 1261-1286.

40. Mackubin Thomas Owens, "Liberty & Security: A Prudential Balance," *National Review On-line*. On-line. Internet, 01 December 2002. Available from <http://www.nationalreview.com/comment/comment-owens120401.shtml>.

41. Jon B. Gould, "Playing With Fire: The Civil Liberties Implications of September 11th," *Public Administration Review*, vol. 62, September, 2002, 74-79.

42. Gould, 74-79.