

THE USA PATRIOT ACT AND THE POLITICS OF FEAR

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The terrorist attacks of 11 September left Americans with a myriad of powerful emotions—anxiety, fear, sorrow, despair, and incandescent rage. Among these emotions, scholars argue that *fear* represents the common baseline for comprehending the complex aftermath of 9/11.¹ That fear was caused by extraordinary images of indiscriminate violence—planes crashing into buildings, skyscrapers in flames, men and women leaping to their deaths, and landmark structures collapsing to the ground as panicked crowds ran for safety amid a whirlwind of dust and debris. This vivid imagery demonstrated that the point of terrorism is fear. And fear, in turn, would define the very fabric of subsequent responses.

APOCALYPSE AND PUBLIC POLICY

¹Barkun 2003; Berry 2001; Louis 2002.

“The shocking imagery of 9/11 redefined the scope of events,” argues Michael Barkun, “transforming spectators into survivors.” We all became survivors on 9/11, writes Barkun, survivors of nothing less than “a world-destroying power”.² Indeed, the very name given to the World Trade Center site—Ground Zero—came from the lexicon of nuclear weapons, themselves associated with the capacity to destroy civilization. The emotional aspects of 11 September were therefore directly associated with its political aspects via a long-standing American fascination with Christian apocalyptic speculation. The 9/11 attacks led to a marked increase in church attendance and a spectacular rise in sales for books with apocalyptic themes published in the United States.³ According to a 2001 Time/CNN poll, roughly 30 percent of Americans believed that the attacks were predicted in the Bible. Another 35 percent thought about the implications of the daily news for the end of the world and 60 percent believed that the future will unfold in accordance with the Book of Revelation.⁴

²Barkun 2003:17.

³Benjamin and Simon 2002.

⁴*Ibid.*

These visions were reinforced by the nineteen hijackers, and their leader--Osama bin Laden--whose messianic pronouncements claimed that the attacks were prophesied in Muslim apocalyptic literature which predicts a disintegration of Islam followed by epic events that will lead to a worldwide resurgence of the Islamic faith.⁵ The U.S. response to 9/11 was also specifically apocalyptic in belief and intent. From his very first speeches following the attacks, President George W. Bush nationalized our fear by launching America on a "crusade" of "infinite justice" against "evil-doers" who had committed "barbarism." To fight this evil, Bush was willing to take on extremist elements of the Muslim world, in almost a Biblical sense. "We will rid the world of evil-doers," he said on 14 September, 2001. "Either you are with us or against us. You're either evil or you're good".⁶ The war on terrorism was therefore presented to the world as a mandate from God. "I know many Americans feel fear today," the President acknowledged when he began the war on 7 October.⁷ "To answer these attacks and rid the world of evil," he said, "we will export death and violence to the four corners of the earth in defense of this great nation."⁸

Anthrax and the USA Patriot Act

While 9/11 was known for its agonizing imagery, the anthrax attacks were marked by silence. Beginning on 4 October, 2001, 23 cases of cutaneous anthrax were reported in the United States, resulting in five deaths. It hardly mattered that there was no evidence linking al

⁵B. Lewis 2003.

⁶Bush 2001.

⁷Quoted in Woodward 2002:209.

⁸*Ibid.*:49.

Qaeda to the attacks, for in terms of popular opinion the anthrax outbreak become part of the 9/11 narrative, thus amplifying the nation's fear. Nowhere was this more evident than on Capitol Hill.

On 15 October, an intern in South Dakota Senator Tom Daschle's office cut open a taped business envelope, letting out a puff of airy white powder that entered the ventilation system of the Hart Senate Office Building. As the airborne anthrax wafted through the building, chaos erupted in government buildings across Washington. Mail deliveries were suspended, bundles of mail and packages were quarantined, meetings were postponed, tours were canceled, and military specialists were dispatched to search for biological and chemical agents. Soon anthrax spores were turning up in other Capitol office buildings, prompting discussions about shutting down the government.⁹ Against this turbulent backdrop Congress enacted one of the most sweeping criminal justice reforms in American history.

⁹Thompson 2003.

On 26 October, 2001, President Bush signed the USA Patriot Act into law. The short-term objective of the Act was to enhance the authority of the Federal Bureau of Investigation's (FBI) "PENTBOMB" case. PENTBOMB focused on identifying the terrorists who hijacked the planes on 9/11 and anyone who aided them. The Act's long-term objective was to avert subsequent terrorist attacks in the United States and against U.S. interests abroad.¹⁰

But much had already been accomplished prior to passage of the Act. The day after 9/11, President Bush had directed the FBI to develop a "scorecard" on the investigation as a way to measure its progress.¹¹ In response, PENTBOMB investigators began compiling a watch list of potential hijackers and other individuals who might be planning future attacks. By 22 September, the watch list had grown to a staggering 331. That meant that there were 331 suspected al Qaeda operatives in the United States—15 times the number of terrorists who had hijacked the planes on 9/11. "I was floored," Bush later recalled to Bob Woodward. "And [given the trauma of 9/11] the idea of saying, there's 331 al Qaeda-type killers lurking, to the point where they made a list...just wasn't necessary."¹² This executive decision, meant to shield Americans from the fear of terrorism, created a model of intense secrecy that would characterize the Patriot Act. Ironically, while the Act was intended to curb the fears of 9/11, it would actually reproduce those fears in its own execution.

The USA Patriot Act—an acronym for United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism—gives far-reaching new powers

¹⁰U.S. Department of Justice 2003. Hereafter referred to as DoJ.

¹¹Woodward 2002.

¹²*Ibid.*:117.

to both the FBI and international intelligence agencies, based on revisions of fifteen different statutes. It also eliminates the checks and balances that previously gave courts the opportunity to ensure that these powers were not abused.

Among its provisions, the 342-page Act grants the Justice Department the authority to: (1) share foreign intelligence surveillance information, (2) increase penalties for money laundering, (3) seize foreign assets in U.S.-based accounts of foreign banks if there is probable cause that the funds were obtained illegally, and (4) place stricter controls on immigration, including the authority to detain non-citizens without a hearing, and to deport immigrants without any evidence that they have committed a crime. For U.S. citizens and non-citizens alike, the Act also grants Justice the authority to: (5) tap telephones, e-mail messages, and personal computer hard drives (including roving wiretaps), without a legal probable cause, (6) request private and personal business and bank records, without a court hearing, and (7) solicit a patron's list of library books. The Act also allows the Justice Department to: (8) investigate a person who is not suspected of a crime and/or is not the target of a terrorist investigation, (9) secretly conduct "sneak-and-peek" searches without a warrant, (10) withhold the names and other information about individuals arrested and detained, (11) hold closed hearings, and (12) monitor jailhouse conversations between attorneys and clients. Finally, the Act (13) creates a new definition of domestic terrorism, (14) gives government the power to designate domestic groups, including religious and political groups, as "terrorist organizations," and (15) expands the authority of the President to designate individuals as "enemy combatants."

According to the Justice Department, these expanded powers are necessary because "the threat presented by terrorists who carried out the September 11 attacks required a different kind

of law enforcement approach....The Department needed to disrupt such persons from carrying out further attacks by turning its focus to *prevention*, rather than investigation and prosecution.”¹³

THE CONTROVERSY

Controversy surrounding the Patriot Act began almost immediately and it centered on three issues, all of which turned on the matter of government secrecy. First, the media started to report allegations of mistreatment among the terrorist suspects who had been rounded up and detained because their names had appeared on the FBI watch list. (Once the number of detainees reached 1,200, officials stopped keeping statistics). Through their attorneys, these “special interest” detainees, as they were known (nearly all Muslim or Arab men who were not U.S. citizens), alleged that they were not informed of the charges against them for extended periods of time; were frequently denied contact with attorneys; remained in detention even though they had no involvement in terrorism; or were physically abused and mistreated in other ways while incarcerated.¹⁴ Attorneys also argued that the Justice Department subjected detainees to arbitrary detention; violated due process by holding closed proceedings against them; trampled basic free speech rights—including the public’s right to know “what their government is up to”—by refusing to release the names of detainees; and ran roughshod over the presumption of innocence by presuming that the detainees were guilty of terrorist activities. The attorneys concluded that the Justice Department shielded itself from scrutiny by keeping from the public information that is crucial to understanding the extent to which the Patriot Act had been enacted in accordance with

¹³DoJ:13.

¹⁴DoJ.

U.S. law and international human rights law.¹⁵

¹⁵Human Rights Watch 2002.

Many of these charges were confirmed in June 2003 when the Justice Department's inspector general released a blistering report that found "significant problems" in the post-9/11 detention of suspected terrorists. Many detainees were classified as terrorism suspects on scant evidence, or no evidence at all. Others were detained for months without charge. There was a "pattern of physical and verbal abuse" and detainees were routinely denied bail and access to lawyers. The report said that the Justice Department had "poorly handled" its policies and practices. Although the report generated headlines around the world that spoke of "unduly harsh conditions" imposed by American officials, Attorney General John Ashcroft dismissed these charges by saying that the Justice Department made "no apologies" for how it went about protecting the American public from further acts of terrorism.¹⁶

¹⁶Lichtblau 2003a.

Such hubris hardly ever goes unnoticed and Ashcroft's pugnacity created a unique opportunity for lawmakers and government officials to reflect candidly on what took place behind the scenes during passage of the Patriot Act, leading to the second major controversy. Although the Patriot Act passed 357-66 in the House of Representatives and 98-1 in the Senate, these figures belie the politics of fear that gripped Congress during the anthrax attacks. Conservative Representative Don Young (R-Alaska), a member of the Homeland Security Committee, admitted to reporters that the Patriot Act was "the worst act we ever passed. Everybody voted for it, but it was stupid, it was what you call 'emotional voting.'"¹⁷ Then Representative Bob Barr (R-Georgia) declared it the "most massive violation of civil liberties in our history."¹⁸ A Congressional observer estimated that "fewer than five percent of the people who voted for the bill ever read it."¹⁹ Representative Ron Paul (R-Texas) explained why. "The bill was not made available to members of Congress," he said, "[it] wasn't even printed before the vote."²⁰ Even Rand Beers, the Bush administration's senior counter-terrorism policy advisor, weighed in with a criticism. The Patriot Act, he said, was "making us less secure, not more secure. As an insider, I saw the things that weren't being done."²¹

RESISTANCE

The third issue also generated wide interest, though it received only marginal attention

¹⁷Quoted in Tapper 2003.

¹⁸Quoted in Hentoff 2003a.

¹⁹Quoted in Tapper 2003.

²⁰Quoted in O'Meara 2001.

²¹Quoted in Krugman 2003.

from the media. This issue, too, arose from fear—a fear that the Patriot Act threatened fundamental civil liberties. The most dramatic response to this was a collective resistance of local governments to the federal law. As of this writing (July 2003), 133 communities in 25 states have passed resolutions condemning the Act.²² These have included big cities like Philadelphia, Detroit, Baltimore, and San Francisco, and small towns like Dillon, Montana, Reading, Pennsylvania, Takoma Park, Maryland, and Ithaca, New York. Statewide resolutions have been passed in Alaska, Hawaii, and Vermont. In all, nearly 12 million Americans live in communities that have passed anti-Patriot Act resolutions.²³

These resolutions assert that the Act contradicts and undermines constitutionally protected rights without making the United States more secure from terrorism. Although these resolutions are largely symbolic, since federal law trumps any local ordinance, they nevertheless speak volumes about the extent to which the extended law enforcement powers have undercut public support for the war on terrorism. In Carrboro, North Carolina, city police are required to stand in the way of any unreasonable searches and seizures conducted by the FBI under authority of the Patriot Act. Police in Detroit are authorized to decline federal requests that are considered “fishing expeditions,” such as compiling a list of mosque attendees. And in the tiny town of Arcata, California, enforcing the Patriot Act is actually a crime punishable by a fine.

²²Clymer 2003.

²³Wenzel 2003.

Other opponents have made the more serious charge that the anti-terrorism laws are being misapplied to advance agendas that have nothing to do with preventing another attack on America. Of primary concern is the revised intelligence-gathering powers of the FBI. Since 9/11, the agency has reportedly collected intelligence on environmental and anti-globalization groups in the U.S., even though these groups have not engaged in terrorism.²⁴ The greatest threat to freedom in the United States, then, is posed not by terrorists themselves but by the government's own response. No less a publication than *The New York Times* reported that one of the nation's leading scholars of international law suggested at a meeting of diplomats that President Bush's advisors were planning to use the authority of the Patriot Act to suspend the elections of 2004.²⁵ In other words, the erosion of civil liberties under the Bush administration constitutes an early stage of the kind of fascism that Hitler brought to Germany. In this nightmare, John Ashcroft is the reincarnation of Hermann Goering.

Cultural conflict

These denunciations served to legitimize the belief that people can and should organize themselves politically to repeal the new anti-terrorism initiative. Many of these local efforts combined politics with culture to produce a colorful collective resistance. Here in Bloomington, Indiana, for instance, the anti-Patriot Act resolution was presented to the City Council in a four-hour meeting that included speeches from scholars, human rights activists, Vietnam veterans, artists, and common citizens. These presentations ranged from legal and sociological analyses of the Patriot Act to poems, songs, and personal testimonies of fear. The name John Ashcroft was

²⁴Dreyfuss 2003.

²⁵Traub 2003.

mentioned pejoratively in nearly every presentation—sometimes accompanied by tambourines, guitars, burning incense and sage. The emotional highpoint came with the testimony of a librarian—known to all as a peaceful young woman—who had recently been approached by two severe FBI agents and told to turn over the borrowing records of several Muslim students from Indiana University. She did not comply and was threatened with arrest.

Such local efforts were part of a wider cultural resistance that occurred as more and more Americans became aware of the Patriot Act’s implications for civil liberties. Rocker John Mellencamp released a remake of the traditional American ballad, “To Washington,” with references to the president who “had made things worse.” Mellencamp then issued a highly controversial open letter to America, declaring, “We have been lied to and terrorized by our own government and it is time to take action.” Neil Young released a song critical of the Patriot Act while such divergent rock, punk, country, and hip hop artists as Merle Haggard, Eddie Vedder, Green Day, Willie Nelson, Jay-Z, Steve Earle, and the Dixie Chicks used their voices to take aim at the Patriot Act, U.S. policy on Iraq, and the Bush administration’s assault on the environment. The crowning moment of this artistic tirade occurred at New York’s Shea Stadium on 4 October, 2003 when America’s working-class poet laureate, Bruce Springsteen, was joined by legendary troubadour Bob Dylan for a glorious romp of “Highway 61 Revisited.” Springsteen then told the crowd of 50,000 adoring fans, “Shout a little louder if you want the president impeached!”²⁶

THE RESPONSE

This assault forced the government to launch its own lobbying efforts to calm the

²⁶Cave 2003.

public's fear of the Patriot Act. First, the White House assured Americans that any encroachments on civil liberties would affect only foreign nationals.²⁷ Then President Bush enthusiastically praised Attorney General Ashcroft for doing a "fabulous job" in the war on terrorism.²⁸ Ashcroft addressed his critics with these words:

For 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, and pause to America's friends. They encourage people of goodwill to remain silent in the face of evil.²⁹

²⁷Hentoff 2003b.

²⁸*Ibid.*

²⁹Ashcroft 2001.

In subsequent Congressional testimony, Ashcroft claimed that the Patriot Act had made it possible to increase surveillance powers, thereby uncovering the status of al Qaeda cells in the United States and abroad. According to the Attorney General, this led to critical intelligence about al Qaeda safe houses, financing, recruitment, training camps, weapons caches, and locations in the U.S. being scouted for potential attacks by al Qaeda. In summarizing these successes, Ashcroft declared that “*more than 3,000* foot soldiers of terror have been incapacitated...and *hundreds* of suspected terrorists have been identified and tracked throughout the U.S.”³⁰

As for the anti-Patriot Act resolutions, the Attorney General proclaimed: “We do not stand for abuse.”³¹ “The guarding of freedom that God grants is the noble charge of the Department of Justice,” he told reporters, adding: “The terrorists who attacked the United States have exploited God’s gift.” And the Patriot Act, he said, would be used “to guarantee God’s gift.”³²

Far from being an impediment to freedom, then, the Bush Administration considers the Patriot Act a valuable tool. Indeed, it is considered a *God-given* tool that has enhanced its ability to investigate and thwart terrorist attacks. “Let me state this as clearly as possible,” said the Attorney General. “Our ability to prevent another catastrophic attack on American soil would be more difficult, if not impossible, without the Patriot Act. It has been the key weapon used across America in successful counter-terrorist operations to protect innocent Americans from the deadly

³⁰Ashcroft 2003. Emphasis added.

³¹*Ibid.*

³²Fox News 2002.

plans of terrorists.”³³

TERRORISM RESEARCH IN A TIME OF WAR

³³Ashcroft 2003.

Strangely silent in this controversy has been a group whose professional training most prepares them to comment on the ramifications of criminal justice policy: Academic criminologists. Such an analysis would consider two essential questions: (1) To what extent are the policy outputs of the Justice Department consistent with the original objectives of the Patriot Act? and (2) What effects, in turn, do these outcomes have on subsequent legislative decisions?³⁴ What follows is a brief attempt to address these problems, along with several challenges facing scholars during a time of war.

The USA Patriot Act has one, and only one, clearly stated output. “Our *single* objective,” said the Attorney General, “is to *prevent* terrorist attacks by taking suspected terrorists off the street.”³⁵ The objective of the Act is not to investigate or prosecute terrorist acts, but to prevent them by bringing suspected terrorists under state control.

To the extent that this objective is achieved, it has important implications for subsequent legislative actions. The Patriot Act carries a “sunset” provision to expire on 31 December, 2005. (Some surveillance provisions do not expire.) Should the Act achieve its stated objective, then Congress will presumably renew it. Should it fail, then presumably the Act will be either revised or terminated. There is presumably only one failure scenario: The FBI fails to prevent another terrorist attack on America.

At least four methodological issues obtain from this sum-zero game, each with its own set of implications for criminological research. First and foremost is an issue of logic: Any

³⁴Mazmanian and Sabatier 1983.

³⁵Ashcroft 2001.

evaluation of the Patriot Act requires disproof of a negative, which is notoriously difficult. If there are no future attacks on the United States by al Qaeda or other terrorist groups, then it may be assumed that the Act has achieved its objective. But if there are no attacks, how do we know that they were actually “prevented” by the Patriot Act? How do we know whether the absence of terrorism was related in part to the Act (and if so, what parts worked?), or whether the Act was unrelated to the absence of terrorism? And, at what point can we be assured that terrorism does not *in fact* exist?

Implications for research. The objective of the Patriot Act reflects a particularly Western slant on a problem framed by the legal institution responsible for its prevention. Yet terrorism is a dynamic phenomenon that is increasingly framed by non-Western sensibilities—most notably, the idea of *jihād*, or international holy war. Certainty about this worldwide *jihād* may not come for a long time. A major lesson of 9/11 is that al Qaeda works on its own time line, often coming back to targets it might not have destroyed the first time around. The 9/11 attacks were the result of eight years of elaborate planning, religious indoctrination, and paramilitary training that began after the 1993 attack on the World Trade Center.³⁶

³⁶Benjamin and Simon 2002.

Because terrorism occurs within a distinctive context of social, political and cultural factors, changes in any one these factors (e.g., increased public awareness) can explain an absence of terrorism. By ignoring these possible changes, the Patriot Act suffers from its own parochialism and isolation. Consistent with the Bush administration's global war on terrorism, the Patriot Act deals with the symptoms rather than the root causes of terror and extremism. As Turk notes, terrorism cannot be stopped solely by a public policy. It can only be ended by "removing the deprivations...that create the environment in which people's fears and hopelessness make terrorism appear to be their only option."³⁷ In this case, those fears are lodged in Muslim grievances. Moreover, there is no way to develop a comparative understanding of the *granularity* of the Justice Department's institutional performance—whether through aggregate quantitative analysis or through ethnographic and historical work—with other nation-states whose post-9/11 counter-terrorism achievements (e.g., Pakistan) have taught us that complex problems require nuanced solutions. These solutions involve not only law enforcement and intelligence capabilities, but also cross-cultural fluency and diplomatic skill.

The second methodological problem involves the Bush administration's doctrine of secrecy. President Bush has taken the firm position that the government's actions in the war on terrorism will remain "secret even in success."³⁸ Indeed, FBI Director Robert Mueller is on record saying that "terrorist attacks have been prevented" since 9/11 but these successes "don't become public."³⁹ Yet Attorney General Ashcroft *has* released aggregate numbers on the war's

³⁷Turk 2002:349.

³⁸Quoted in Woodward 2002:108.

³⁹Mueller 2003.

success by stating that more than 3,000 “foot soldiers of terror” have been incapacitated, “hundreds” more have been identified and tracked, thereby interrupting their “deadly plans” of terror. But how can these figures be verified when the press, legislators, advocacy groups, social scientists, and law academics are denied independent access to basic information about these terrorists or their plots? Even the names of terrorist suspects are withheld from the public.

Implications. These conditions fail to meet even the most rudimentary standard for policy-oriented research on terrorism. Analysts therefore have little way of assessing whether the administration’s actions under the Patriot Act are actually preventing terrorism. They also have no way of evaluating whether the provisions of the Act are being applied in accordance with the law, nor do they have a way of evaluating whether the fundamental values and principles of America’s constitutional republic are being compromised in the process.

The third problem relates to the credibility of official statements about the Patriot Act’s effectiveness. Take, for example, the Attorney General’s claim that hundreds of terrorists have been identified and tracked across the United States via the Patriot Act, leading to the successful disruption of numerous plots. Publicly available information paints a very different picture:

* The Justice Department’s own inspector general examined the files of 762 of the 1,200 “special interest” detainees arrested following 11 September. None of them was ever linked to 9/11 or any other terrorist plot.⁴⁰

* Under the Patriot Act, the Justice Department has conducted a massive counter-terrorism sweep to deport some 13,000 Muslim men. Of that group, more than 3,000 have been arrested under the premise that they pose a “security threat” to the United States. Yet the Justice

⁴⁰DoJ.

Department has acknowledged that the majority of these men were involved in offenses such as violating immigration rules, using fake identity documents, and various civic infractions.⁴¹ There is no evidence that any of them were involved in plotting terrorist attacks against the United States.

⁴¹Dreyfuss 2003.

* Since 9/11, approximately 680 men from more than forty countries have been detained indefinitely at the U.S. naval base at Guantanamo Bay, Cuba. The vast majority of these “enemy combatants” are suspected al Qaeda fighters who were captured on the battlefields of Afghanistan; thus the actions leading to their incapacitation are unrelated to the Patriot Act.⁴² And while the FBI has used the Act’s provisions to interrogate some of these enemy combatants, to date terrorism charges have been brought against only one of them.

* The Patriot Act has contributed little to what the administration considers its most important successes in the war on terrorism. These include the arrests of Abu Zubaydah, a Qaeda planner and recruiter; Khalid Sheikh Mohammed, the Qaeda chief of operations; Jose Padilla, the former Chicago gang member turned al Qaeda operative who allegedly planned to attack a U.S. city with a crude radioactive bomb; Zacarias Moussaoui, reportedly the 20th hijacker of 9/11; Richard Reid, who tried to set off a shoe bomb on a trans-Atlantic flight; and John Walker Lindh, the so-called “American Taliban.” None of these suspects were incapacitated under the Patriot Act.

* There has only been one major terrorism trial since 9/11. This case involved two Arab immigrants from Dearborn, Michigan, convicted in June 2003 for plotting to attack U.S. airports, military bases, and landmarks. Yet these immigrants were arrested on 17 September, 2001—before the Patriot Act was implemented.⁴³

⁴²N. Lewis 2003.

⁴³Hakim 2003.

* There *are* cases in which the Patriot Act has been used to arrest suspected terrorists in the United States. In each case, though, suspects have been arrested for conspiring to provide “material support and resources” to al Qaeda. None have been accused of preparing, planning, or committing acts of terrorism. These cases include Minnesota resident Illyas Ali and two Pakistani accomplices, currently incarcerated in a Hong Kong prison for trying to sell drugs to raise money for al Qaeda; James Ujama, convicted of running a Qaeda training camp in Bly, Oregon; six young Yemeni men from Lackawanna, New York, convicted of training at a Qaeda camp in Afghanistan; and five residents of Portland, Oregon, convicted of making an unsuccessful attempt to visit a bin Laden camp.⁴⁴

* Under the Patriot Act, only one known al Qaeda member has been charged with plotting a terrorist attack against America. Iyman Faris—a 34-year-old Kashmiri resident of Columbus, Ohio, who suffers from mental illness—was taken into custody by the FBI in 2003 for planning to destroy the Brooklyn Bridge in New York City shortly after 9/11. Accounts vary as to why his plan was aborted, yet the plot *was not* prevented by the Patriot Act.⁴⁵

Implications. The disjunction between official claims-making and publicly available information creates a reliability problem. Because the problem of reliability is a basic one in social science—especially in criminology—researchers have developed a number of techniques for dealing with it. Yet each technique requires a baseline accounting of fact (e.g., police records) which is prohibited under the Patriot Act. This problem is exacerbated by the numerous classifications used to define individuals affected by U.S. counter-terrorism policy in the post

⁴⁴Arena 2002; Associated Press 2002.

⁴⁵Lichtblau 2003b.

9/11 era. What terrorism researcher can keep track of so many disembodied “special interest” detainees, “security threats,” “enemy combatants,” “terrorist suspects,” and “American Taliban” catalogued in U.S. military stockades, jails, prisons, and foreign lock ups?

Finally, any analysis of the Patriot Act will face a serious time series problem. Earlier I listed fifteen provisions of the Act as it was originally implemented in October, 2001. (Again, this is only a partial listing.) Since then, the Attorney General has instituted more than a dozen Executive orders changing various rules of the Act. These have dealt mainly with surveillance and matters related to the interrogation of material witnesses. Justice Department attorneys have drafted a blueprint for the Domestic Enhancement Security Act (Patriot Act II), which contains additional provisions for expanding arrest and deportation authority.

Implications. Although there is a time-series design for examining such a fluid implementation problem,⁴⁶ the solution requires data. And, once again, there is little reliable data afforded under the Patriot Act. As such, any systematic analysis of the Act must be viewed as the social scientific equivalent of nailing jello to a wall.

CONCLUSIONS

⁴⁶Campbell and Stanley 1966.

Using selected statistics for a political purpose is one of the oldest tricks in the book. A classic example occurred in the mid 1960s when the Federal Bureau of Narcotics (FBN) reported a 66 percent drop in federal prosecutions for drug offenses from 1925 to 1966. The FBN concluded, therefore, that narcotics prohibition was a successful policy, thereby guaranteeing increased budgets and the development of new technologies of power targeted on vulnerable populations of urban blacks and foreign nationals. Against the FBN figures, criminologist Alfred Lindesmith contrasted non-federal prosecutions (state and municipal), showing that prosecutions had actually *increased* by more than 500 percent for the period in question, thereby raising doubts about the nation's drug policy. Lindesmith concluded that the official data were "worthless...they are nevertheless popularly accepted because the Bureau is in a position to repeat them endlessly in the mass media."⁴⁷

The same can be said of the Patriot Act. Not only are official claims about the Act uncritically reported in the media, oftentimes the media function as a public relations organ for the Justice Department. In its coverage of the Attorney General's 2003 Congressional testimony, for example, the Associated Press reported: "The USA Patriot Act has stopped more than 3,000 'foot soldiers' of terror, Ashcroft said."⁴⁸ Ashcroft did not say that. Publicly-available information indicates that some 3,000 al Qaeda fighters have been incapacitated in the *global war* on terrorism, largely through the efforts of intelligence agencies in Pakistan, Jordan, Spain, Germany, and France. The Patriot Act played no role whatsoever in this effort.

Nevertheless, the Justice Department has used the Act to justify substantial spending

⁴⁷Lindesmith 1965:119.

⁴⁸Holland 2003.

increases. For 2003, the Department's budget request was \$30.2 billion, representing a thirteen percent increase over its 2002 request.⁴⁹ Even though counter-terrorism is the Department's top priority, its post 9/11 requests have included increases in more than sixty programs that do not directly involve that priority (e.g., cybercrime, prisons, drug enforcement). As it turns out, the Attorney General has failed to endorse FBI requests for counter-terrorism field agents, intelligence analysts, Arabic translators, and domestic preparedness.⁵⁰

The Justice Department's budget increases are therefore based less on the pragmatics of combating terrorism than they are on institutionalizing the politics of fear. In dozens of press conferences, the Attorney General and the FBI Director have failed to comment on the details of the Patriot Act and how the law will affect ordinary Americans. Instead, they have repeatedly played on the fears of Americans and their inability to assess terrorism threats. Return to the case of Jose Padilla for a moment.

⁴⁹Ashcroft 2002.

⁵⁰Clymer 2003; White House Press release 2003.

On 8 June, 2002, Ashcroft revealed in a dramatic announcement via satellite from Moscow, “We have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb.”⁵¹ President Bush deemed Padilla so grave a threat to national security that he ordered him held incommunicado until the war on terrorism was over. A day later, the administration began to back pedal. Assistant Secretary of Defense Paul Wolfowitz told reporters that there was not an actual plot “beyond some fairly loose talk,”⁵² while other sources reported that Ashcroft had been chastised by the White House for overplaying the Padilla arrest. But the damage had already been done. By exaggerating the “dirty bomb” threat, Ashcroft ignited public anxiety and ill reasoning, setting off a buying frenzy for duct tape and survival supplies. This is not an isolated incident, but part of a pattern of Justice Department warnings about impending doom. Director Mueller has repeatedly proclaimed on national television, “We can *expect* more terrorist acts in the United States.”⁵³

⁵¹Quoted in Lee 2003.

⁵²Quoted on CBS News 2002.

⁵³For example, Mueller 2003.

The Justice Department asserts that critics fail to understand the seriousness of the terrorism threat, and misconstrue how the Patriot Act is used to prevent another attack. But given the administration's doctrine of secrecy, it is effectively asking the public to be taken on faith. Add to this the results of emerging research showing that Justice Department prosecutions of terrorism-related cases since 9/11 have produced few significant results,⁵⁴ plus the methodological problems presented in this essay, and we arrive at a situation where there is virtually no way for researchers to verify Ashcroft's contention that progress is being made in the war on terrorism. This situation has occurred not through oversight but by design. That is, the Patriot Act carries no requirement for the Justice Department to report to Congress about how the policy has been employed and no requirement for reporting to the federal courts. The veil of secrecy, invoked in the name of national security, has effectively prevented public scrutiny of the government's "key weapon" in the fight against terrorism.

Yet Congress has the responsibility to do *precisely* that as it goes about the business of deciding whether the sun should set on the Patriot Act at the end of 2005. So, in this vein, I will end with a modest proposal.

A test

The most contentious part of the Patriot Act is the increased ability of the federal government to conduct surveillance on anyone without a search warrant. This provision is

⁵⁴Burnham and Long 2003. Since 11 Sept., 2001, about 6,400 people were referred by investigators for criminal charges involving terrorism, but fewer than one-third actually were charged and only 879 were convicted. The median prison sentence was only 14 days.

contained in Section 213 of the Act (Authority for Delaying Notice of the Execution of a Warrant). Also known as the “sneak-and-peek” provision, Section 213 allows law enforcement to avoid giving prior warning when searches of personal property are conducted. Before the Patriot Act, the government was required to obtain a warrant and give notice to the person whose property was to be searched. The Patriot Act took away the right of every American fully to be protected under the Fourth Amendment against unreasonable searches and seizures.

Congress can examine the extent to which this provision has *in fact* prevented acts of terrorism against the United States. If the provision has failed to achieve the Patriot Act’s primary objective—or worse yet, it has been misused to round up and incarcerate innocent people—then Congress faces a different kind of problem, namely: How can the abrogation of freedoms be justified when there is no proof that security is enhanced in the trade off?

There is, however, an even more important test for the provision: Would it have made any difference in stopping the 11 September attacks? The starting point for this test is the widely cited fact that 9/11 was the result of a massive intelligence failure caused by a legal wall prohibiting the sharing of information between law enforcement and intelligence communities. The Act was designed to tear down the wall and there is little public anguish over this section of the policy. Yet when combined with new surveillance provisions, it increases the likelihood of creating an intelligence overload.

For instance, the FBI now has the authority to investigate religious and political groups to determine their possible ties to terrorist organizations, leading to the surveillance of mosques and the Muslims who attend them. The FBI is now allowed to tap their telephones, monitor their e-mails, confiscate their business records, and secretly search their homes and businesses without

having to show evidence of a crime. The FBI can then share that information with the CIA, and the CIA can share it with foreign intelligence agencies. Used often enough, this strategy can create more data than intelligence systems can effectively manage. And to what end?

In general, terrorists keep a low profile and do not advocate publicly for social change. The 9/11 hijackers evidenced no public or religious activism during their time in the United States. Instead, they were busy penetrating airline security. In July 2001, a Phoenix FBI agent sent a memo to Washington headquarters recommending that the Bureau investigate the possibility that Islamic radicals were receiving training at U.S. flight schools. The agent determined that several Middle Eastern flight students were linked to bin Laden's terrorist network. Yet counter-terrorism specialists did not discover the Phoenix memo until after 11 September. It had been buried in an intelligence overload.⁵⁵

In the final analysis, popular support for the war on terrorism will turn on evidence made available to the public. That evidence will be based on intelligence. To the extent that Congress is able to extract this intelligence from its administrative sources, it will be able to open up a national debate that may inspire confidence in the government's approach to counter-terrorism. Such a strategy may brake the currents and crosscurrents of fear caused by 9/11. In so doing, the government might well avoid Samuel Taylor Coleridge's dire warning, "In politics, what begins in fear usually ends up in folly."⁵⁶

⁵⁵Benjamin and Simon 2002.

⁵⁶Quoted in Glassner 1999:xxviii.

