THE PATRIOT ACT AND CRISIS LEGISLATION: THE UNINTENDED CONSEQUENCES OF DISASTER LAWMAKING

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I. INTRODUCTION

Over the course of American history, the people have endured many crises that have tested their character and resolve. These trials and tribulations have also prodded the Constitution, trying its durability and the capability of the government it created. Since its inception, the United States Government has proven its ability to respond to these crises to protect its citizens while adequately preserving the Constitution they hold so dear.

Nevertheless, U.S. lawmakers have never been reluctant to exploit these crises for political gain. Again and again, Congress has exploited emergencies to pass legislation that would not otherwise have been tenable to either the American public or the political opposition. When faced with trying, often frightening times, the nation's democratically elected representatives have used disaster as fuel to propel previously unacceptable, even unconstitutional[1] laws through Congress.[2] Often, these emergency acts are marginally related or altogether unrelated to the crisis they purport to relieve.[3]

The fear inspired by disaster and tragedy has frequently produced overreactions at watershed moments in American history. This Article argues that these recurring spasms of fearful congressional overreaction should be properly labeled as "crisis legislation." Most instances of crisis legislation pass unheeded, and any allusions to the phenomenon in discourse

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[1] *See, e.g.*, Sedition Act of 1798, ch. 74, 1 Stat. 596, 596–97 (expired in 1801) (one of the Alien and Sedition Acts, passed during the Quasi-War with France, which forbade conspiring against the government and libeling the government and its officials). "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (footnote omitted).

[2] *See, e.g.*, Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (passed during World War I, forbidding the use of "disloyal, profane, scurrilous, or abusive language" about the United States government).

[3] *See* discussion *infra* Parts III–IV.B.

lack a universal term.[4] In *The Shock Doctrine: The Rise of Disaster Capitalism*, Naomi Klein argued that modern governments have frequently exploited periods of great shock, disaster, or crisis to promulgate free market ideals.[5] She described the phenomenon: "[O]nly a crisis—actual or perceived—produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are *lying around*."[6] Following major disasters that provoke fear, sadness, or anger, citizens demand action from their legislators and, in their haste, "are too focused on the emergency . . . to protect their interests."[7] Though Klein's *Shock Doctrine* focused on the economic aspects of our emergency responses, crisis legislation shares many of the same attributes.[8] Crisis legislation is the legislative equivalent of what

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[4] *See, e.g.*, Robert O'Harrow Jr., *Six Weeks in Autumn*, WASH. POST, Oct. 27, 2002, (Magazine), at 6, 8–9, 10 (describing the "classic dynamic" of crisis legislation largely as this Article does throughout, but without any widely-accepted term to express the dynamic in the context of legislation). The only other instance of the term found by the author, rather coincidentally, was in a 1940 *Columbia Law Review* article discussing crisis legislation in Britain. Cecil T. Carr, *Crisis Legislation in Britain*, 40 COLUM. L. REV. 1309 (1940). Apparently the term did not catch on with legal scholars, though; and obviously there are significant differences between United States and British law. *See id.* at 1309.

[5] *See* NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 3–11 (2007).

[6] KLEIN, *supra* note 5, at 6 (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM xiv (3d ed. 2002)) (emphasis added). *See* also, THE SHOCK DOCTRINE, at 8:00 (Renegade Pictures & Revolution Films 2009) [hereinafter SHOCK DOCTRINE film] (Naomi Klein, reading from FRIEDMAN, *supra*, during a lecture at the University of Chicago in October, 2008), *available at* http://www.youtube.com/watch?v=SrpA46YS7P0 (emphasis added).

[7] SHOCK DOCTRINE film, *supra* note 6, at 68:00 (quoting Naomi Klein at a lecture at Loyola University, Chicago, 2009).

[8] The chief attribute of crisis legislation acts is that they exploit a crisis (real or perceived) to pass a previously politically impossible bill. *See infra* Parts IV–V. Additionally, acts of crisis legislation usually—but not always—pass too quickly for a full and proper debate on the matter; prey on the fears of American voters; are largely unrelated to their claimed purpose; have drastic unintended consequences that become entrenched in the American legal system; have catchy and voter-friendly names; have few critics that are often vocal and perceptive; and require more the appearance of action than the efficacy through action. *See id.* Beside the content of the policy, a major difference between crisis legislation and Naomi Klein's disaster capitalism is that crisis legislation is borne not out of design, but rather out of the best of intentions. *See* KLEIN, *supra* note 5, at 6 ("I call these orchestrated raids on the public sphere in the wake of catastrophic events, combined with the treatment of disasters as exciting market opportunities, 'disaster capitalism.'") (emphasis added); *id.* at 7 ("For more than three decades, Friedman and his powerful followers had been perfecting this very

Klein brands "disaster capitalism"[9] and is a tradition as old as the republic itself.[10] This type of "disaster lawmaking" is responsible for helping shape the legal framework of the United States.

Perhaps no single act of Congress better exhibits the well-rehearsed choreography of crisis legislation than the USA Patriot Act of 2001 (Patriot Act).[11] Passed in the frantic weeks following the terrorist attacks of September 11th, 2001, the Patriot Act ostensibly empowered the government to prevent future terrorist attacks.[12] In reality, the Patriot Act was a monstrous, sweeping piece of legislation that reshaped the landscape of government-ordered surveillance, possibly irrevocably.[13] Many of the Patriot Act's provisions that were criticized[14] were only incidentally related to the terrorism that the Patriot Act purported to stop—both in practice and by design.[15] When faced with the task of fixing the leaks in the U.S. intelligence boat, Congress decided instead to buy a bigger boat.

Nearly twelve years since its enactment, the Patriot Act's legacy is complex and its history is turbulent. Despite the questionable behavior surrounding the U.S. government during and in the wake of its passage,[16] the Patriot Act still enjoys a great amount of bipartisan support in the face

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strategy."). One could take a more cynical view on the unintended consequences of crisis legislation, but there is a dearth of evidence to support that view.

[9] KLEIN, *supra* note 5, at 6.

[10] *See* Sedition Act of 1798, ch. 74, 1 Stat. 596, 596–97 (expired in 1801). *See* also Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of Cointelpro and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1066–67 (2002) ("The Federalists who enacted the 1798 Alien and Sedition Acts claimed the acts were necessary because of the increase in U.S.-French hostility . . . . As it turned out, only Republicans were prosecuted under the Sedition Act, and they were clearly prosecuted for political—not security—reasons.") (footnotes omitted); David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 252 (1996) ("In the United States, there is a long, sad history of interest groups or government officials taking a few isolated incidents and inflating them into some kind of vast threat, requiring an immediate, repressive response.").

[11] USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered U.S.C. titles 8, 12, 15, 18, 20, 31, 42, 47, 49, and 50) [hereinafter USA Patriot Act].

[12] *See infra* Part III.A.

[13] *See infra* Part V.

[14] *See* Saito, *supra* note 10, at 1114–15.

[15] *See infra* Part III.A.

[16] *See infra* Part VI.C.

of its impassioned detractors.[17] The prevailing ambivalence toward the Patriot Act over a decade after its passage is a fitting tribute to the confusion and uncertainty that are characteristic of the War on Terror and other instances of crisis legislation.

The Patriot Act is quick to provoke vigorous debate by those eager to demonize or defend it on its merits;[18] but this Article is interested in the Patriot Act only as an illustrative example of crisis legislation and its inherent concerns. First, one must reimagine the moments of September 11th, 2001 (9/11) to recreate the tense political climate in the United States and the fragile, frightened psyche of the American people that precipitated it.[19] The failures that culminated in 9/11 should have inspired strategies to craft a true "antiterrorism" bill.[20] Instead, what transpired will show how the Patriot Act was force-fed through the legislative process—even when its provisions were not adjustments to the letdowns causing 9/11, but items that had long been on a "wish list" for prosecutors.[21] Other examples of crisis legislation will smear broad brushstrokes alongside the Patriot Act that paint a picture of how crisis legislation can transform the American justice system, especially by expanding domestic surveillance.[22] Finally, the effects and legacy of the Patriot Act will demonstrate the actualization of one of crisis legislation's great concerns: its curious and questionable uses not anticipated by many members of Congress or the American people.[23] For the Patriot Act, this meant the pervasive use of its powers against "garden-variety" criminals instead of terrorists.[24]

The Patriot Act may well be the "best" law passed by Congress since the Voting Rights Act,[25] but that is beside the point. Crisis legislation is a

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[17] *See infra* Part V.C.

[18] *See, e.g.*, GLENN GREENWALD, HOW WOULD A PATRIOT ACT?: DEFENDING AMERICAN VALUES FROM A PRESIDENT RUN AMOK 5 (2006) (arguing that the increase in Government power in the wake of 9/11 was "a true crisis for the United States"); Saito, *supra* note 10, at 1115 ("[I]t becomes clear that the [Patriot] Act is attempting to legalize many of the repressive practices that the FBI and other intelligence agencies have been engaging in for decades."). *See also infra* Part V.C.

[19] *See infra* Part II.

[20] *See infra* Part II.

[21] *See infra* Part III.

[22] *See infra* Parts IV & V.

[23] *See infra* Part V.

[24] *Id. See infra* Part IV.B.

[25] *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2626 (2013) (referring to the Voting Rights Act of 1965, 42 U.S.C. § 1973 (2013)) ("The [Voting Rights] Act has proved

perversion of the legislative process whereby a law is deceptively thrust upon the American people as something it is not.[26] Each instance should be viewed with skepticism, and such legislation should only pass after a well-informed debate, rather than when Americans are at their most frightened and vulnerable. Though emergencies demand congressional action, we must remember that most Americans would not want to live in a country shaped by the fears and emotions of voters and lawmakers on December 8, 1941,[27] November 23, 1963,[28] or September 12, 2001.[29]

II. WHAT WENT WRONG ON SEPTEMBER 11TH AND THE LIMITED RELEVANCE OF THE PATRIOT ACT

A. Produced in the immediate aftermath of the devastating September 11th attacks, the Patriot Act was supposedly Congress's legal counter to the threat of terrorism.

On September 11th, 2001, the United States suffered a series of coordinated terrorist attacks of unprecedented scope and unspeakable horror.[30] Possessed with a fanatical desire to frighten the world and strike

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immensely successful at redressing racial discrimination and integrating the voting process. . . . [T]here is no denying that, due to the Voting Rights Act, our Nation has made great strides.").

[26] Although congressional pretext may be a widespread problem, this Article only examines it in the context of crisis legislation.

[27] The Imperial Japanese Navy attacked Pearl Harbor, Hawaii on December 7, 1941. *See The International Situation*, N.Y. TIMES, December 8, 1941, at A1. Within months, people of Japanese ancestry had been ordered from their homes pursuant to the authority of Congress and the President. *See* Civilian Exclusion Order No. 34, Pub. L. No. 77-503, 56 Stat. 173 (1942); Korematsu v. United States, 323 U.S. 214, 220 (1944); Exec. Order No. 9066, 3 C.F.R. 1092, 1093 (1942).

[28] President John F. Kennedy was assassinated in Dallas, Texas on November 22, 1963. *See* Tom Wicker, *Gov. Connally Shot; Mrs. Kennedy Safe*, N.Y. TIMES, Nov. 23, 1963, at A1. After Kennedy's assassination, anti-Dallas sentiment was rampant across the country. *See* Peter Applebome, *25 Years after Death of Kennedy, Dallas Looked at its Changed Image*, N.Y. TIMES, Nov. 21, 1988, at A8.

[29] *See infra* Parts II & IV.

[30] Hijacked American Airlines Flight 11 crashed into the North Tower of the World Trade Center 8:46 AM on September 11, 2001. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 285 (2004) [hereinafter 9/11 COMMISSION]. Hijacked United Airlines Flight 175 crashed into the South Tower of the World Trade Center at 9:03 AM. *Id.* A third hijacked plane, American Airlines Flight 77, hit the west wall of the

at the heart of the infrastructure of the West,[31] jihadists answering to the terrorist organization Al Qaeda[32] crashed two commercial airliners into the World Trade Center towers, which soon collapsed into smoldering pyres of twisted wreckage.[33] Another flight crashed into the Pentagon,[34] while passengers aborted a fourth hijacking in a field in eastern Pennsylvania.[35]

By the end of the day, there were nearly 3,000 American lives lost[36] leaving a nation of scared individuals and traumatized communities.[37] It

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Pentagon at 9:37. *Id.* at 314. A fourth hijacked plane, United Airlines Flight 93, "plowed into an empty field in Shanksville, Pennsylvania" at 10:03 when passengers alerted to the World Trade Center attacks rushed the cockpit of the airplane. *Id.* at 14. Both World Trade Center towers had collapsed by 10:28. *Id.* at 285. All four plane crashes and the collapse of both towers transpired within 102 minutes. *See id.*

[31] *See id.* at 47–49.

> A National Intelligence Estimate distributed in July 1995 predicted future terrorist attacks against the United States—and *in* the United States. It warned that this danger would increase over the next several years. It specified as particular points of vulnerability the White House, the Capitol, symbols of capitalism as Wall Street, critical infrastructure such as power grids, areas where people congregate such as sports arenas, and civil aviation generally. It warned that the 1993 World Trade Center bombing [by Al Qaeda] had been intended to kill a lot of people, not to achieve any more traditional political goal.

Id. at 341. *See also id.* at 323 ("The lesson of 9/11 for civilians and first responders can be stated simply: in the new age of terror, they—we—are the primary targets. The losses America suffered that day demonstrated . . . the gravity of the terrorist threat.").

[32] Although the politics of Al Qaeda and the allegiances of all the 9/11 terrorists are complicated and not uniform, it is fair to hold Al Qaeda and Islamic extremist sympathizers of Al Qaeda responsible for 9/11. *See id.* at 145–73. Notably, Khalid Sheikh Mohammed is considered the "mastermind of the 9/11 plot." *Id.* at 148. Mohammed eventually formally joined Al Qaeda. *Id.* at 154. Osama Bin Laden gave the "green light for the 9/11 operation sometime in late 1998 or 1999" as a head figure of Al Qaeda. *Id.* at 145, 149. Al Qaeda provided the primary resources for executing the 9/11 plot. *Id.* at 169. Several key players in the 9/11 conspiracy were not formal Al Qaeda members, but a group of "aspiring jihadists from Germany" that participated under Al Qaeda and Khalid Sheikh Mohammed's direction. *Id.* at 160. *See also id.* at 160–73.

[33] *See id.* at 285.

[34] *Id.* at 314.

[35] *Id.* at 14.

[36] *Id.* at 552 n.188.

[37] *See* Blaine Harden, *Physical and Psychological Paralysis of Nation*, N.Y. TIMES, Sept. 12, 2001, at A18.

was the largest loss of lives on American soil "as a result of hostile attack in its history."[38] Before the day had begun, the most contentious political issue in the country was stem cell research.[39]

Following the attacks, President George W. Bush's administration and Congress cooperated to produce a flurry of legislation designed to thwart future terrorist attacks and empower the executive branch.[40] In the weeks following the 9/11 terrorist attacks, Congress passed appropriation bills,[41] joint resolutions condemning the attacks and expressing sympathy for the victims,[42] and the Authorization for Use of Military Force.[43] Their efforts would culminate in the USA Patriot Act of 2001,[44] a massive piece of legislation that may have irrevocably changed the way the U.S. government observes and interacts with its citizens.[45]

The bill spanned over 342 pages and reached the Senate only six weeks after 9/11.[46] The Patriot Act's sprawling sections created new laws and amended important existing ones in drastic ways. The Patriot Act's greatest contributions concerned wiretapping,[47] money laundering,[48] and immigration.[49] Congress and the Bush Administration touted the Patriot Act

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[38] 9/11 COMMISSION, *supra* note 30, at 311.

[39] Cullen Murphy & Todd S. Purdum, *Farewell to All That: An Oral History of the Bush White House*, VANITY FAIR, Feb. 2009, at 96; O. Carter Snead, *Public Bioethics and the Bush Presidency*, 32 HARV. J.L. & PUB. POL'Y 867, 879 (2009).

[40] *See* John Lancaster, *House Approves Terrorism Measure: Bill Grants Bulk of Bush's Request*, WASH. POST, Oct. 25, 2001, at A1, A4 ("The Senate worked closely with the administration in drafting the [Patriot Act].").

[41] *See, e.g.*, H.R. 2586, 107th Cong. (2001) (enacted) (providing authorization and funding for military action).

[42] *See* S.J. Res. 22, 107th Cong. (2001) (enacted).

[43] Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat 224 (codified in 50 U.S.C. § 1541 note (2001)) (authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

[44] USA Patriot is an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[45] *See infra* Part V.

[46] USA Patriot Act of 2001, H.R. 3162, 107th Cong. (as passed by House, Oct. 24, 2001).

[47] *Id.* §§ 201–25.

[48] *Id.* §§ 301–77.

[49] *Id.* §§ 401–28.

as the centerpiece in anti-terror legislation.[50] If the crisis was 9/11 and the persistent threat of terrorism, the Patriot Act was broadcast to the world and understood by the public[51] as the definitive and most comprehensive attempt to remedy that crisis.[52]

B. Although the failures leading up to 9/11 were complex and systemic, the 9/11 Commission and other attempts to explain the failures provided strategies for preventing future terrorist attacks.

The September 11th attacks were of unimaginable magnitude and unprecedented sophistication.[53] But even in 2001, terrorism was far from a novel threat to American lives, both abroad and at home.[54] President Bush's

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[50] *See, e.g.*, 147 CONG. REC. 19,505–07 (2001) (statement of Sen. Orrin Hatch, a Republican from Utah) ("These tools [in the Patriot Act] are vital to our ability to effectively wage the war against terrorism, and ultimately to win it."); *id.* at 531 (statement of Sen. Maria Cantwell, a Democrat from Washington) ("This is probably one of the most significant pieces of legislation that affects our home-front activities in fighting that battle [to fight terrorism]."); *id.* at 19,511–12 (statement of Sen. Bob Graham, a Democrat from Florida) ("If there is a single goal of the intelligence components of this antiterrorism bill, it is to . . . to prevent[] the acts which threaten the lives of American citizens in this country and abroad."); Dana Milbank, *President Asks for Expanded Patriot Act: Authority Sought to Fight Terror*, WASH. POST, Sept. 11, 2003, at A1; O'Harrow Jr., *supra* note 4, at 9 (explaining that the Patriot Act was seen by the administration as "a long overdue reworking of anti-terrorism laws to prevent something like this from happening again on American soil").

[51] *See, e.g.*, Adam Clymer, *Terror Bill Clears House; Moves to Senate*, N.Y. TIMES, Oct. 25, 2001, at B9 ("The House today overwhelmingly passed sweeping antiterrorism legislation"); Lancaster, *supra* note 40, at A1 (describing the Patriot Act as a "terrorism measure").

[52] *See, e.g.*, 147 CONG. REC. 19,507 (statement of Sen. Paul Sarbanes, a Democrat from Maryland) (describing the Patriot Act as "our comprehensive anti-terrorism package"); *id.* at 19,544–45 (statement of Sen. Ted Kennedy, a Democrat from Massachusetts) (suggesting that Congress "can send the President a tough, comprehensive, and balanced anti-terrorism bill").

[53] 9/11 Commission, *supra* note 30, at xv ("September 11, 2001, was a day of unprecedented shock and suffering in the history of the United States"); *id.* at 154 ("[Khalid Sheikh Mohammed] concedes that [his initial] proposal received a lukewarm response from al Qaeda leaders skeptical of its scale and complexity."); *id.* at 311 ("On September 11, the nation suffered the largest loss of life—2,973—on its soil as a result of hostile attack in its history.").

[54] On February 26, 1993, two men detonated a van loaded with bombs in the parking garage of the World Trade Center, killing six people, injuring hundreds more, and causing millions in property damage. United States v. Yousef, 327 F. 3d 56, 79 (2d Cir. 2003). Al

advisors warned that Osama Bin Laden was "determined to strike in U.S." as close to 9/11 as August 6, 2001.[55] By the end of the summer of 2001, the intelligence sector was "blinking red," warning that a "near-term spectacular terrorist attack" was near and would be perpetrated by al Qaeda and Bin Laden.[56]

Jim Dempsey, an employee at the Center for Democracy and Technology, firmly believed the FBI "screwed up" and "should have caught [the 9/11 hijackers]."[57] Writer and statistician Nate Silver insists that the intelligence community's failure to stop Bin Laden was due to its inability to separate the pertinent information on the imminent attack—which was "somewhere in a file cabinet or a computer database"—from the overwhelming influx of irrelevant data.[58] 9/11 may have simply been what Secretary of Defense Donald Rumsfeld called an "unknown unknown,"[59] falling within a gap in our knowledge we didn't even know existed due to a "mental block" left by inadequate experience.[60] Basically, 9/11 was *not* caused by a lack of information, but not knowing what to do with the information the intelligence community and law enforcement had: A failure of analysis.[61]

Qaeda killed 224 people in bombings perpetrated against U.S. embassies in Kenya and Tanzania in 1998. NATE SILVER, THE SIGNAL AND THE NOISE 422 (2012). In 2000, al Qaeda used a bomb to rip a hole in the USS Cole off the coast of Yemen, killing 17 and injuring 40. 9/11 COMMISSION, *supra* note 30, at 190.

[55] Murphy & Purdum, *supra* note 39, at 96. *See also* 9/11 COMMISSION, *supra* note 30, at 260–61.

[56] 9/11 COMMISSION REPORT, *supra* note 30, at 259. *See also id.* at 256–57, 262 ("Most of the intelligence community recognized in the summer of 2001 that the number and severity of the reports were unprecedented."). The intelligence community considered al Qaeda an organization capable of large-scale attacks, and was aware that it was actively seeking targets on U.S. soil. Murphy & Purdum, *supra* note 39, at 96.

[57] O'Harrow Jr., *supra* note 4, at 6 (quoting CDT employee Jim Dempsey). Officials investigated Zacarias Moussaui less than a month before September 11th, after he requested training in a Boeing 747 simulator despite only minimal flight training. 9/11 COMMISSION REPORT, *supra* note 30, at 246–47. U.S. intelligence officials cautioned that terrorists may use aircraft as weapons. SILVER, *supra* note 54, at 422.

[58] SILVER, *supra* note 54, at 418.

[59] *Id.* at 421 (quoting Donald Rumsfeld).

[60] *Id.*

[61] *See id.* at 412–45.

The most ambitious and comprehensive answer to the question "How did this happen?" was the 9/11 Commission.[62] The 9/11 Commission Report largely echoed the sentiments of Dempsey and Silver. The Report, compiled by a bipartisan team of commissioners,[63] sought to investigate the facts and circumstances surrounding 9/11, so as to "provide the fullest possible account of the events surrounding 9/11 and to identify lessons learned."[64] Released in 2004, the 9/11 Commission identified four primary types of failure in the government's prevention efforts: "failures[] in imagination, policy, capabilities, and management."[65]

Like Pearl Harbor,[66] some of these internal problems were not knowable at the time of the attack and were only apparent once the threat of terrorism became fully realized.[67] Even the most perceptive national security advisor

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[62] Otherwise known as the "National Commission on Terrorist Attacks Upon the United States" (hereinafter the "9/11 Commission"). Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 601, 116 Stat. 2383, 2408 (2002) (current version at 6 U.S.C. § 101 note (2013)). The 9/11 Commission was created to answer the questions "How did [9/11] happen, and how can we avoid such tragedy again?" 9/11 COMMISSION, *supra* note 30, at xv. Their mandate from Congress was "sweeping." *Id.*

[63] The 9/11 Commission was composed of five Democrats and five Republicans, and chaired by Thomas Kean (Rep.-former Governor of New Jersey). *Id.* at xiv–xv.

[64] *Id.* at xvi.

[65] *Id.* at 339.

> Surprise, when it happens to a government, is likely to be a complicated, diffuse, bureaucratic thing. It includes neglect of responsibility, but also responsibility so poorly defined or so ambiguously delegated that action gets lost." That comment was made more than 40 years ago, about Pearl Harbor. We hope another commission, writing in the future about another attack, does not again find this quotation to be so apt.

Id. at 406 (quoting Thomas Schelling, *Foreword* to ROBERTA WOHLSTETTER, PEARL HARBOR: WARNING AND DECISION, at viii (1962)).

[66] SILVER, *supra* note 54, at 412–20.

[67] *Id.* at 420–28.

> [W]e believe that both President Clinton and President Bush were genuinely concerned about the danger posed by al Qaeda. . . . [but] [i]t is hardest to mount a major effort while a problem still seems minor. Once the danger has fully materialized, evident to all, mobilizing action is easier—but then it may be too late.

9/11 COMMISSION, *supra* note 30, at 349–50.

to President Bush, Richard Clarke, admitted that his policy advice would not have prevented 9/11 if it had been implemented prior to the attacks.[68] Over a decade after the collapse of the Soviet Union, the U.S. Government still showed vestiges of Cold War institutions.[69] The U.S. government was ill-prepared to handle a threat like al Qaeda in 2001.

The 9/11 Commission identified the insecurity of the country's borders as a problem, and noted the failure of the Clinton administration to reform immigration policy.[70] The Commission also recommended that the government track and disrupt terrorist finance sources.[71] The most convenient scapegoat for the lack of readiness in preventing the attacks on 9/11 was the intelligence gap between the gang of foreign intelligence and law enforcement agencies (such as the FBI and CIA).[72] Clarke, the National Security Council Counterterrorism Coordinator, did not have access to much of the NSA, CIA, and FBI's important internal information.[73] Eliminating these blind spots was a priority in the aftermath of 9/11.[74]

However, not all of these gaps in intelligence were caused by a failure in the existing legal infrastructure or bureaucratic organization.[75] Office foibles and administrative fumbles were more destructive than a lack of legal

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[68] *Id.* at 348 ("Perhaps the most incisive of the advisors on terrorism to the new administration was the holdover Richard Clarke. Yet he admits that his policy advice, even if it had been accepted immediately and turned into action, would not have prevented 9/11.") (citation omitted).

[69] *Id.* at 350–51. "As presently configured [in 2004], the national security institutions of the U.S. government are still the institutions constructed to win the Cold War." *Id.* at 399.

[70] *Id.* at 352.

[71] *Id.* at 381–83.

[72] *See* O'Harrow Jr., *supra* note 4, at 11 ("[S]ome conservatives . . . long contended that [FISA] created unnecessary, even absurd, barriers between criminal and intelligence investigators."); *see, e.g.*, 9/11 COMMISSION, *supra* note 30, at 83 (serious FAA blind spot on the domestic threat picture as understood by the FBI and CIA); *id.* at 417 (undistributed NSA information).

[73] 9/11 COMMISSION, *supra* note 30, at 255.

[74] *See id.* at 416–19 (recommending that "information be shared horizontally, across networks that transcend individual agencies."); *see, e.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1016(b)(1)(A), 118 Stat. 3638, 3665 ("The President shall create an information sharing environment for the sharing of terrorism information in a manner consistent with national security and with applicable legal standards relating to privacy and civil liberties") (current version at 6 U.S.C. § 485(b)(1)(A) (2013)).

[75] Many of the problems were self-inflicted; either errors in management, policy, or effort. 9/11 COMMISSION, *supra* note 30, at 339. For example, the CIA's concern for security "bordering on paranoia . . . vastly complicated information sharing." *Id.* at 91.

authority in allowing the 9/11 attacks to occur.[76] In a series of bumbling, television sitcom-like mishaps, important information was inadvertently not shared,[77] documents were lost,[78] then-existing laws were misinterpreted by officials,[79] and analysis was not shared between agencies.[80] During the Clinton Administration, the relationship between the FBI Director and the President was "nearly nonexistent."[81] Consequently, the director's information was rarely shared with the National Security Council (NSC).[82] There were also the common bureaucratic problems of financial uncertainty over departmental budgets[83] and, most importantly, a lack of a comprehensive strategy to deal with terrorism.[84] "However the specific problems are labeled," wrote the 9/11 Commission, "we believe they are symptoms of the government's broader inability to adapt how it *manages problems* to the new challenges of the twenty-first century."[85]

In response to their findings, the 9/11 Commission issued many recommendations to the federal government: define the threat of terrorism,[86] initiate military action against terrorist organizations,[87] cooperate with foreign governments to eradicate terrorism,[88] assume a role of moral leadership in the world,[89] prevent the proliferation of weapons of mass

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[76] *See id.* at 355–56.

[77] *Id.* at 267, 353, 502 n.44.

[78] *Id.* at 353.

[79] *Id.* at 79, 271, 353.

[80] *Id.* at 353–57.

[81] *Id.* at 358.

[82] *Id.*

[83] *See id.* at 76, 93, 106 ("[Congressional staff] tended as well to focus on parochial considerations, seeking to add or cut funding for individual (often small) programs, instead of emphasizing comprehensive oversight projects.").

[84] *Id.* at 106; *see id.* at 357–58 ("[T]he vision of central management clearly has not been realized."); *see id.* at 361 ("The United States should consider *what to do*—the shape and objectives of a strategy. Americans should also consider *how to do it*—organizing their government in a different way.").

[85] *Id.* at 353 (emphasis added).

[86] *Id.* at 361–63.

[87] *Id.* at 365–68.

[88] *Id.* at 379–81.

[89] *Id.* at 375–76.

destruction,[90] target terrorist money,[91] monitor veins of transportation and the border,[92] and many others.[93]

In spite of these suggestions, the 9/11 Commission Report devoted significant time to discussing the preservation of civil liberties.[94] While conceding that it called "for the government to increase its presence in our lives," the Commission stressed the need to balance this presence with individual liberties and personal privacy.[95] Beyond the specific measures previously mentioned, the report did not call for the government to "enhance law enforcement investigatory tools"[96] or overhaul wiretapping powers beyond "updating America's surveillance laws to reflect technological developments . . . ."[97] Trap–and–trace devices and sneak–and–peek warrants[98] were omitted from the report. The 9/11 Commission notably reserved judgment on the efficacy of the Patriot Act, but suggested "that a full and informed debate on the Patriot Act would be healthy" due to the "concerns regarding the shifting balance of power to the government . . . ."[99]

Because Congress intended the Patriot Act to be the major measure preventing the United States from future terrorist attacks,[100] a thoughtful and well-drafted bill to avert such attacks would be designed to ameliorate the shortcomings of the law and correct the institutional flaws that led to 9/11, such as those identified by the 9/11 Commission. A good antiterrorism law would also anticipate other deficiencies in the legal system that could hamper efforts to fight terrorism. Although the 9/11 Commission in 2004 was blessed with the luxury of hindsight that Congress and the President did not have in October 2001, this lack of hindsight in crisis creates an unavoidable risk that crisis legislation will alter the law in undesirable and unnecessary ways.

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[90] *Id.* at 380–81.

[91] *Id.* at 381–83.

[92] *Id.* at 383–91.

[93] *See id.* at 361–93.

[94] *Id.* at 393–95.

[95] *Id.*

[96] USA Patriot Act of 2001, Pub. L. No. 107-56, § 1, 115 Stat. 272, 272 (2001) (current version at 18 U.S.C. § 1 note (2013)).

[97] 9/11 COMMISSION, *supra* note 30, at 394.

[98] Sneak-and-peek warrants, or delayed notice warrants, allow law enforcement officers to delay in notifying a searched party upon the execution of a warrant. *See* USA Patriot Act of 2001 § 213 (codified as amended at 18 U.S.C. § 3103(a)). *See also infra* Parts III.C & V.

[99] 9/11 COMMISSION, *supra* note 30, at 394.

[100] *See supra* Part II.A.

C. Several of the Patriot Act's provisions were overt adjustments to the institutional and legal weaknesses that culminated in 9/11, as observed by the 9/11 Commission.

Some of the Patriot Act's provisions are unmistakable responses to what caused the attacks and, if imperfect or severe, are at least entirely understandable. Representatives and senators alike championed the need to weaken terrorist organizations by crippling their ability to launder money.[101] In the midst of expanding clandestine government behavior, Congress found that financial transparency was a priority.[102] The provisions in the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001 took aim at the laundered capital that is critical to terrorist organizations[103] and the "financial fuel that permits transnational criminal enterprises to conduct and expand their operations."[104]

The Act also forces financial institutions to maintain records and track transactions in order to keep the federal government abreast of institutions' and their customers' activities in painstaking detail,[105] permits the sharing of customer information between financial institutions,[106] and authorizes the seizure of funds of those suspected of money laundering activities related to terrorism.[107] Section 106 amends the International Emergency Powers Act (IEPA), granting the President the power to confiscate the property "of any foreign person, foreign organization, or foreign country that he determines

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> [101] [T]he war against terrorism will not be won unless we cut off al-Qaeda and all terrorist groups from the funds that sustain their attacks against civilized humanity. We can do that. Title III of the PATRIOT Act provides the United States absolutely essential weapons in our fight to disrupt terrorist funding.

147 CONG. REC 20,444 (2001) (statement of Rep. John LaFalce, a Democrat from New York); *id.* at 19,507 (statement of Sen. Paul Sarbanes, a Democrat from Maryland) ("I rise in very strong support of . . . Title III of S. 1510, [a previous bill and part of the Patriot Act] the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.").

[102] USA Patriot Act of 2001, Pub. L. No. 107-56, § 302 (current version at 31 U.S.C. § 5301 note, 5311 note (2013)).

[103] *Id.* § 302 (amending 31 U.S.C. § 5311).

[104] *Id.*

[105] *See id.* § 311 (codified as amended in 31 U.S.C. § 5318 (2013)).

[106] *Id.* § 314 (amending 31 U.S.C. § 5311).

[107] *See id.* § 806 (amending 18 U.S.C. § 981 (a)(1)).

has planned, authorized, aided, or engaged in such hostilities or attacks against the United States."[108]

Section 203 expands the authority of law enforcement to share criminal investigative information with other law enforcement "to the extent that such contents include foreign intelligence or counterintelligence."[109] The Act even amends the Federal Rules of Criminal Procedure to permit the sharing of grand jury information between government officials "for the purpose of enforcing [criminal] law" or "when the matters involve foreign intelligence or counterintelligence."[110] Title IX requires the Attorney General to disclose to the Director of Central Intelligence any "foreign intelligence acquired by an element of the Department of Justice"[111] and alters the responsibilities and priorities of Central Intelligence.[112] These changes help close intelligence gaps and initiate the needed changes in Central Intelligence policy.[113]

In an effort to protect the borders of the United States, which were perceived as vulnerable to terrorist infiltration,[114] the Patriot Act "enhanced" the Immigration and Nationality Act.[115] Section 412 institutes mandatory detentions of suspected terrorists, whose custody may be maintained indefinitely until they are no longer deemed a threat to national security.[116] Section 501 of the Patriot Act makes funds available to the Department of Justice to pay rewards to those who combat terrorism pursuant to public

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[108] *Id.* § 106 (amending 50 U.S.C. § 1702). Before seizing assets, the President designates an organization or individual a "global terrorist." Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (as amended in 15 C.F.R. 744.12 (2003)). This designation is made pursuant to and is known by different variations of "global terrorist." *Id.*; *see, e.g.*, Global Relief Foundation v. O'Neill, 315 F. 3d 748, 750 (7th Cir. 2002) (designating Global Relief Foundation as a "Specially Designated Global Terrorist" under Executive Order 13224, who then had its assets seized).

[109] USA Patriot Act of 2001 § 203 (amending 18 U.S.C. § 2517).

[110] *Id.* § 203 (amending FED. R. CIV. P.(e)(3)(C)).

[111] *Id.* § 905. (amending 50 U.S.C. § 403-5b).

[112] *See id.* § 901 (amending 50 U.S.C. § 403-3c) (requiring that the Director of Central Intelligence "establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived . . . [under FISA] is disseminated so it may be used efficiently and effectively for foreign intelligence purposes").

[113] *See supra* Part III.B.

[114] Glynn Custred, North American Borders: Why They Matter, CTR FOR IMMIGRATION STUDIES, May 2003, at 2–3 (2003).

[115] *See* USA Patriot Act of 2001 §§ 401–428 (amending scattered sections of 8 U.S.C.).

[116] *Id.* § 412 (amending 8 U.S.C. § 1226(a)).

advertisements for assistance from the Department of Justice, reminiscent of wanted posters from the Wild West as imagined by Hollywood.[117]

While these measures were popular in 2001, several members of Congress criticized measures similar to those in the International Money Laundering and Anti-Terrorism Act as potential opportunities for "official abuse directed at peaceful political activity" years earlier.[118] While there are plenty of reasons to quibble over these provisions or their severity, these portions of the Patriot Act are at least identifiably related to the failures cited in the 9/11 Commission Report.[119]

D. Many of the Patriot Act's provisions were not responses to either existing legal deficiencies or the 9/11 Commission's recommendations, but were completely unrelated to terrorism.

Although the Patriot Act was perceived by the American public to be a specifically "anti-terrorist" measure when enacted,[120] this characterization was highly inaccurate. Regardless of the merit of the Patriot Act's various provisions, many are at least logically related to enhancing the government's terrorism-fighting abilities.[121] On the other hand, many of the Patriot Act's other provisions are not reasonably related to terrorism.[122] Even the act's stated purpose exceeded the mission to protect Americans from terrorism: "To deter and punish terrorist acts in the United States and around the world, *to enhance law enforcement investigatory tools, and for other purposes*."[123] It is these portions of the bill that alarmed representatives[124] and civil

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[117] *Id.* § 501 (current version at 18 U.S.C. § 3071 note).

[118] H.R. REP. NO. 104-383, at 189 (1995) (dissenting views) (report prepared in anticipation of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 810, 110 Stat. 1214, 1311–12).

[119] *See supra* Part III.A.

[120] *See supra* Part III.A.

[121] *See supra* Part II.C.

[122] "I have expedited work on anti-terrorism legislation, within which the Administration has insisted on including general criminal law measures not limited to terrorism, in order to allow the Senate to act promptly in response to the unprecedented attacks of September 11, 2001." 147 CONG. REC. 19,515 (2001) (Exhibit 1: Letter from Sen. Patrick Leahy, a Democrat from Vermont to Sen. Arlen Specter, a Republican from Pennsylvania).

[123] USA Patriot Act of 2001, Pub. L. No. 107-56, § 1, 115 Stat. 272, 272 (emphasis added).

[124] *See infra* Part III.C.

libertarians alike.[125] Simply put, the executive branch and certain legislators had been trying to get many of the nuts and bolts of the Patriot Act passed for years.[126]

The Patriot Act rewrote American law in ways that affected American citizens in intensely personal ways. The infamous "business records" provision gave the FBI power to "requir[e] the production of any tangible things . . . for an investigation to protect against international terrorism or clandestine intelligence activities," listing "books, records, papers, documents, and other items" as such "tangible things."[127]

Many of the most serious additions were to the Foreign Intelligence Surveillance Act of 1978 (FISA),[128] which was enacted to reign in domestic surveillance amidst evidence of "widespread abuse of government wiretaps."[129] Section 206 of the Patriot Act amended FISA by permitting roving wiretaps[130] when the target of the FISA application "may have the effect of thwarting the identification of a specified person."[131] Section 214 broadened the scope of lawful uses[132] for pen register[133] and trap and trace

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[125] *See* Lancaster, *supra* note 40, at A1 (discussing that the Patriot Act "alarm[ed] civil liberties advocates who say that lawmakers are being stampeded into far-reaching measures that they will someday regret."); O'Harrow Jr., *supra* note 4, at 20 ("The implications of giving the government access to so much personal information unnerved [CDT employee Jim Dempsey] and other civil libertarians").

[126] *See, e.g.*, H.R. REP. NO. 104-383 (1995). *See* also Lancaster, *supra* note 40, at A4 (the bill "incorporates new powers long sought by prosecutors and law enforcement but resisted by Congress on civil liberties grounds").

[127] *Id.* § 215 (amending 50 U.S.C. § 1861).

[128] Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1885c (2012).

[129] Foreign Intelligence Surveillance Act (FISA) Signed Into Law, Protecting Americans from Domestic Spying, N.Y. TIMES (Oct. 6, 1978), *available in pertinent part at* https://www.eff.org/nsa-spying/timeline (emphasis added).

[130] "A roving wiretap confers blanket authority to tap all phones a suspect uses, instead of requiring separate applications for each telephone." Adam Clymer, *Bush Set to Sign: Measure Provides Tools White House Sought, With Some Limits*, N.Y. TIMES, Oct. 26, 2001, at B5 [hereinafter Clymer, *Antiterrorism Bill*].

[131] USA Patriot Act of 2001, § 206, 115 Stat. 272, 282 (amending 50 U.S.C. § 1805).

[132] *Id.* § 214 (amending 50 U.S.C. §§ 1842–43) (removing the requirement that the target be a non-U.S. citizen).

[133] *Id.* "A pen register is a mechanical device that records the numbers dialed on a telephone . . . . [i]t does not overhear oral communications." United States v. N.Y. Tel. Co., 434 U.S. 159, 161 n. 1 (1977).

devices,[134] while Section 216 expanded their application to monitor cell phones, the Internet, and email.[135] Furthermore, law enforcement can obtain authority under FISA upon certification from a federal or state law enforcement officer that the information sought "is relevant to an ongoing *criminal* investigation."[136] These requests for wiretaps under the newly amended FISA were to be approved by the Foreign Intelligence Surveillance Court (FISC), which was created by Congress partly because it believed "that the executive branch had proved incapable of properly policing itself."[137]

While the changes to FISA were technical and confusing—particularly in the Patriot Act's text[138]—the general trend was that the Patriot Act relaxed FISA's requirements for obtaining surveillance on targets, especially domestic targets.[139] This was most prominently reflected in Section 218, which changed the requirement that "*the* purpose" of a FISA request be to gather foreign intelligence to merely "*a* significant purpose."[140] This is a subtle semantic difference that seems harmless on its face. But as a result, it allowed the primary goal of an investigation with such wiretaps or

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[134] USA Patriot Act of 2001 § 206. Trap and trace devices are used to record telephone numbers of incoming calls received by the subject of surveillance. *See* U.S. Telecom Ass'n v. FBI, 276 F. 3d 620, 623 (D.C. Cir. 2002).

[135] USA Patriot Act of 2001 § 216 (amending 18 U.S.C. §§ 3121–27).

[136] ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 23 (D.D.C. 2003) (interpreting and quoting 18 U.S.C § 3122(b)(2), which was amended by section 216 of Patriot Act).

[137] Scott Shane, *A Court to Vet Kill Lists*, N.Y. TIMES, Feb. 9, 2013, at A8.

[138] *See, e.g.*, USA Patriot Act of 2001 § 202 ("Section 2516(1)(c) of title 18, United States Code, is amended by striking 'and section 1341 (relating to mail fraud),' and inserting 'section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse)'").

> Section 3121(c) of title 18, United States Code, is amended—(1) by inserting "or trap and trace device" after "pen register"; (2) by inserting "routing, addressing," after "dialing"; and (3) by striking "call processing" and inserting "the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications."

Id. § 216.

[139] *See* USA Patriot Act of 2001 §§ 213–225; *see, e.g., id.* § 214 (amending FISA in 50 U.S.C. §§ 1842–43) (removing the requirement that the target be a non-U.S. citizen); *id.* § 505 (amending scattered sections at 12, 15, 18 U.S.C.) (lowering the threshold for the FBI to obtain certain telephone and financial records).

[140] *Id.* § 218 (amending 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B)) (emphasis added).

surveillance to be a criminal investigation, though courts have rejected the notion that FISA may now be used to investigate "wholly unrelated ordinary crimes."[141]

For instance, in 1995, the Committee on the Judiciary recommended a law permitting the use of pen registers and trap and trace devices in foreign intelligence investigations,[142] as well as the use of roving wiretaps for criminal investigations.[143] The bill eventually passed, omitting authorization for such devices.[144] The failure to include these amendments owed no small part to the dissenting views from committee members, who felt such measures "threaten[ed] our fundamental rights and liberties."[145] The six dissenting representatives concluded that "the Committee ha[d] chosen to approve a bill which represents one of the most significant intrusions on our civil liberties since the eras of interning Japanese-Americans during World War II and the red-baiting of McCarthyism."[146]

The Patriot Act expanded acceptable use of pen register and trap and trace devices so that they may monitor cell phones, email, and computer networks,[147] even though the contents of any communications are to remain confidential.[148] The need to bring FISA and federal wiretapping laws into the 21st century in 2001 may have been a matter of great importance, but that doesn't excuse the inclusion of tools that are ultimately used against criminals in what was widely understood to be a "terror bill."[149] Senator

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[141] *In re* Sealed Case, 310 F. 3d 717, 736 (FISA Ct. Rev. 2002).

[142] H.R. REP. NO. 104-383, at 88 (1995) (authorizing pen registers and trap and trace devices upon showing that the information sought is relevant to an ongoing counterintelligence investigation "will be all that is required"). *See also infra* Part IV.D.

[143] *Id.* at 90 (authorizing multipoint or roving wiretaps for targets engaged in strictly criminal activity).

[144] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 810, 110 Stat. 1214, 1311–12 (commissioning a study on electronic surveillance laws using pen registers and trap and trace devices, but not altering the authority to use them).

[145] H.R. REP. NO. 104-383, at 176 (dissenting views).

[146] *Id.* at 188.

[147] *See In re* Application of U.S. for use of Pen Register, 396 F. Supp. 2d 45, 48 (D. Mass. 2005) (holding that information contained in the "subject" line could not be obtained using pen register and trap and trace devices). *See also In re* Application of U.S. for Pen Register and Trap & Trace Device, 416 F. Supp. 2d 13, 16–17 (D.D.C. 2006) (explaining that the Patriot Act modernized the law by applying pen registers and trap and trace devices to the Internet and email).

[148] USA Patriot Act of 2001, Pub. L. No. 107-56, § 203, 115 Stat. 272, 278–81 (codified as amended at 18 USCA § 3103(a) (2013)).

[149] *See* Clymer, *supra* note 51, at B9.

Patrick Leahy, a Democrat from Vermont and one of the leading architects of the Patriot Act, coordinated with then-Senator John Ashcroft, a Republican from Missouri, to update the "antiquated" legal procedures for trap and trace and pen register devices "for several years" through bills wholly unrelated to terrorism.[150]

There are other tools in the Patriot Act that, while occasionally used to fight terrorism, are frequently used in criminal investigations.[151] Section 213 of the Patriot Act allows the government to delay giving notice of a search or seizure of "any property or material that constitutes evidence of a criminal offense" if "providing immediate notification of the execution of the warrant may have an *adverse result*," among other things.[152] The Patriot Act popularized these adorably nicknamed "sneak–and–peek" warrants, whose constitutionality has since been successfully challenged in one federal district court.[153] Sneak–and–peek warrants "allow agents to conduct searches secretly (whether physically or virtually), to observe or copy evidence, and to depart the location searched, generally without taking any tangible evidence or leaving notice of their presence."[154]

Not only was the Patriot Act intent on crippling the money laundering operations of sophisticated international terrorist organizations, it also targeted the cash-based operations of "drug dealers and other criminals"[155] avoiding their friendly neighborhood banks.[156] Provisions such as these seem simply tacked onto the Patriot Act. They have little or no connection

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[150] 147 CONG. REC 19,498 (2001) (statement of Sen. Patrick Leahy) (referring to the E-Privacy Act of 1998 and the E-Rights Act of 1999).

[151] *See infra* Part V. *See* also Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sep. 28, 2003, at 1.

[152] USA Patriot Act of 2001 § 213, 115 Stat. 272, 286 (codified as amended at 18 U.S.C. § 3103a (2013)) (emphasis added).

[153] *See* Mayfield v. United States, 504 F. Supp. 2d 1023, 1042–43 (D. Or. 2007) ("Therefore, I conclude that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are unconstitutional because they violate the Fourth Amendment of the United States Constitution."), *vacated for lack of standing*, 599 F.3d 964 (9th Cir. 2010). *See also infra* Part V.A.

[154] ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 23–24, 21 (D.D.C. 2003) (denying ACLU's Freedom of Information Act (FOIA) request).

[155] USA Patriot Act of 2001 § 371, 115 Stat. 272, 336 (codified in 31 U.S.C. § 5332 note).

[156] The Patriot Act made "the act of smuggling bulk cash itself a criminal offense," authorized the seizure of such cash, because "only the confiscation of the smuggled bulk cash can effectively break the cycle of criminal activity of which the laundering of the bulk cash is a critical part." *Id.* § 371.

to terrorism and are instead aimed at Joe Drug Dealer and Larry Money Launderer.[157] One gets the feeling that some provisions were sitting on the Attorney General John Ashcroft's nightstand, waiting for the moment they could be appended to a more popular bill, such as a suddenly fashionable bill sporting an antiterrorism façade.[158]

These abundantly irrelevant provisions represent what is troubling about congressional exploitation of a crisis. While many of the proposals frantically rammed through committees are proportionate responses to severe problems the nation has been forced to confront, many of the Patriot Act's provisions were entirely disconnected from terrorism and were simply things "that ha[d] been on prosecutors' wish lists for years."[159] Instead of having the foresight to shoot for the solution with a cautious pitching wedge, Congress and the Justice Department hacked at the problems of preventing terrorism with a three wood in hopes that the ball would land somewhere near the green. In crisis legislation, it is the provisions serving "other purposes"—merely hitching a ride on the runaway political train—that are most worrisome and most ripe for vigilant scrutiny.[160]

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[157] The purpose of [sec. 217] is to get at the threat of computer hackers [as well as students and non-contractual employees] . . . . this could be interpreted and could be understood to include situations that not only have nothing to do with the problem but represent a very serious departure from the individual rights people should have in our country.

147 CONG. REC. 19,519 (2001) (statement of Sen. Russ Feingold, a Democrat from Wisconsin).

[158] *See, e.g.*, *id.* at 20,448 (statement of Rep. Mike Oxley, a Republican from Ohio) ("This is going to pass by an overwhelming margin. I think we all understand that."); Clymer, *supra* note 51, at B9 ("The House today overwhelmingly passed sweeping antiterrorism legislation including new attacks on money laundering.").

[159] Lichtblau, *supra* note 151, at 1 (quoting Elliot Mincberg, legal director for People for the American Way). *But see* 147 CONG. REC. 19,498 (statement of Sen. Patrick Leahy, a Democrat from Vermont) ("For example, sections 201 and 202 of the USA Act would add to the list of crimes that may be used as predicates for wiretaps certain offenses which are specifically tailored to the terrorist threat.").

[160] *See* Carr, *supra* note 4, at 1311 ("Crisis legislation will not only be hurried, imperfect and tentative; it will often be novel and unexpected.").

III. THE PASSAGE OF CRISIS LEGISLATION AS SHOWN BY THE PATRIOT ACT

A. September 11th, 2001, was the culmination of the terrorism crisis and demanded action from Congress.

The preceding section established two things: First, the Patriot Act was pitched as an anti-terrorism bill and the major congressional response to the terrorism crisis that resulted in 9/11;[161] and second, much of the Patriot Act was entirely unrelated to—or had a tenuous link to—terrorism and the 9/11 attacks.[162]

So how did a massive bill with irrelevant provisions that had been "shot down in recent years because of civil liberties concerns"[163] pass despite worries that such provisions would not "pass constitutional muster?"[164] Robert O'Harrow Jr. explained the "classic dynamic" in the *Washington Post* one year later: "Something terrible happens. Legislators rush to respond. They don't have time to investigate the policy implications thoroughly, so they reach for *what's available* and push it through."[165] This is the essence of crisis legislation.

The Patriot Act is a perfect example of the familiar beats of crisis legislation. "There was clearly a crisis"[166] in the wake of 9/11, and in a rush to appease Americans' demand for action, Congress passed sweeping legislation in an emotionally charged environment that compromised its ability to have a "full and informed debate"[167] on the issues. Like a dog

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[161] *See supra* Part II.A.

[162] *See supra* Parts II.B–D. Although, thirteen years later, there is a level of hindsight that the Congress did not possess in 2001, many contemporary critics both in- and outside Congress made the same observations, but without the complete factual record that would take years to develop. *See infra* Parts III.B–C.

[163] O'Harrow Jr., *supra* note 4, at 10.

[164] 147 CONG. REC. 19,513 (2001) (statement of Sen. Arlen Specter (a Republican from Pennsylvania.)). "Thank goodness we have a severability clause because that provision [regarding immigration] is likely unconstitutional. These matters could have been corrected had we engaged in regular order." *Id.* at 20,446 (statement of Rep. Zoe Lofgren, a Democrat from California).

[165] O'Harrow Jr., *supra* note 4, at 10 (emphasis added). *Compare id.* ("what's available"), *with* KLEIN, *supra* note 5, at 6 ("what's lying around").

[166] O'Harrow Jr., *supra* note 4, at 10.

[167] 9/11 COMMISSION, *supra* note 30, at 394.

taking its medication in a scoop of peanut butter, the hungry American public swallowed it whole.[168]

Remembering the feelings of Americans in the aftermath of 9/11 is vital to understanding how the Patriot Act was able to benefit from this emotional overload. On 9/11, the entire nation reckoned with powerful grief and terrible shock.[169] In the days and weeks following the attacks, Americans were stunned and paralyzed.[170] Starbucks quit serving customers in America's coffee capital, the Happiest Place on Earth closed its doors, America's pastime took time off, and Texas even delayed an execution.[171]

Suddenly the world had changed, as Americans became overwhelmed with fear, confusion, and sadness.[172] Americans wondered, "'Who are these people? Where did they come from? Why do they hate us?' There was a total loss of collective narrative."[173] This "loss of collective narrative" would make it a politically advantageous climate for the ideas that were "lying around."[174] Once the media inundated the bewildered public with the horrifying and shocking footage from the attacks, demands for "war" and "a clenched-fist response from the Bush administration" were rampant.[175]

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[168] *See infra* Part IV.B.

[169] 9/11 COMMISSION, *supra* note 30, at xv ("September 11, 2001, was a day of unprecedented shock and suffering in the history of the United States."); *id.* at 326 ("No American, [President Bush] said, 'will ever forget this day.'") (citing White House record, Situation Room Communications Log, Sept. 11, 2001).

[170] Harden, *supra* note 37, at A18 (explaining "a kind of national paralysis that was both physical and psychological").

[171] *Id.*

[172] *See, e.g.*, *id*. *See also* 9/11 COMMISSION, *supra* note 30, at xv ("The nation was unprepared [for September 11th]. How did this happen, and how can we avoid such tragedy again?").

[173] SHOCK DOCTRINE film, *supra* note 6, at 49:00 (quoting Naomi Klein). *See also* 9/11 COMMISSION, *supra* note 30, at 51 ("Many Americans have wondered [about Bin Ladin's worldview], 'Why do "they" hate us?' Some also ask, 'What can we do to stop these attacks?'").

[174] *See* SHOCK DOCTRINE film, *supra* note 6.

[175] Harden, *supra* note 37, at A18. *See also, e.g.*, Peter Carlson, *The Solitary Vote Of Barbara Lee: Congresswoman Against Use of Force*, WASH. POST, Sept. 19, 2001, at C4 ("People are very emotional . . . . They're frustrated and they're angry.") (alteration in original) (quoting Rep. Barbara Lee, a Democrat from California); Harden, *supra* ("Bush isn't going to stand for this . . . . We'll take care of it. One plane and an atom bomb. An atom bomb. That's all it will take.") (quoting an unnamed Michigan man); Jim Rutenberg, *From Pundits and Polls, Talk of War Fills the Air*, N.Y. TIMES, Sept. 14, 2001, at A24 ("A drumbeat

The nation's leaders, warm-blooded Americans themselves, had emotions of their own. Senator Leahy recalled, "I was just thinking how angry I was."[176] Immediately after the attacks, Assistant Attorney General Viet Dinh became "consumed with a desire to strike back."[177] Dinh and the Justice Department intended to effectuate that end "by doing whatever was necessary to strengthen the government's legal hand against terrorists."[178] Even if they were not grabbing pitchforks of their own,[179] members of Congress understood that America had a crisis on its hands.[180]

America's elected officials had a job to do. Mary Matalin, an assistant to the President, described "how calm people at the White House were, and focused on getting their job done . . . . '[p]rofessional' doesn't even scratch the surface."[181] Although the end product would be largely unrelated to terrorism, there is no doubt the desire to better equip the government to prevent terrorist attacks was genuine.[182] The Justice Department demanded "all that [was] necessary for law enforcement, within the bounds of the

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for war has begun to permeate the blanket television news coverage of the attacks on the World Trade Center and the Pentagon.").

[176] O'Harrow Jr., *supra* note 4, at 8 (quoting Sen. Patrick Leahy).

[177] *Id.* at 6.

[178] *Id.*

[179] *See, e.g.*, Carlson, *supra* note 175, at C4 ("Let's show some restraint.") (quoting Rep. Barbara Lee, a Democrat from California).

[180] "I worked . . . to give the Administration the tools it needs in this crisis." 147 CONG. REC. 19,504 (2001) (statement of Sen. Pat Leahy, a Democrat from Vermont). *See also id.* at 19,521 (statement of Sen. Russ Feingold, a Democrat from Wisconsin) ("the crisis our Nation faces"); *id.* at 19,544 (statement of Sen. Ted Kennedy, a Democrat from Massachusetts) ("the current crisis"); *id.* at 20,449 (statement of Rep. Barney Frank, a Democrat from Massachusetts) ("time of crisis"); Serge Schmemann, *President Vows to Exact Punishment for 'Evil'*, N.Y. TIMES, Sept. 12, 2001, at A14 ("[President Bush's] first major crisis in office"); O'Harrow, Jr., *supra* note 4, at 10 ("there was clearly a crisis") (quoting CDT employee Jim Dempsey).

[181] Murphy & Purdum, *supra* note 39, at 96.

[182] *See, e.g.*, 147 CONG. REC. 19,507 (statement of Sen. Orrin Hatch, a Republican from Utah) ("These tools are vital to our ability to effectively wage the war against terrorism, and ultimately to win it."); *id.* at 19,512 (statement of Sen. Bob Graham, a Democrat from Florida). *See also, e.g.*, *supra* notes 176–80 and accompanying text (discussing both lawmakers' and policy advisors' reaction post-9/11 to enhance the government's legal authority to combat terrorism).

Constitution, to discharge the obligation to fight this war against terror."[183] In the coming weeks, that was what Congress sought to do.[184]

B. Fear of another attack, the rush to act, and the desire to appear strong on terror in the weeks after September 11th made the Patriot Act's passage inevitable.

Crisis has a unique and special way of creating extraordinary pressure both inside and outside Congress. After the initial shock and grief of 9/11, Americans and their elected officials experienced a medley of emotions that vacillated between fear, confusion, anxiety, and anger.[185] The collision of all these forces produced a climate that made the passage of ordinarily untenable legislation a certainty, as concerns over overreacting were replaced by the "the maxim that public safety is the highest law of all."[186]

The administration[187] and members of Congress[188] understandably shared the fear of Americans in the wake of the devastating 9/11 attacks. The executive branch had an "extraordinary sense of responsibility" and viewed another potential attack "as having blood on their hands."[189] "They were very afraid they didn't have the tools to meet the threat. . . . [T]here was enormous legal uncertainty about how far [they] could go."[190] Congress was similarly motivated by a sense of responsibility, deeply rooted in the apprehension of future attacks.[191]

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[183] O'Harrow, Jr., *supra* note 4, at 9 (quoting Assistant Att'y Gen. Viet Dinh, on behalf of Att'y Gen. John Ashcroft, to policy advisers and lawyers).

[184] *See, e.g.*, 147 CONG. REC. 19,505 (statement of Sen. Orrin Hatch, a Republican from Utah) ("[W]e have been able to put together a bill that . . . will give the Justice Department the tools it needs to be able to work and stamp out terrorist activity within our country. At least we want to give them the very best tools we possibly can.").

[185] *See supra* Part III.A.

[186] Carr, *supra* note 4, at 1309.

[187] Murphy & Purdum, *supra* note 39, at 100 (quoting Jack Goldsmith, legal adviser at the Department of Defense and later head of the Justice Department's Office of Legal Counsel) ("After 9/11 the administration faced . . . . fear of another attack. This permeated the administration. Everyone felt it . . . . They were really scared.").

[188] Carl Hulse, *In New Book, Ex-Senator Says Fear Clouded Judgment After 9/11*, N.Y. TIMES, Feb. 21, 2012, at A14 ("Mr. Feingold assembles a narrative of how the terrorist attacks . . . created a climate of fear.").

[189] Murphy & Purdum, *supra* note 39, at 100 (quoting Goldsmith, legal adviser at the Department of Defense and later head of the Justice Department's Office of Legal Counsel).

[190] *Id.*

[191] *See* 147 CONG. REC. 19,517 (2001) (statement of Sen. Maria Cantwell, a Democrat from Washington) ("It is a time in which we want to act to give law enforcement the tools

The fear of another attack fostered the belief that time was of the essence.[192] Attorney General Ashcroft demanded that Congress agree to the Justice Department's plan within a week.[193] "The implication" to Congress from the Attorney General was that the U.S. was "going to have another attack if we did not agree to this immediately."[194] Ashcroft warned, "Talk won't prevent terrorism, . . . adding that he was deeply concerned about the rather slow pace" of progress with the legislation.[195] Congress ultimately responded to demands to pass an antiterrorism bill immediately, rushing the

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they need to apprehend those who have been responsible and may be responsible for future acts of terrorism."); *id.* at 19,505 (statement of Sen. Orrin Hatch, a Republican from Utah) ("The responsibility of redeeming and rectifying this situation is the responsibility of the Congress, the Justice Department, the FBI, the INS, and the Border Patrol."); *id.* at 19,537 (statement of Sen. John Kyl, a Republican from Arizona) ("We have a responsibility to the people of this nation to ensure that those who are charged with protecting us from future terrorist attacks are empowered to do so."); *id.* at 20,438 (statement of Rep. Jim Sensenbrenner, a Republican from Wisconsin) ("Mr. Speaker, today we have the duty and privilege to pass this historic legislation, the USA-PATRIOT Act of 2001, which was born of adversity and violent attack.").

[192] Murphy & Purdum, *supra* note 39, at 100 (quoting Jack Goldsmith, legal adviser at the Department of Defense and later head of the Justice Department's Office of Legal Counsel) ("[F]ear of another attack . . . basically means that you can't wait for the usual amounts of information before acting on a threat because it may be too late.").

[193] O'Harrow Jr., *supra* note 4, at 17.

[194] *Id.* (quoting Sen. Patrick Leahy (a Democrat from Vermont)) (internal quotation marks omitted).

[195] *Id.* at 20 (quoting Att'y Gen. John Ashcroft) (internal quotation marks omitted). *See* also Lancaster, *supra* note 40, at A1, A4 (discussing that Att'y Gen. John Ashcroft received "most of what he asked for" in "legislation[,] [which] galloped through Congress in record time, skirt[ed] normal committee procedures," and "grew out of intense negotiations between" Ashcroft and Senate leaders).

bill along and skirting normal procedures.[196] Alarmingly, many members of Congress did not have time to read the Patriot Act.[197]

In a foreboding Executive Order issued on September 23, 2001, the President urged, "[T]he continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and *extraordinary threat* to the national security, foreign policy, and economy of the United States."[198] Although occurring on his administration's watch, the tragedy provided President Bush with enough political capital for his cabinet to insist on virtually anything they desired.[199] Within twenty-four

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[196] Lancaster, *supra* note 40, at A1. The Patriot Act passed the House of Representatives under a procedure known as "suspension of the rules," initiated by a motion from Rep. Jim Sensenbrenner, a Republican from Wisconsin, and normally reserved for non-controversial bills. *See* 147 CONG. REC. 20,400. *See also id.* at 19,518 (statement of Sen. Paul Wellstone, a Democrat from Minnesota) ("But I also think there is no reason, in this rush to pass the bill, that we can't make some changes."); *id.* at 19,535 (statement of Sen. Jon Corzine, a Democrat from New Jersey) ("[W]e have rushed this legislation through the Senate so quickly."). *But see id.* at 19,537 (statement of Sen. Jon Kyl, a Republican from Arizona) ("I reiterate that we are not rushing"). *See also* O'Harrow Jr., *supra* note 4, at 18 ("But [Sen.] Leahy also made it clear he would not be rushed into approving a bill.").

[197] 147 CONG. REC. 20,449 (statement of Rep. Barney Frank, a Democrat from Massachusetts) ("Mr. Speaker, I do not know how I am going to vote on this bill yet because I have a notion that a bill of this weight, I ought to read it."); Saito, *supra* note 10, at 1114 (quoting DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 151 (3d ed. 2002)) ("It is virtually certain that not a single member of the House read the bill for which he or she voted."). *But see* Lancaster, *supra* note 40, at A4 (quoting Sen. Patrick Leahy, a Democrat from Vermont) ("We have done the White House a great favor by taking the time to actually read and improve this bill before passing it."). It appears that more senators had an opportunity to read the Patriot Act in its entirety than did representatives. On the other hand, Sen. Leahy was chair of the Senate Judiciary Committee, is considered one of its authors, and was as well-informed as any member of Congress on the Patriot Act's contents.

[198] Exec. Order No. 13,224, 3 C.F.R. 786, 787 (2002) (emphasis added).

[199] *See* Murphy & Purdum, *supra* note 39, at 99–100, 148. According to pollster Matthew Dowd, Bush's approval rating sharply increased following the 9/11 attacks. *Id.* at 96 ("I had done a poll that finished the morning of 9/11 . . . . [N]ot a single question was asked about foreign policy, terrorism, national security . . . . Bush's approval I think was 51 or 52 percent. Twenty-four hours later his approvals [were] 90 percent."). According to chief counter-terrorism advisor Richard Clarke, on the evening of 9/11 Defense Secretary Rumsfeld contended that the United States should target Iraq as well as Afghanistan because "[t]here just aren't enough targets in Afghanistan. We need to bomb something else to prove that we're, you know, big and strong and not going to be pushed around by these kind of attacks." *Id.* Despite opposition to that position then and later on, the President and administration

hours of the World Trade Center's collapse, President Bush's approval rating soared from "51 or 52 percent" to "90 percent," simply by occupying his elected office and maintaining a face of resilience in grief.[200]

The Bush Administration and the Patriot Act's supporters in Congress had other ways of neutralizing the limited political opposition. Resisting the Justice Department's demands—or even suggesting the need to "step back and think"[201] about how best to proceed—was regarded as "soft on terrorism."[202] There was no time allotted for contemplation. Many members of Congress wilted under this intense and undiscerning pressure.[203] Senators Dianne Feinstein and Charles Schumer, both typically protective of citizens' private rights, had no intention of questioning efforts to push a bill through quickly.[204]

Meanwhile, other members of Congress capitalized on the anti-terrorist fervor to raise the mantle against the villainy of terrorism. Representative Mike Oxley lauded the anti-money laundering provisions of the Act as a way "to starve Osama Bin Laden and others like him of the funding needed to commit their acts of evil."[205] Other members of Congress viewed the attacks as a rousing wakeup call; Representative Jim Sensenbrenner announced, "We may not have appreciated the need for this legislation before September 11, but surely today we appreciate the need for this legislation and the urgency of such legislation."[206]

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would make the case for, and engage the United States in, the invasion of Iraq. *See id.* at 100, 149–51.

[200] *Id.* at 96 (quoting Matthew Dowd, Bush's pollster and chief strategist for the 2004 presidential campaign) ("In the poll I'd been sitting on, Bush's approval I think was 51 or 52 percent. Twenty-four hours later his approvals [were] 90 percent.").

[201] Carlson, *supra* note 175, at C1 (quoting Rep. Barbara Lee, a Democrat from California) (internal quotation marks omitted). *See also* 147 CONG. REC. 19,531 (statement of Sen. Russ Feingold (a Democrat from Wisconsin)) ("Each of us who spoke on these amendments tonight cares just as much as everybody in this room about the fight against terrorism and stopping it. We just want to make sure we do not go beyond that goal with unnecessary language that intrudes on our civil liberties. That is it. That is all we are trying to do.").

[202] Carlson, *supra* note 175, at C4 (quoting Rep. John Lewis, a Democrat from Georgia).

[203] *See* O'Harrow Jr., *supra* note 4, at 17; Carlson, *supra* note 175, at C4.

[204] O'Harrow Jr., *supra* note 4, at 17. Sen. Dianne Feinstein is a Democrat from California and Sen. Chuck Schumer is a Democrat from New York.

[205] 147 CONG. REC. 20,443 (2001) (statement of Rep. Mike Oxley, a Republican from Ohio).

[206] *Id.* at 20,444 (statement of Rep. Jim Sensenbrenner, a Republican from Wisconsin).

The pressure created an overwhelming impulse to just do *something*.[207] As Senator Orrin Hatch explained, "I believe the American people and my fellow Senators, both Republican and Democratic, deserve faster final action."[208] With the American people clamoring for action—and some for war[209]—conviction took the place of contemplation. An intrusive wiretapping bill was a pedestrian measure compared to demands for bombs, war, and swift retribution.[210]

The political pressure felt by Republicans and Democrats alike was ultimately overwhelming.[211] Senator Leahy, the chairman of the Senate Judiciary Committee immediately after 9/11, was keenly aware that he would be "under attack" in the ensuing weeks, much like the country he was serving.[212] But, "he was prepared to swallow hard and support it. To do anything else was politically impossible."[213] Many politicians simply acquiesced to the bill, coming to the conclusion that the Act had the necessary votes and resistance was futile.[214] It made more political sense, at that point, to concede defeat and vote for the bill in an attempt to support the fight against terrorism.[215]

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[207] *See* O'Harrow Jr., *supra* note 4, at 10 ("A crisis mentality emerges, and there was clearly a crisis . . . The push for action, the appearance of action, becomes so great.") (alteration in original) (quoting CDT employee Jim Dempsey).

[208] 147 CONG. REC. 19,493 (statement of Sen. Orrin Hatch, a Republican from Utah). *See also id.* at 19,551 (statement of Sen. Tom Daschle, a Democrat from South Dakota) ("But I believe that to truly honor those whose lives were lost, we must match our words with action."); *id.* at 19,523 ("I am sympathetic to many of these ideas, but I am much more sympathetic to arriving at a product that will bring us to a point where we can pass something into law.").

[209] *See supra* Part III.B.

[210] *See* Harden, *supra* note 37, at A18.

[211] *See, e.g.*, 147 CONG. REC. 19,505 (statement of Sen. Orrin Hatch, a Republican from Utah) ("This has been a very difficult bill to put forward because there are all kinds of cross-pressures, all kinds of ideas, all kinds of different thoughts, all kinds of differing philosophies."); Clymer, *Antiterrorism Bill, supra* note 130, at A1 ("Senator Feingold . . . complained of 'relentless' pressure to move quickly.").

[212] O'Harrow Jr., *supra* note 4, at 8.

[213] *Id.* at 20.

[214] *See, e.g.*, 147 CONG. REC. 19,493 (statement of Sen. Pat Leahy, a Democrat from Vermont) ("Despite my misgivings, I have acquiesced in some of the administration's proposals because it is important to preserve national unity in this time of national crisis and to move the legislative process forward.").

[215] *See id.*

Even the name, the USA Patriot Act or, as Representative Barney Frank ridiculed, "the stand up and sing the Star Spangled Banner bill,"[216] suggested that voting against the Patriot Act would be akin to renouncing apple pie or spitting on the graves of Joe DiMaggio and George Washington. As is frequently the case with crisis legislation, the exigencies created by apparent emergency and the urgency created by the ensuing emotional vortex made the passage of the Patriot Act a foregone conclusion.[217]

C. The process propelling the Patriot Act alarmed several members of Congress, but the Act's vocal and impassioned detractors were unable to slow the runaway legislative train.

Although the pressure exerted by the post-9/11 political climate made passage of the Patriot Act an inevitability, many members of Congress questioned the prudence of their collective decision-making.[218] Contemporary critics of the Patriot Act both inside and outside Congress were a minority (albeit, a vocal one) in October 2001, but many of their worries would seem perceptive years later.[219]

Though it is now easier to see much of the Patriot Act has attenuated connections to terrorism,[220] this was apparent to many at the time. "First of all, this has [a] limited [amount] to do with terrorism," lamented Representative Robert C. Scott on the House floor.[221] "This bill is [a]

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[216] "This bill, ironically, which has been given all of these high-flying acronyms, it is the PATRIOT bill, it is the U.S.A. bill, it is the stand up and sing the Star Spangled Banner bill, has been debated in the most undemocratic way possible, and it is not worthy of this institution." 147 CONG. REC. 20,449 (statement of Rep. Barney Frank, a Democrat from Massachusetts).

[217] *See, e.g.*, 147 CONG. REC 20,448 (statement of Rep. Mike Oxley, a Republican from Ohio) ("This is going to pass by an overwhelming margin. I think we all understand that.").

[218] *See supra* Parts III.B–C.

[219] *See infra* Part V.

[220] *See supra* II.D.

[221] 147 CONG. REC. 20,443 (statement of Rep. Robert C. Scott, a Democrat from Virginia).

general search warrant and wiretap law."[222] The most common gripe in 2001 was that the Patriot Act ravaged Americans' cherished civil liberties.[223]

Senator Russ Feingold was the Patriot Act's most committed detractor and the only Senator who vehemently fought its adoption.[224] He considered the Act to contain "some of the most radical changes to law enforcement in a generation."[225] On the floor of the Senate, he proclaimed, "There is no doubt that if we lived in a police state, it would be easier to catch terrorists . . . But that would not be a country in which we would want to live."[226] Feingold proposed several amendments to the bill that he thought would limit its potential for harm, which were summarily axed at the behest of Senator Tom Daschle.[227]

Despite the severity of many of the Patriot Act's provisions, some members of Congress viewed the Act as a genuine compromise—a crucial

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[222] *Id.* *See also* 147 CONG. REC. 19,519 (statement of Sen. Russ Feingold, a Democrat from Wisconsin) ("[T]his could be interpreted and could be understood to include situations that not only have nothing to do with the problem but represent a very serious departure from the individual rights people should have in our country."); *id.* at 19,542 (statement of Sen. Paul Wellstone, a Democrat from Minnesota) ("There are parts that should be more narrowly focused on combating terrorism."); O'Harrow Jr., *supra* note 4, at 10 ("Many of the proposals [immediately after September 11th] had originally had nothing to do with terrorism."). *But see* 147 CONG. REC. at 20,448 (statement of Rep. Bill Delahunt, a Democrat from Massachusetts) ("I think it is absolutely essential to note that the expansion of powers do not go to the criminal side of the bill.").

[223] *See, e.g.*, 147 CONG. REC. at 19,534 (statement of Jon Corzine, a Democrat from New Jersey) ("I do have real concerns about . . . the implications of some provisions for fundamental civil liberties."); *id.* at 19,540 (statement of Sen. Maria Cantwell, a Democrat from Washington) ("I remain concerned that some of the legislative changes fail to balance the increased powers to law enforcement against the need to protect the civil liberties of Americans."); Lancaster, *supra* note 40, at A1 ("The legislation . . . alarm[ed] civil liberties advocates who say that lawmakers are being stampeded into far-reaching measures that they will someday regret."). *But see* 147 CONG. REC. 19,505 (statement of Sen. Orrin Hatch, a Republican from Utah) ("We took into consideration civil liberties throughout our discussions on this bill. I think we got it just right.").

[224] *See* O'Harrow Jr., *supra* note 4, at 20.

[225] *Id.*

[226] *Id.* at 20–21.

[227] *See* 147 CONG. REC. 19,521 (agreeing 83-13 to Sen. Tom Daschle's motion to table Sen. Russ Feingold's first amendment, to H.R. 3162, 107th Cong., § 217 (2001)); *id.* at 19,523–24 (agreeing 90-7 to Sen. Tom Daschle's motion to table Sen. Russ Feingold's second amendment, to H.R. 3162, § 206); *id.* at 19,533 (agreeing 89-8 to Sen. Tom Daschle's motion to table Sen. Russ Feingold's third amendment, to H.R. 3162, § 215).

aspect of crisis legislation. Representative Bill Delahunt, while "brac[ing] for a frontal assault on civil liberties," ultimately supported the bill due to the abandonment of some of its more "profoundly disturbing features" and the inclusion of the "sunset provision."[228] The sunset clause provided an expiration date for many of the Patriot Act's wiretapping sections[229] and assuaged fears that the Act established a permanent "police state."[230] The sunset clause hinted that some of its more controversial features were temporary measures demanded by the urgent circumstances[231]—and whose unforeseen effects would be evaluated over the next several years.[232] At the time, Rep. Sensenbrenner described balancing civil liberties and the need for modernizing police powers as "the most difficult thing I have ever done."[233]

A rushed, ad hoc legislative process hastened the bill along.[234] On the day that the bill was both introduced and passed in the House of Representatives, Representative Robert C. Scott expressed his disdain with the procedure being employed.[235] "It would be helpful if we would wait for some period of time so that we can at least review what we are voting on,

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[228] 147 CONG. REC. 20,448 (statement of Rep. Bill Delahunt, a Democrat from Massachusetts).

[229] USA Patriot Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (note to 18 U.S.C. § 2510).

[230] *See* O'Harrow Jr., *supra* note 4, at 20 (listing examples indicative of a police state: the police searching homes at any time for any reason; the government opening mail, eavesdropping on phone conversations, or intercepting email; the jailing of people indefinitely based on mere suspicion or what they write or think).

[231] *See, e.g.*, 147 CONG. REC. 19,535 ("Given the stakes involved, I think it would be better to make many of these provisions temporary, and then revisit these issues when we have more time to thoroughly consider all their implications."); *id.* at 20,445 (statement of Rep. Sheila Jackson-Lee, a Democrat from Texas) ("It is also good to know that the sunset provision has now been established . . . so America knows that we are using these tools to help us fight terrorists but not fight Americans.").

[232] *See, e.g.*, 147 CONG. REC. 19,518 (statement of Sen. Paul Wellstone, a Democrat from Minnesota) ("The sunset provision . . . is so important, so that we can continue to monitor this legislation as we move forward."); Lancaster, *supra* note 40, at A4 (saying that the sunset clause "would permit Congress to deal with any unforeseen consequences from the legislation."); O'Harrow Jr., *supra* note 4, at 18 ("A sunset provision would guarantee that some of the most troubling new powers would be revisited by Congress, giving lawmakers an important check on executive authority.").

[233] Lancaster, *supra* note 40, at A4.

[234] *See supra* Part III.B; O'Harrow Jr., *supra* note 4, at 17.

[235] 147 CONG. REC. 20,443 (statement of Rep. Robert C. Scott, a Democrat from Virginia).

but I guess that is not going to stop us, so here we are."[236] The Patriot Act was never debated in committee and was mostly the outcome of closed-door discussions between a few senators and the Bush administration.[237] Senator Feingold wondered aloud, "What have we come to when we don't have either committee or Senate deliberation on amendments on an issue of this importance?"[238] Again, most members of Congress did not have time to read the Patriot Act.[239]

Even though at least one congresswoman was "disturb[ed]" by the process bringing the bill to the House floor,[240] others found the forceful thrust of the Patriot Act to be the "legislative process at its best."[241] Representative Oxley considered the Act's passage "one of the proudest moments of my 20 years here in the Congress" and a "wonderful exercise of democracy and positive legislation."[242] Rep. Barney Frank concluded that the House had been forbidden from "engag[ing] in democracy," and found the whole procedure "degrade[d] democracy in the name of defending it."[243] Yet the House passed the Patriot Act 357-66 on the same day it received the bill.[244]

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[236] *Id.* *See* also 147 CONG. REC. 19,493 (statement of Sen. Pat Leahy, a Democrat from Vermont) ("I think back to what happened in Oklahoma City in 1995 and the actions we took then. We are moving, of course, much faster now than we did at that time, and I hope perhaps with more care on legislation.").

[237] *See* Saito, *supra* note 10, at 1113–14.

[238] 147 CONG. REC. 19,521 (statement of Sen. Russ Feingold, a Democrat from Wisconsin). *See also* 147 CONG. REC. 20,449 (statement of Rep. Barney Frank, a Democrat from Massachusetts) ("We now, for the second time, are debating on the floor a bill of very profound significance for the constitutional structure and security of our country. In neither case has any Member been allowed to offer a single amendment.").

[239] *See supra* Part III.B. *See* also Editorial, *President Obama's Dragnet*, N.Y. TIMES, June 7, 2013, at A26 [hereinafter *Dragnet*] ("[T]he Patriot Act [was] enacted in the heat of fear after the Sept. 11, 2001, attacks by members of Congress who mostly had not even read it.").

[240] 147 CONG. REC. 20,445 (statement of Rep. Sheila Jackson-Lee, a Democrat from Texas).

[241] *Id.* at 20,448 (statement of Rep. Mike Oxley, a Republican from Ohio).

[242] *Id.* (statement of Rep. Mike Oxley, a Republican from Ohio).

[243] *Id.* at 20,449 (statement of Rep. Barney Frank, a Democrat from Massachusetts). "At no point in the debate in this very profound set of issues have we had a procedure whereby the most democratic institution in our government, the House of Representatives, engages in democracy." *Id.* (statement of Rep. Barney Frank).

[244] Clymer, *Terror Bill*, *supra* note 51.

Applauding the inclusion of the sunset clause, Leahy found that the bill that ultimately passed was "'a far better bill than proposed . . . by the administration and a better bill than either body passed initially,'" noting, "We have done the White House a great favor by taking the time to *actually read* and improve this bill."[245] Despite Russ Feingold's efforts, the Patriot Act sailed through the Senate 98-1.[246] Those not attempting to slow this legislative behemoth ramming its way through Congress applauded the bipartisan effort.[247]

In the end, Congress satisfied most of the administration's demands.[248] In addition to those steering the ship, the passengers—the American people—insisted on action as well.[249] The public was more concerned with their safety than their civil liberties following the terrorist attacks.[250]

In short, the U.S. Government rode a wave of approval for the Patriot Act to increase its power "far beyond what even the most ardent law enforcement supporters had considered politically possible before the attacks."[251] Many of the provisions that ended up in the Patriot Act's tackle box had been proposed and rejected in recent years due to civil liberty concerns.[252] President Clinton proposed many of the provisions increasing

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[245] Lancaster, *supra* note 40 (emphasis added) (internal quotation marks omitted). Many other members of Congress admitted to not having time to read the version of the bill that Congress passed. *See* sources cited *supra* note 197.

[246] Clymer, *Antiterrorism Bill*, *supra* note 130.

[247] 147 CONG. REC. 20,444 (statement of Rep. Mike Oxley, a Republican from Ohio) ("Obviously, to move such complex and far-reaching legislation through the process so quickly requires an extraordinary level of bipartisan cooperation."); 147 CONG. REC. 19,495 (statement of Sen. Leahy, a Democrat from Vermont) ("I want to thank Senator Biden and Senator Hatch for their bipartisan leadership on this provision.").

[248] *See* Elizabeth A. Palmer, *Committees Taking a Critical Look at Ashcroft's Request for Broad New Powers*, CQ WEEKLY, Sep. 29, 2001, at 2263.

[249] *See supra* Part II.A. *See also* Carlson, *supra* note 175 (quoting Rep. Barbara Lee's, a Democrat from California, observation that she had received "thousands of calls and thousands of emails.").

[250] *E.g.*, O'Harrow Jr., *supra* note 4, at 17 ("Polls later showed that most people were more than willing to trade off civil liberties and privacy protections for more security"); Adam Clymer, *In the Fight for Privacy, States Set Off Sparks*, N.Y. TIMES, July 6, 2003, at Sec. 4 ("A Harris Poll taken late in September 2001 found public majorities in the 80 to 90 percent range for everything from more penetration of suspicious groups to more monitoring of credit card transaction.").

[251] O'Harrow Jr., *supra* note 4, at 9.

[252] *See* 147 CONG. REC. 19,505 (statement of Sen. Orrin Hatch, a Republican from Utah) ("[A] lot of the provisions we have in the bill are not brand new; a lot of them have been

FBI wiretap authority as early as 1995.[253] They would now be "hauled out and approved in minutes" with limited objection.[254] And that was how a sweeping piece of legislation containing prosecutors' "'wish lists'" [255] for surveillance tools passed under the guise of a terror bill that bore huge risks of being fatally flawed.[256]

IV. OTHER INSTANCES OF CRISIS LEGISLATION AND THEIR SIMILARITIES

A. The Smith Act, passed in 1940, is an example of crisis legislation that foreshadowed the Cold War's agenda to forward domestic surveillance.

The opportunistic exploitation of a crisis displayed by the Patriot Act is neither an unusual nor an unfamiliar pattern to those attuned to the political and legal history of the United States. Congress has ridden the waves of fear to the shoreline of extremity several times in the past.[257] Now that the Patriot Act is the most prominent example showing crisis legislation in action, other examples in recent history will help us further develop and understand the signs and risks of crisis legislation.

While crisis legislation comes in many shapes and sizes, there are a few characteristics that nearly all iterations share. Obviously, one prerequisite for crisis legislation is a crisis, emergency, or other set of exigent circumstances that demands a response from Congress. Because the crisis is of an urgent nature, the symbolic gesture of passing a bill is more important than the substance of the law itself. Many provisions in crisis legislation are not even designed to address the problems of the crisis, but

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requested for years."). *See also* O'Harrow Jr., *supra* note 4, at 10 ("[A] handful of lawmakers took to the Senate floor with legislation that had been proposed and shot down in recent years because of civil liberties concerns.").

[253] 9/11 COMMISSION REPORT, *supra* note 30, at 100.

[254] O'Harrow Jr., *supra* note 4, at 10.

[255] Lichtblau, *supra* note 150 (quoting Elliot Mincberg, legal director for People for the American Way).

[256] *See, e.g.*, Carr, *supra* note 4, at 1311 ("[C]risis legislation . . . exhibits just those faults and disadvantages which one would expect. The official draftsman would like a couple of months, if he could have them, for incubating any major legislative proposal; in time of crisis he may find himself framing some drastic change in the law with only a couple of days to do it in. Because it is hurried, it will be imperfect; because it is imperfect, it will need frequent as well as speedy amendment.").

[257] *See*, *e.g.*, Espionage Act of 1917, Pub L. No. 65-24, 40 Stat. 217 [hereinafter Espionage Act of 1917]; Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 [hereinafter Smith Act]; McCarran Act, Pub. L. No. 81-831, 64 Stat. 987 (1950) [hereinafter McCarran Act].

are opportunistic, aspiring laws that have failed in the past and are now latching onto a popular host cause.

In crisis legislation, the alleged objective is an uncontroversial one. Legislators, instead of harming each other with petty partisan barbs, injure each other by nudging one another off of the band wagon in a rush to prove they support a cause like eliminating drugs or fighting terrorism. In a hurry to pass the law before goodwill expires, crisis legislation skirts normal procedures to avoid deliberation that would likely gut the bill of its extreme, or at least previously distasteful provisions. Despite insistent, vocal detractors with prescient criticisms of the bill, it passes anyway amidst a raucous chorus of congratulatory back-patting on a job well done. The rhythms and rhetoric of crisis legislation are well rehearsed and provide the template for future bills looking to exploit the anxieties of the American people during harrowing times.

Fear of socialists plotting to overthrow the U.S. Government was a motivation for legislation multiple times throughout the twentieth century.[258] By the dawn of World War II, the rise of fascism in Europe, the spread of communism worldwide, and the subversion both would inspire were all on the mind of the nation's lawmakers.[259] This fear motivated the passage of the Alien Registration Act of 1940,[260] better known as the Smith Act. The Smith Act prohibited "certain subversive activities"[261] and required all alien residents to register with the government.[262] It provided for the deportation of every "alien who, at any time, shall be or shall have been a member of . . . the anarchistic and similar classes," such as communists, Nazis, and fascists.[263] It also had several seemingly unrelated provisions, such as those that made the unlawful possession of guns[264] or heroin[265] grounds for deportation.

The Smith Act could be used to prosecute Communist Party organizers within the U.S. whose program evinced that they were "unwilling to work within our framework of democracy but intended to initiate a violent

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[258] *See*, *e.g.*, Espionage Act of 1917.

[259] Patrick Schmidt, *"The Dilemma to a Free People": Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence*, 20 LAW & HIST. REV. 517, 534 (2002).

[260] *See* Smith Act. *See also* McCarran Act.

[261] *See* Smith Act §§ 2–3.

[262] *Id.* § 30.

[263] *Id.* § 23(a).

[264] *Id.* § 20(b)(3).

[265] *Id* § 21(3).

revolution whenever the propitious occasion appeared."[266] In *Dennis v. United States*,[267] the Supreme Court upheld convictions for mere speech, departing from the previous "clear and present danger" standard.[268] The *Dennis* Court found that the defendants' "formation . . . of such a highly organized conspiracy . . . convince us that their convictions were justified."[269] The fear created by the proliferation of communism and other perceived anarchistic classes in the preceding fifteen or so years was evident in the Court's opinion, which cited the "inflammable nature of world conditions" as one of the reasons for upholding the defendants' convictions despite no activity beyond mere speech.[270]

On August 25, 1940, the *New York Times* described the Smith Act's climate remarkably similar to the one that birthed the Patriot Act and other types of crisis legislation—specifically the role of "fear" in creating the "hastily passed" legislation that, though "normally distasteful," passed because it appeared inevitable and was sponsored by the Roosevelt administration.[271] With war at America's doorstep, Representative John Martin remarked, "There are those who today in their embassies and in their consulates are plotting internal warfare against the United States."[272]

Some scholars have suggested that the authors wrote the Smith Act to deport radical labor organizer Harry Bridges, an immigrant from Australia, and others like him.[273] House members insinuated that this was true. Representative Howard Smith, the author of the bill and renowned anti-labor representative, found Harry Bridges had given the United States "about as much trouble as all the rest of the aliens put together."[274] Smith believed that "in the face of his outrageous violation of all rules of hospitality since

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[266] Dennis v. United States, 341 U.S. 494, 497 (1951).

[267] 341 U.S. 494.

[268] *Id.* at 510.

[269] *Id.* at 510–11.

[270] *Id.* at 511.

[271] Delbert Clark, *Aliens to Begin Registering Tuesday*, N.Y. TIMES, Aug. 25, 1940, at S8. *See also* 84 CONG. REC. 10,446 (1939) (statement of Rep. John Martin, a Democrat from Colorado) (stating "I know the bill will pass, no matter what is in it.").

[272] *Id.* (statement of Rep. John Martin, a Democrat from Colorado).

[273] RICHARD W. STEELE, FREE SPEECH IN THE GOOD WAR 81 (St. Martin's Press eds. 1st ed. 1999).

[274] 84 CONG. REC. 10,449 (statement of Rep. Howard Smith, a Democrat from Virginia). ("That is exactly what it is designed to do," in response to the question: "Will this bill as presently proposed give Congress authority to handle the Bridges case . . . ?").

he has been in this country, under the decision in the *Strecker* case we are probably powerless to get rid of him."[275]

The questionable motivations of the Smith Act did not go unnoticed by other members of Congress. Implying that the act was aimed at communists and labor organizers, Representative Abe Murdock asked, "Does [Representative Hobbs] know of any court in the United States or any action of the Secretary of Labor where an alien has been deported because of his affiliation or membership in either the Fascist or Nazi Party?"[276] With regards to the "at any time" provision, Representative John Gwynne suggested, "This provision was placed in the bill to meet the situation left after the decision of the Supreme Court in the *Strecker* case."[277]

Representative Francis Walter speculated that the Act would be used against aliens who, desperate during the Depression, joined labor organizations only to subsequently discover that they had joined communist parties.[278] Fear of having their "loyalty to American principles" questioned was certainly a motivating factor in pledging support of the Smith Act.[279] "The implication" was that those who opposed the Smith Act were "un-American" or "not good Americans."[280] The bill purported to "protect the United States from subversive activities,"[281] but Representative Lee Geyer nonetheless opposed it to "defend American principles," finding the bill to

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[275] *Id.* (statement of Rep. Howard Smith, a Democrat from Virginia) (referring to Kessler v. Strecker, 307 U.S. 22, 35 (1939) (reversing an order remanding petitioner Joseph George Strecker for deportation)).

[276] 84 CONG. REC 10,447, (statement of Rep. Abe Murdock, a Democrat from Utah).

[277] *Id.* at 10,448 (statement of Rep. John Gwynne, a Republican from Iowa).

[278] *Id.* (statement of Rep. Francis Walter, a Democrat from Pennsylvania).

[279] *Id.* at 10,452 (statement of Rep. Lee Geyer, a Democrat from California).

[280] *Id.*

> The implication has been made by certain ones on this floor that those who are opposing this bill are un-American. Gentlemen got up on the floor yesterday, after a facetious amendment had been offered, and inferred that those who were opposing this bill were trying to establish foreign principles here in the United States. Another gentleman got up and after defending the American bund, inferred that Members, particularly on this side, were not good Americans . . . I do not want any man anywhere, and most of all on this floor, to question my loyalty to American principles.

Id. at 10,452 (statement of Rep. Lee Geyer, a Democrat from California).

[281] *Id.* at 10,448 (statement of Rep. John McCormack, a Democrat from Massachusetts).

be a "labor-baiting measure . . . under the guise of Americanism" designed to deport those "going to bat for the underprivileged group."[282]

Like the War on Terror, the government used the Cold War to justify an agenda dedicated to domestic surveillance.[283] First and Fourth Amendment rights were repeatedly violated "on national security grounds."[284] Law enforcement frequently circumvented warrants and used wiretaps to monitor those Americans "engaged in lawful political activities" or members of "disfavored groups" ranging from communists to civil rights activists.[285] The pattern is so familiar that some predicted that terrorism would "replace communism as the main justification for domestic surveillance" more than ten years before the attacks of 9/11.[286]

B. The death of college basketball star Len Bias from a cocaine overdose provoked crisis legislation that enhanced "tools" for law enforcement and began the War on Drugs in earnest.

Most Americans would incorrectly assume that there could be no possible parallels between the Patriot Act and—of all things—the tragic death of a young college basketball player. On June 19, 1986, the nation lost a young man and beloved athlete when Len Bias, star basketball player for the University of Maryland and second overall pick in the National Basketball Association (NBA) draft only days earlier, died of a seizure brought on by experimental use of cocaine.[287] While Len Bias was only one young man and his death was not as visceral and immediately overwhelming as 9/11, the drug crisis in American communities (particularly cocaine and crack cocaine) never materialized for many Americans until Bias' death.[288] Less than five months later, Congress permanently transformed the face of American law enforcement with the Anti-Drug Abuse Act of 1986, creating

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[282] *Id.* at 10,452–53 (statement of Rep. Lee Geyer, a Democrat from California).

[283] Morton H. Halperin & Jeanne M. Woods, *Ending the Cold War at Home*, 81 FOREIGN POLICY 128, 136 (1991).

[284] *Id.*

[285] *Id. See also infra* text accompanying notes 373–75.

[286] *See, e.g.*, O'Harrow Jr., *supra* note 4, at 10 (referring to Morton Halperin's predictions). *See also* Halperin & Woods, *supra* note 283.

[287] Jonathan Easley, *The Day the Drug War Really Started*, SALON (June 19, 2011), http://www.salon.com/2011/06/19/len_bias_cocaine_tragedy_still_affecting_us_drug_law/.

[288] And to a lesser extent Cleveland Browns safety Don Rogers, who died of a cocaine overdose eight days after Bias. Sam McManis, *When Rights Go Wrong: Before June 27 Drug Death, Don Rogers Was Troubled*, LOS ANGELES TIMES (Aug. 3, 1986), http://articles. latimes.com/1986- 08-03/sports/sp-1270_1_don-rogers.

severely stiff mandatory penalties and enhanced confiscation powers for drug-related crimes.[289]

While the Anti-Drug Abuse Act of 1986 and the Patriot Act are apparently unrelated, investigating how both bills passed reveals startling similarities. Writer Jonathan Easley explained, "Stunned Americans demanded action . . . . Responding to this outpouring of grief and fear, Congress promptly passed (and [President] Reagan signed) the Anti-Drug Abuse Act of 1986. In their haste, they may not have fully grasped what they were doing."[290] "Suddenly, the Len Bias case was the driving force behind every piece of legislation," remembers Eric Sterling, who served as counsel to the House committee that drafted the bill.[291] "[Len Bias] became shorthand, a high-profile symbol for all of these issues."[292] Like the Patriot Act, the Anti-Drug Abuse Act was a response to a legitimate "crisis,"[293] bypassed normal legislative procedures,[294] received bipartisan support in a race by both parties to look tough on the crisis,[295] and provided "tools" for

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[289] *See generally* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2–5 (imposing a mandatory 10 year minimum on any person possessing 50 grams of crack cocaine). *See also* 132 CONG. REC. 22,668 (1986) (statement of Rep. George Brown, Jr. (a Democrat from California)) ("But the federal government must also say yes to a whole lot more. Yes to stiffer penalties for drug-related crimes, yes to increased drug enforcement and confiscation assistance; yes to stricter prohibitions on money laundering; yes to international cooperation; yes to drug education, treatment and prevention; yes to a whole lot more federal cooperation and commitment to eradicating this national crisis.").

[290] Easley, *supra* note 287. *See also* 132 CONG. REC. 22,665 (1986) (statement of Rep. Benjamin Gilman, a Republican from New York) ("[T]he time for action is now. An in-depth, comprehensive, coordinated antidrug policy is the only way we will ever have a chance of victory in the 'war' on drugs.").

[291] Easley, *supra* note 287.

[292] *Id.* (quoting Eric Sterling).

[293] *See*, *e.g.*, 132 CONG. REC. 22,675 (1986) (statement of Rep. Daniel Mica, a Democrat from Florida) ("The time has come; there is a crisis in America; we need action.").

[294] > Usually when you want to introduce a new bill, you sit down and carefully write the policy. Are we clear on what the implications are? You write a draft and maybe circulate it around for ideas. You ask federal judges, prisons, prosecutors, U.S. attorneys, the DEA, law professors, sentencing commissions, criminal defense lawyers and the ACLU how it will affect things. You have hearings. All of this was skipped. Both sides were trying to be quicker and tougher than the other.

Easley, *supra* note 287 (quoting Eric Sterling).

[295] *Id.* ("[The Republicans] looked at it and said: 'OK, well if the Democrats have a sentence of five years to 20 years, let's up it to 10 years to 40 years. And if the Dems say 20

law enforcement[296] to wage "war" on an abstract concept.[297] Also like the Patriot Act, the Anti-Drug Abuse Act contained many provisions only slightly connected to eradicating the drug epidemic,[298] and its passage was immediately preceded by indulgent displays of pride and congratulations.[299]

Even the rhetoric used on the congressional floor was similar to that of the Patriot Act. Representative Robert Michel said, "The death of basketball star Len Bias shocked us into action. What should shock us even more is that we had to be aroused out of our apathy by such a disaster."[300] Representative Peter Rodino, Jr. worried, "[I]t seems to me that we now have the possibility of certain amendments being offered which in my considered judgment would not in any way effectively deal with this crisis against drugs. . . . Rarely do we see our Nation so united behind the need for action."[301] Representative William Broomfield summarized, "At the moment, the whole Nation's attention is focused on the drug problem . . . . To a large degree, this can be attributed to the drug related deaths of two well-known athletes, Len Bias and Don Rogers."[302] After reading the Congressional Records of other acts of crisis legislation, one

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grams, we'll make it 5!' Nobody looked at the proper ratios based on how harmful it was.") (quoting Eric Sterling); 132 CONG. REC. 22,660 (1986) (statement of Rep. Robert Michel, a Republican from Illinois) ("[T]he comprehensive legislation before us is bipartisan in origin, multifaceted in approach, and unified in purpose.").

[296] *See* 132 CONG. REC. 22,659 (1986) (statement of Rep. Jim Wright, a Democrat from Texas) ("[The act] will provide numerous better and much needed tools for law enforcement in this country."); *id.* at 22,661 (statement of Rep. Peter Rodino, Jr., a Democrat from New Jersey) ("Now all of these bills will provide needed tools as our Nation confronts the drug problem.").

[297] *Id.* at 22,660 (statement of Rep. Robert Michel, a Republican from Illinois) ("Speaking of the declaration of war on drugs, this officials [sic] said: . . . 'We should know just what it is, we are declaring war on.'") (quoting an unnamed drug and alcohol treatment official).

[298] *Id.* (statement of Rep. Peter Rodino, Jr., a Democrat from New Jersey).

[299] *See, e.g.*, *id.* at 22,691 (statement of Rep. Fernand St. Germain, a Democrat from Rhode Island) ("I feel very good about the legislative product that we have brought to the House and I am confident that it provides significant new tools and sharpened weapons in the war against drug trafficking–a war that must be won unconditionally.").

[300] *Id.* at 22,660 (statement of Rep. Robert Michel, a Republican from Illinois). *See also id.* at 22,697 (statement of Rep. Sander Levin, a Democrat from Michigan) ("[I]t is not clear what has sparked this prairie fire of interest and concern about drugs. Perhaps the latest spark that set this off was Len Bias' tragic death. What is clear is that the tinder was very, very dry. In a real sense, there have been many Len Biases.").

[301] *Id.* at 22,660 (statement of Rep. Peter Rodino, Jr., a Democrat from New Jersey).

[302] *Id.* at 22,673 (statement of Rep. William Broomfield, a Republican from Michigan).

experiences a strong feeling of déjà vu.[303] While the War on Drugs was formally declared years earlier by President Nixon, the Anti-Drug Abuse Act of 1986 was its first piece of major legislation.[304] Like the Patriot Act, the fervor displayed in crafting the bill "was hyperbole piled on top of exaggeration."[305]

The Cold War, the War on Drugs, and the War on Terror appear unrelated. However, their relationship is much more intimate than one would suspect. These three "crises" that demanded congressional action to protect the American people were the three greatest excuses in the last century to deprive Americans of their rights:[306] "The restrictions on civil liberties . . . stand in the way of the full and robust national security debate that is essential to sound, informed policy."[307] Looking retrospectively, the years after 9/11 and recent tales of excess in the intelligence community raise serious questions about whether the United States has had a "full and robust" debate on whether the War on Terror unnecessarily deprives Americans of their civil liberties.[308]

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[303] *E.g.*, *id.* at 22,734 (statement of Rep. Al McCandless, a Republican from California ("As Chief Justice Burger has said, he feels [drugs are] the biggest crisis which the United States faces, even greater than the threat of communism."); *id.* at 27,174 (statement of Sen. Pete Domenici, a Republican from New Mexico) ("But the dangers of drugs, as graphically demonstrated by the tragic death of basketball star Len Bias, are so great.").

[304] Easley, *supra* note 287.

[305] *Id.* (quoting Eric Sterling).

[306] "The Cold War's bellicose political climate allowed . . . restraints on freedom unprecedented in peacetime." Halperin & Woods, *supra* note 283 at 128–29. "The constitutional rights of Americans have . . . been major casualties in the war on drugs." *Id.* at 142.

[307] *Id.* at 143.

[308] *Compare* Sharon H. Rackow, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651, 1652 (2002) (noting that the new powers given to the executive are "unnecessary," "violate civil liberties," and "go . . . beyond the stated goal of fighting . . . terrorism"), *and* Saito, *supra* note 10 at 1060 (noting that the Patriot Act "has been vociferously criticized by many civil liberties advocates . . . "), *with* Michael B. Mukasey, *Intelligence Averts Another Attack*, WALL ST. J., Oct. 2, 2009, at A19 (saying that "[t]hose who indulge paranoid fantasies of government investigators snooping on the books they take out of the library, and who would roll back current authorities in the name of protecting civil liberties, should consider what legislation will be proposed and passed if the next [terrorist] is not detected") (Mukasey served as Att'y Gen. from 2007-09), *and* Juan C. Zarate, *Obama and Bush: Together on Terror Law*, WALL ST. J., Aug. 14–15, 2010, at A11

C. Terrorism's use as pretense for domestic surveillance was foreseeable following crisis legislation, such as the Smith Act, passed during the Cold War.

Among those who foresaw the government using terrorism to justify domestic surveillance was Morton Halperin, a former national security official during three presidencies and former head of the Washington office of the ACLU.[309] The Cold War set the table for what was to come with the War on Drugs and the War on Terror: "'The Cold War changed us. We became a national security state. . . . The Cold War's bellicose political climate allowed policymakers to adopt, and led the public to accept, restraints on freedom unprecedented in peacetime."[310] These restraints on freedom were all rooted in the "communist threat" that was both "global" in scope and "pervasive."[311]

But unwinding from the Cold War was difficult for the establishment to do.[312] Halperin predicted the use of "warrantless searches and wiretaps" being used by the U.S. against organizations it "dislike[s]" and labels "terrorists."[313] Relying on this instinct, Halperin "braced [himself] for the fallout from the attacks" after September 11th.[314]

Sometimes Congress undid these legislative overreactions for fear of abuse by the executive branch. Congress enacted 18 U.S.C. § 4001 to overturn the Emergency Detention Act of 1950[315]—passed in the midst of

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(hoping that "the Obama administration has the courage to defend this new normal publicly as consistent with the rule of law.").

[309] *See, e.g.*, O'Harrow Jr., *supra* note 4, at 10 (referring to Morton Halperin's predictions). *See also* Halperin & Woods, *supra* note 283.

[310] Halperin & Woods, *supra* note 283, at 128–29. *See also* Smith Act, Pub. L. No. 76-670, 54 Stat. 670 (1940); Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

[311] Halperin & Woods, *supra* note 283, at 129. *See also id.* at 131 ("The post-Cold War period present[ed] an opportunity to eradicate the vestiges of an unseemly chapter in the nation's history and to establish safeguards to ensure that new 'threats' do not replace the Cold War as justifications for eroding constitutionally guaranteed liberties.").

[312] *Id.* at 141 ("The national security apparatus that was put in place to wage the Cold War is now a burgeoning bureaucracy in search of a new mission . . . . International terrorism is rapidly supplanting the communist threat as the primary justification for wholesale deprivations of civil liberties and distortions of the democratic process.").

[313] *Id.* at 141–42.

[314] O'Harrow Jr., *supra* note 4, at 10.

[315] Internal Security Act of 1950, Pub. L. No. 81-831, tit. II, §§ 100, 103, 64 Stat. 987, 1019-30 (also known as the Emergency Detention Act of 1950) (allowing for detention of suspected subversives without normal constitutional checks).

the Red Scare—due to fears of a revival of the Japanese–American interment camps instituted during World War II.[316] The measure provided that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[317]

D. The Antiterrorism and Effective Death Penalty Act of 1996, crisis legislation passed after the Oklahoma City bombings, fulfilled predictions that terrorism would be the next justification for domestic surveillance following the Cold War.

Complying with the speculation, Congress latched onto terrorism to justify domestic surveillance only years after the collapse of the Soviet Union and the disintegration of the threat of communism.[318] On April 19, 1995, the United States endured its most devastating terrorist attack prior to 9/11 when a domestic terrorist detonated a bomb in front of a federal building in downtown Oklahoma City.[319] The blast killed 168 people, damaged 324 buildings, and burned or destroyed 86 cars in the area.[320] A year later, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act").[321] The act restricted the ability of death row inmates to appeal their sentences and, like the Patriot Act, provided "new tools" for law enforcement.[322]

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[316] "Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950 . . . which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese-American internment camps of World War II." Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

[317] 18 U.S.C. § 4001(a) (2012). In 2001, the Authorized Use of Military Force provided such authority which is still in effect. Authorization for Use of Military Force, PL 107–40, 115 Stat 224 (2001).

[318] John Tirman, *The War on Terror and the Cold War: They're Not the Same*, MIT CTR. FOR INT'L STUD. AUDIT OF THE CONVENTIONAL WISDOM, 06-06 (Apr. 2006).

[319] *See* John Kifner, *Terror in Oklahoma City: The Overview*, N.Y. TIMES, Apr. 20, 1995, at A1; OKLAHOMA CITY POLICE DEP'T, ALFRED P. MURRAH BUILDING BOMBING AFTER ACTION REPORT [hereinafter OKLA. CITY P.D.], *available at* http://web.archive.org/web/20070703233435/http://www.terrorisminfo.mipt.org/pdf/okcfr_App_C.pdf.

[320] OKLA. CITY P.D., *supra* note 319, at 6.

[321] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[322] *See* Alison Mitchell, *Clinton Signs Measure on Terrorism and Death Penalty Appeals*, N.Y. TIMES, Apr. 25, 1996, at A18.

By 1996, the threat of terrorism was no stranger to the American people,[323] but the bombing in Oklahoma City was the catalyst for the comprehensive[324] Antiterrorism Act.[325] Like the Patriot Act, the Antiterrorism Act boasted new tools for law enforcement that were only incidentally related to terrorism.[326] In the Congressional Record, representatives congratulated the bipartisan effort of Congress to strike the proper "balance" between national security and civil liberties.[327] As in all forms of crisis legislation, the emotional rhetoric spouted by some legislators made a rational debate on some of the act's provisions seem improbable. Once a representative characterized the bill as one to fight "madmen" perpetrating the "senseless slaughter of innocent men, women, and children,"[328] one can see how the opposition was reluctant to make a stand.[329] Representative Mike Oxley found the mere existence of debate on

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[323] *See*, *e.g.*, 142 CONG. REC. 4556 (1996) (statement of Rep. Deborah Pryce, a Democrat from Ohio) (alluding to the bombing on the World Trade Center in 1992, "bombing of the U.S. Embassy in Lebanon, the murder of American tourist [sic] on the Achille Lauro, the downing of Pan Am flight 103 over Lockerbie, Scotland, and more recently, the string of terrible bombings that has disrupted the flow of daily life in Israel.").

[324] "First, Mr. Chairman, how can we most effectively and most comprehensively minimize the chances for acts of terror being committed against our citizens, our institutions, and our homes?" *Id.* at 4594 (statement of Rep. Bob Barr, a Republican from Georgia).

[325] *Id.* at 4556 (statement of Rep. Deborah Pryce, a Democrat from Ohio) ("But, in the wake of the bombings which shook New York and Oklahoma City, we are faced with the sobering prospect that terrorists are at work right here in the United States.").

[326] *Id.* (statement of Rep. Deborah Pryce, a Democrat from Ohio) ("H.R. 2703 contains a variety of tools designed to strengthen law enforcement's hand against terrorists, including, but not limited to: Expanded investigative methods for combatting terrorism; special procedures for removing aliens suspected of terrorist activity; and important reforms to curb the abuse of habeas corpus by convicted criminals."). *See also* 141 CONG. REC. 11,407 (1995) (statement of Rep. Bob Dole, a Republican from Kansas) ("Our job today is . . . to lay the foundation for a comprehensive antiterrorism plan for America."). *But see id.* ("Many of the provisions of this act were contained in S. 3, the anti*crime* bill introduced by Senate Republicans last January.") (emphasis added).

[327] 142 CONG. REC. 4556 (1996) (statement of Rep. Deborah Pryce, a Democrat from Ohio) ("[G]overnment must balance the need for public safety and security with individual rights and liberties . . . . In my view, this bill represents a serious, bipartisan attempt to protect American citizens against terrorism, while also protecting their fundamental constitutional rights.").

[328] *Id.* at 4557 (statement of Rep. Martin Frost, a Democrat from Texas).

[329] *Id.* (statement of Rep. Martin Frost, a Democrat from Texas) ("The December 1993 World Trade Center bombing made it very clear that external threats are a clear and present

an amendment that would "weaken the ability of law enforcement" "unbelievable."[330]

Some lawmakers and many voters remained skeptical of the act.[331] Representative Porter Goss received warnings from constituents that "all the new powers . . . may not be necessary" and that "simply . . . passing new legislation . . . does not effectively attack the problem."[332] But in the emotional post-crisis environment, old legislative ideas get pushed through despite "tortured fantasies," "academic exercises for law professors," and "extreme hypothetical[s] under which someone, somewhere, somehow will be treated unfairly by Federal laws."[333] Ultimately, as with the Patriot Act, the most exuberant legislators dictated the terms of negotiation, so the final product—while extreme and retaining what its proponents long desired—looked like a compromise.[334] In the end, legislators stripped the bill of some of the provisions that President Clinton supported, including the same wiretap measures that would be resurrected in the Patriot Act[335] and a provision permitting the use of improperly obtained wiretap evidence if obtained in good faith.[336] Many of these proposed measures would reappear in the Patriot Act, as predicted by contemporaries of the Antiterrorism

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danger to us all. It was clear, however, that the original legislative response to these threats had substantial opposition from both conservative and liberal Members of the House.").

[330] *Id.* at 4600 (statement of Rep. Mike Oxley, a Republican from Ohio).

[331] *See, e.g.*, *id.* at 4,609 (statement of Rep. Melvin Watt, a Democrat from North Carolina) ("[T]here is a substantial division in our ranks about the extent to which we must go to protect constitutional rights and freedoms and still feel that we are making a concerted and effective effort against terrorism. It is a very, very difficult issue, and there are some of us, myself included, who believe that we cannot afford to undermine our Constitution and the rights and protections our Constitution provides to individual citizens in this country because, when we do that, we undermine the very fabric of our Nation.").

[332] *Id.* at 4,562–63 (statement of Rep. Porter Goss, a Republican from Florida).

[333] *Id.* at 4,568 (statement of Rep. Charles Schumer, a Democrat from New York).

[334] *Id.* (statement of Rep. Charles Schumer, a Democrat from New York) ("I originally introduced the terrorism legislation similar to this last year before the Oklahoma City bombing. People then said we are overreacting. Oklahoma City proved them wrong.").

[335] *See* Mitchell, *supra* note 322. *See* also H.R. REP. NO. 104-383, at 88 (1995) (authorizing pen registers and trap and trace devices upon showing that the information sought is relevant to an ongoing counterintelligence investigation) (not part of final version of bill).

[336] 142 CONG. REC. 4596 (1996) (statement of Rep. Henry Hyde, a Republican from Illinois) ("Strike section 305, this is serious. This provides in the bill a good-faith exception to the statutory exclusionary rule for wiretap evidence.").

Act.[337] Nevertheless, legislation passes because "[i]t is time to act. . . . [Terrorists] hate America and all it stands for, and they will hurt us again and again and again unless we give law enforcement reasonable tools to stop them."[338] The result: a bill that is primarily directed at law enforcement,[339] habeas,[340] immigration,[341] money-laundering reform,[342] and other measures having "nothing to do with terrorism"[343] and none of which "would have prevented the tragedy in Oklahoma."[344]

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[337] *See, e.g.*, Kopel & Olson, *supra* note 10, at 248. ("The focus of the Article is not simply to analyze the new law, but instead to look at a wide spectrum of antiterrorism proposals, some of which, while not enacted in 1996, will likely be proposed in future years.").

[338] 142 CONG. REC. 4569 (1996) (statement of Rep. Schumer, a Democrat from New York). *See also id.* at 4,596 (statement of Rep. Henry Hyde, a Republican from Illinois.) ("[W]e negotiated for 3 months trying to get a bill in proper shape that would be acceptable to people of different points of view in this matter. We took out emergency wiretap provisions, to my regret. We took out roving wiretap provisions, to my regret. We took out use of the military to protect against the use of chemical warfare, say, in mass transportation, to my regret. We took out funding provisions for that domestic counterterrorism center, which the intelligence agencies and the FBI wanted, to my regret.").

[339] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 701-823, 110 Stat. 1214, 1291-1317.

[340] *See id.* §§ 101–08.

[341] *See id.* §§ 401–43.

[342] *See id.* §§ 302–30.

[343] *See* 142 CONG. REC. 4609 (1996) (statement of Rep. Melvin Watt, a Democrat from North Carolina) ("Habeas corpus has nothing to do with terrorism . . . . If it does, it has such a small amount to do with it . . . ."); *id.* at 4611 (statement of Rep. John Conyers, Jr., a Democrat from Michigan) ("[I]nstead of bringing this up on its own merits, we wait until we get an emotionally charged piece of legislation and bring up habeas corpus, which has no relationship to terrorism whatsoever."); *id.* at 4617 (statement of Rep. John Conyers, Jr.) ("If we ever get somebody that fits this description in this amendment, they are going to really get it, because the death penalty as an aggravating factor, multiple killings or attempted killings, has nothing to do with terrorism, but that is really not that important."). *But see id.* at 4610 (statement of Rep. Henry Hyde, a Republican from Illinois) ("[To say] that habeas corpus has nothing to do with terrorism . . . I am kind of at a loss as to the logic behind that [remark].").

[344] *Id.* at 4602 (statement of Rep. Jim Bunning, a Republican from Kentucky) ("I think that the author of the base bill, while completely well-intentioned in this effort, would be the first to admit that there is nothing in this bill that would have prevented the tragedy in Oklahoma.").

V. EFFECTS AND LEGACY OF THE PATRIOT ACT

A. The Patriot Act's new and potent powers granted the executive branch sweeping powers to search individuals and conduct surveillance that the government has predominantly used against ordinary criminals instead of suspected terrorists.

While previous sections discussed much of the Patriot's Act sections and tools,[345] they did not discuss the cumulative impact of the Patriot Act on the American legal system and the relationship between the federal government and American citizens. Such a discussion of the Patriot Act is an instrumental exercise that demonstrates the inherent risks of crisis legislation without passing judgment on the efficacy of its provisions. The primary risk of crisis legislation is that a law borne of disaster will transform the government's legal infrastructure—as well as the use of those legal changes in unanticipated ways, justified post hoc by the exigencies of the crisis. The Patriot Act, for example, launched the country on a trajectory that "shift[ed the] balance of power to the government" and used the War on Terror to enhance executive power.[346]

In the years following the passage of the Patriot Act, its laws have been used in drastic ways that would have sounded unthinkable and extreme even to those who anticipated widespread surveillance of everyday criminal suspects.[347] Pursuant to the Patriot Act's expansion of authority for pen registers and trap and trace devices,[348] courts have granted requests to use these devices to obtain cell phone location information for domestic targets.[349] The executive branch wasted no time in using the Patriot Act

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[345] *See supra* Parts II.C–II.D.

[346] 9/11 COMMISSION REPORT, *supra* note 30, at 394. *But see id.* ("Some executive actions that have been criticized are unrelated to the Patriot Act.").

[347] *E.g.*, 147 CONG. REC. 20,444 (2001) (statement of Rep. Robert C. Scott, a Democrat from Virginia) ("[The Patriot Act] goes way past terrorism. This is the way we are going to be conducting criminal investigations."). *See also supra* Parts II.D, III.C (statements of Sen. Russ Feingold, a Democrat from Wisconsin, Rep. Robert C. Scott, a Democrat from Virginia).

[348] *See* USA Patriot Act of 2001, Pub. L. No. 107-56, § 214, 216, 115 Stat. 272, 286–90.

[349] *See In re* Application of U.S. For an Order for Disclosure of Telecommunication Records and Authorizing the Use of a Pen Register and Trap and Trace, 405 F. Supp. 2d 435, 448 (S.D.N.Y. 2005) (permitting grant of cell site information upon reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation involving the illegal sale of contraband); *In re* U.S. for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices, 632 F. Supp. 2d 202, 205

powers "with increasing frequency in many criminal investigations that have little or no connection to terrorism."[350] This departure may be nothing more than pragmatism on the part of the federal government to "use all the tools now available," or it may indicate that "the administration is using terrorism as a guise to pursue a broader law enforcement agenda."[351] Of the smuggled cash seized under the money laundering provisions,[352] ostensibly that which funds terrorist organizations, "much of it involved drug smuggling, corporate fraud, and other crimes not directly related to terrorism."[353]

Concerns about the Patriot Act are exacerbated by the Justice Department's insistence on pushing the envelope in the name of protecting the public.[354] In 2002, the FISC identified more than 75 cases where the FBI misled the court in an attempt to "justify its need for wiretaps and other electronic surveillance."[355] Though their substance remains classified, the number of FISA surveillance applications soared after the Patriot Act's passage.[356] Through 2013, the FISC had only denied twelve FISA

(E.D.N.Y. 2008) ("concluding that the Government may obtain, without a showing of probable cause, the cell-site information it requests pursuant to the combined authority of [18 U.S.C. § 3121] and the [Stored Communications Act].") (the Patriot Act amended 18 U.S.C. § 3121). *But see In re* U.S. For an Order Authorizing the Release of Prospective Cell Cite Information, 407 F. Supp. 2d 134, 139 (D.D.C. 2006) (holding that government was not entitled to an order for cell phone site information in a narcotics investigation).

[350] Lichtblau, *supra* note 151 ("The government is using its expanded authority under the far-reaching law to investigate suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies and even corrupt foreign leaders, federal officials said.").

[351] *Id.*

[352] *See* USA Patriot Act of 2001, Pub. L. No. 107-56, tit. III, 115 Stat. 272, 296–342. *See also supra* Part II.C.

[353] Lichtblau, *supra* note 151.

[354] *See In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (Foreign Intel. Surv. Ct. 2002) (rebuking the FBI for misleading the court in at least 75 attempts to obtain surveillance).

[355] Philip Shenon, Secret Court Says F.B.I. Misled Judges in 75 Cases, N.Y. TIMES, Aug. 23, 2002, at A1 (referring to *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 611).

[356] *See* ELEC. PRIVACY INFO. CTR., Foreign Intelligence Surveillance Act Court Orders, 1979-2011, http://epic.org/privacy/wiretap/stats/fisa_stats.html (last updated May 1, 2014) (compiled from FISA annual reports). *Compare id.* from 1980-2001 (609 FISA surveillance applications per year), *and id.* from 1990-2001 (721 FISA applications per year), *with id.* from 2002-2013 (1776 FISA applications per year). The number of FISA applications increased by 296 from 2001 to 2002, and continued to increase until 2007, peaking at 2,371

applications in its thirty-five year history.[357] The shift to these "secret surveillance warrants" has been so dramatic that they exceeded the number of criminal wiretaps for the first time in 2003.[358]

Because the threshold for FISA requests is lower than that of ordinary probable cause,[359] they are far more attractive than traditional warrants. For this reason, referring to FISA requests as "warrants" in the traditional sense under the Fourth Amendment[360] is inaccurate.[361] The lack of a probable cause requirement, combined with the ability for "more aggressive and wide-ranging" surveillance, more permitted time, and generally fewer restrictions,[362] explains the "fundamental shift in the way [the Justice Department] conducts surveillance."[363] Since 1967, the use of wiretaps on

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FISA applications. The most in any one year prior to September 11th was 1005, in 2000. The 2007 peak represented a 135% increase from only seven years before (the previous peak of FISA applications) and a 288% increase over the pre-9/11 average.

[357] *See id.* The FISC has not denied an application for a traditional FISA surveillance order since 2009 (through 2013). *See id.*

[358] Dan Eggen & Susan Schmidt, *Data Show Different Spy Game Since 9/11*, WASH. POST, May 1, 2004, at A1 (In 2003, only 1442 criminal warrants were granted, compared with over 1700 FISA "warrants.").

[359] This innovation is not the doing of the Patriot Act, but rather of FISA. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 102, 92 Stat. 1783, 1786–88 (codified at 50 U.S.C. § 1802 (2012). However, it is the Patriot Act's changes to FISA that made FISA surveillance much more accessible, as succinctly explained by Rep. Robert C. Scott. *See infra* note 365.

[360] U.S. CONST. amend. IV ("[A]nd no Warrants shall issue, *but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") (emphasis added).

[361] *See* Mayfield v. United States, 504 F. Supp. 2d 1023, 1042–43 (D. Or. 2007) *vacated for lack of standing*, 599 F.3d 964, 973 (9th Cir. 2010) ("*In re Sealed Case* ignores congressional concern with the appropriate balance between intelligence gathering and criminal law enforcement . . . . Therefore, I conclude that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are unconstitutional because they violate the Fourth Amendment of the United States Constitution.").

[362] Eggen & Schmidt, *supra* note 358. *See also Mayfield*, 504 F. Supp. 2d at 1023.

[363] Eggen & Schmidt, *supra* note 358 (quoting "David L. Sobel, counsel at the Electronic Privacy Information Center, which monitors government surveillance policies"). Although the applications for traditional FISA surveillance orders and criminal wiretap warrants sought do not tell the entire story on government surveillance, such as physical searches or variety of targets, the number of such applications is a good proxy for a shift in policy. *Id.*

domestic criminals did not exist beyond the reach of the Bill of Rights,[364] something that the Patriot Act facilitated.[365]

None of this is to claim that the Patriot Act has not been used against terrorists because it certainly has been.[366] In 2003, Attorney General Ashcroft said, "We have used these tools to prevent terrorists from unleashing more death and destruction on our soil. . . . We have used these

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[364] "The Fourth Amendment has served this Nation well for 220 years, through many other perils. Title III [of FISA], like the Supreme Court's pronouncements in *Katz* and *Berger*, recognizes that wiretaps are searches requiring fidelity to the Fourth Amendment." *Mayfield*, 504 F. Supp. 2d at 1042 (referring to Katz v. United States, 389 U.S. 347 (1967), and Berger v. New York, 388 U.S. 41 (1967)).

[365] *See*, *e.g.*, USA Patriot Act of 2001, Pub. L. No. 107–56, § 203, 206, 218, 115 Stat. 278

> Now, the [pre-Patriot Act] law under wiretap provides that you cannot wiretap until you have probable cause that a crime has been committed. Then you can get a wiretap order from a judge. There is an exception for Federal intelligence. It is a much lower standard, but you can only use the wiretap information, what you gain, in foreign intelligence. So law enforcement officials have no incentive to try to push the envelope using the foreign intelligence idea as a pretext excuse for getting wiretap orders, because if they find anything, under criminal law, they cannot use it anyway.
>
> This bill makes three significant changes. One, it reduces standards for getting a foreign intelligence wiretap from one where it is a primary, the reason you are getting it, to: it is a significant reason for getting the wiretap. Much less. Well, we wonder, if it is not the primary reason, why are you getting the wiretap?
>
> Second, it allows the roving wiretap, so once you find a target, if he is using cell phones, for example, you can go and find him wherever he is. Third, you can use the information in a criminal investigation. The combination gives us the situation where there is very little standard and one can essentially conduct a criminal investigation with- out probable cause.

147 CONG. REC. 20,443 (2001) (statement of Rep. Robert C. Scott, a Democrat from Virginia).

[366] *See* Lichtblau, *supra* note 151 ("Justice Department officials point out that they have employed their newfound powers in many instances against suspected terrorists . . . . [The Justice Department] has used its expanded surveillance powers to move against several suspected terrorist cells.").

tools to save innocent American lives."[367] In 2009, police arrested several terrorists aspiring to bomb New York subways and blow up buildings in Dallas, Texas and Springfield, Illinois.[368] The government won convictions of individual cells in New York, Virginia, North Carolina, Oregon, Texas, and Ohio.[369] Representative Mike Rogers said that a program using the business records provision of the Act helped avert a "significant domestic terrorist attack . . . within the last few years."[370] But the reality is that Patriot powers are predominantly used against suspects of unsexy, ordinary crimes.[371]

Whenever the government is operating a broad agenda of surveillance, there is danger that the power is abused to infringe on First Amendment rights. Even the 9/11 Commission Report discussed such "unlawful wiretaps and surveillance" on individuals the government wanted to discredit, most notably Martin Luther King Jr.[372] It is conceivable that terrorism may be used as a cloak for such abuses of wiretaps to suppress political dissent, particularly because "material support" for terrorism is "couched in such vague and expansive terms."[373] Though some believe "[m]any forms of social and political protest in the United States can now be classified as 'domestic terrorism,'"[374] it is difficult to ascertain how much

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[367] *Id.* (quoting Att'y Gen. John Ashcroft).

[368] Mukasey, *supra* note 308.

[369] *Id.*

[370] Kevin Johnson, *Phone Tracking Raises More Concerns than Internet Tapping*, USA TODAY (June 7, 2013), *available at* http://www.usatoday.com/story/news/politics/2013/06/07/spying-nsa-obama-surveillance-verizon-prism/2401857/ (quoting Rep. Mike Rogers, a Republican from Michigan) (internal quotation marks omitted).

[371] *See, e.g.*, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS 2, 6 (2010), *available at* https://www.aclu.org/files/assets/aousc_patriot_act_section_213_sneak_and_peek_report.pdf (showing that less than 1% of sneak-and-peek warrants requested under section 213 of the Patriot Act in fiscal year 2010 were for terrorism offenses, compared to 74% for drugs, 3% for extortion/racketeering, 4% for fraud, and 2% for weapons).

[372] 9/11 COMMISSION REPORT, *supra* note 30, at 75.

[373] Saito, *supra* note 10, at 1120 (quoting NANCY CHANG AND THE CTR. FOR CONSTITUTIONAL RIGHTS, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES 4444 (2002)) (internal quotation marks omitted). *See also* Halperin & Woods, *supra* note 283, at 139 ("Another way the government circumvents . . . legal reforms is by labeling foreigners 'terrorists' based on their political support for guerrilla movements Washington disapproves of . . . .").

[374] *See* Saito, *supra* note 10, at 1120.

the Patriot Act has been used against political dissenters since their basis for labeling certain groups as terrorist organizations remains classified.[375] Naming groups as "terrorists" is done via ex parte applications relying on classified evidence,[376] making it impossible to discern which uses of these powers are legitimate. But it's certainly not as black–and–white as determining whether the Red Cross or the Osama Bin Laden Fan Club are "terrorist organizations."[377] While many organizations targeted by such forays into criminal law are not exactly as wholesome as the Brady or Cunningham families, the Constitution drew heavily on the idea that criminal suspects in the United States deserve strong and unqualified constitutional protections.[378]

Even more worrisome than the wielding of Patriot Act powers for criminal investigations is the use of the powers on American citizens not even suspected of criminal activity. A revelation in June 2013 revealed that, as long suspected by civil libertarians,[379] "federal authorities routinely

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[375] "In sum, we join all other courts to have addressed the issue in holding that, subject to the limitations discussed below, the government may use classified information, without disclosure, when making [terrorist] designation determinations." Al Haramain Islamic Found. v. U.S. Dep't of the Treasury, 660 F. 3d 1019, 1035 (9th Cir. 2011), *reh'g denied*, 686 F.3d 965 (9th Cir. 2012) (allowing "global terrorist" organization designated under Exec. Order No. 13,224 to have assets frozen pursuant to 50 U.S.C.A. § 1702, which was amended by scattered sections of the Patriot Act). *See also* Global Relief Found. v. O'Neill, 315 F. 3d 748, 754 (7th Cir. 2002) (finding determination of "global terrorist" organization "is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered ex parte by the district court").

[376] *See* United States v. Ott, 827 F.2d 473, 476–77 (9th Cir. 1987) (rejecting defendant's claim that use of and ex parte judicial review of classified information under FISA are unconstitutional); United States v. Belfield, 692 F.2d 141, 147 (D.C. Cir. 1982) (holding that use of and ex parte judicial review of classified information under FISA are constitutionally proper).

[377] *See, e.g.*, *Al Haramain Islamic Found*., 660 F. 3d at 1055 (finding that government's seizure of assets had violated terrorist-designated organization's due process rights when notice for the search made pursuant to sneak-and-peak warrant was not given until the organization's assets were frozen seven months later).

[378] *See, e.g.*, U.S. CONST. amend. IV–VII.

[379] *See, e.g.*, *CBS/AP, Obama "Autopens" Patriot Act Extension into Law*, CBS NEWS (May 27, 2011) [hereinafter *Patriot Act Extension*], http://www.cbsnews.com/stories/2011/05/26/politics/main20066686.shtml. ("[T]he ACLU . . . contends the Patriot Act has blurred the line between investigations of actual terrorists and those not suspected of doing anything wrong."); Johnson, *supra* note 370 ("[A]spects of the phone tracking program have been known since 2006 . . . .").

collect data on phone calls Americans make, regardless of whether they have any bearing on a counterterrorism investigation."[380] The FISC granted the FBI an order to collect the information on telephone calls made in a service provider's system under the authority of the business records provision of the Patriot Act—which is illegal even under the Patriot Act's forgiving standards.[381] Representative Sensenbrenner, while labeling the actions "excessive and un-American," said, "As the author of the Patriot Act, I am extremely troubled by the FBI's interpretation of this legislation. . . . While I believe the Patriot Act appropriately balanced national security concerns and civil rights, I have always worried about potential abuses."[382]

Some of the Patriot Act's uses against criminals were to be expected—a small cost for enhanced abilities to fight terrorism. But the results have been unexpectedly extreme. Senator Leahy (one of the Patriot Act's chief authors) "expected some of the new powers granted to law enforcement to be used for nonterrorism investigations," but has since questioned whether "'the government is taking shortcuts around the criminal laws.'"[383] The startling uses of the Patriot Act's tools as "shortcuts around the criminal

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[380] *In re* Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Business Network Serv. (Foreign Int. Surv. Ct. July 19, 2013). *See also Dragnet*, *supra* note 239 (specifying that the data includes the phone numbers and length of calls but not the content).

[381] *See* ACLU v. Clapper, No. 14-42-cv, slip op. at 82 (2d Cir. May 7, 2015) (holding that "the text of § 215 cannot bear the weight the government asks us to assign to it, and that it does not authorize the telephone metadata program"). *See also* Elizabeth Goitein, *The Spying on Americans Never Ended*, WALL ST. J., June 7, 2013, at A15 ("Another concern is legality. . . . It is simply not possible that all of the phone records of every American are relevant to a specific authorized investigation. Such an interpretation of 'relevance' (or of 'investigation') would render Section 215's limitation utterly meaningless."); Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order ("The order . . . requires Verizon on an 'ongoing, daily basis' to give the NSA information on all telephone calls in its systems, both within the US and between the US and other countries.").

[382] *Dragnet*, *supra* note 239.

[383] Lichtblau, *supra* note 151 ("We did not intend for the government to shed the traditional tools of criminal investigation, such as grand jury subpoenas governed by well-established precedent and wiretaps strictly monitored.") (quoting Sen. Patrick Leahy, a Democrat from Vermont.) (internal quotation marks omitted); Eggen & Schmidt, *supra* note 358 (quoting ACLU lawyer Timothy Edgar's accusation that the Bush administration "us[ed] spy-hunting tools to sidestep the basic protections that exist in criminal cases.").

laws"[384] disappointed many of its original supporters, and illustrates why rushing crisis legislation through the legislative process has unintended long-term consequences when ordinary legal limitations are lacking and a thorough evaluation of the law is perpetually shelved.

B. The Patriot Act instituted limited oversight on the executive branch's new powers, and the Judiciary has been more willing to defer to the executive branch in the name of national security since 9/11.

Striking the proper balance between security and liberty is an ongoing struggle and cannot be achieved without an independent, assertive judiciary. Many of the competing concerns implicated by the Patriot Act, such as intelligence-gathering and individual liberty, were contemplated when the Founding Fathers wrote the Bill of Rights.[385] Criminal procedure relies on the judiciary's regulation of law enforcement, guided by the Bill of Rights.[386] Passing legislation is just the first step in combating a crisis, followed by implementation and, critically, vigilant oversight by Congress and the judiciary.[387] Unfortunately, what few oversight measures were

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[384] Lichtblau, *supra* note 151.

[385] Mistretta v. United States, 488 U.S. 361, 380 (1989) (explaining "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); Mayfield v. United States, 504 F. Supp. 2d 1023, 1042 (D. Or. 2007), *vacated for lack of standing*, 599 F.3d 964 (9th Cir. 2010) ("[The Founding Father's] concern regarding unrestrained government resulted in the separation of powers, checks and balances, and ultimately, the Bill of Rights. Where these important objectives merge, it is critical that we, as a democratic Nation, pay close attention to traditional Fourth Amendment principles.").

[386] *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Fifth Amendment forbids the prosecution from using statements obtained via custodial interrogation in its case-in-chief absent prior warnings to the suspect and a subsequent waiver); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that a criminal defendant's Sixth Amendment right to counsel was violated when law enforcement deliberately elicited statements from the defendant without his retained counsel); Katz v. United States, 389 U.S. 347, 347 (1967) (holding that electronic interception of defendant's conversation in public telephone both was a search under the Fourth Amendment and required a warrant).

[387] 147 CONG. REC. 19,521 (statement by Sen. Tom Daschle, a Democrat from North Dakota) ("[L]et's let law enforcement do its job, and let's use our power of oversight to ensure that civil liberties are protected."); 132 CONG. REC. 22,660 (statement of Rep. Robert Michel, a Republican from Illinois) ("This means that we do something more than pass this legislation and then go on to other things. We do that so often in the Congress . . . . We have only just begun. If the House isn't willing, through oversight, to see to it that the legislation we pass is really working, we shouldn't pass a law in [drug treatment and enforcement].").

created by the Patriot Act are limited or vaguely written in such a way to render them ineffective or difficult to enforce.[388]

The paranoid thinking that the executive branch used to expand its power also infected the judiciary, which has happily deferred to its executive counterparts since 2001 in most cases.[389] Associate Justice Thomas, quoting Alexander Hamilton, has acknowledged that "[t]he circumstances that endanger the safety of nations are infinite."[390] In *Global Relief Foundation v. O'Neill*,[391] Judge Easterbrook suggested, "Consider for a moment what would happen if Osama bin Laden put all of his assets into a trust, under Illinois law, administered by a national bank."[392] An allegedly charitable organization challenging the blocking of its assets via ex parte application (as was the case in *Global Relief*) stands little chance once Osama Bin Laden has been dragged into the picture. The anxiety caused by 9/11 lingers long after the attacks, as the Justice Department still views the dissemination of information on the Patriot Act's uses as a threat to national security.[393]

The lingering fear from 9/11 has affected how courts review challenges to executive powers, including those exercised pursuant to the Patriot Act. For instance, when using the *Mathews* test to determine if the Office of Foreign Assets Control violated an organization's due process rights,[394] the Ninth Circuit explained, "[T]he government's interest in national security

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[388] *E.g.*, 18 U.S.C. § 2520(f) (2012) (providing that when "a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provisions of this chapter," the head of that department shall internally and independently determine if disciplinary action is warranted); 50 U.S.C. § 1702(c) (2012) (providing that "any judicial review" of the President's determination that an organization aided terrorists will be reviewed ex parte and in camera when based on classified information, even though "[t]his subsection does not confer or imply any right to judicial review").

[389] *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting).

[390] *Hamdi*, 542 U.S. at 580 (Thomas, J., dissenting) (quoting A HAMILTON, THE FEDERALIST NO. 23 147 (J. Cooke ed. 1961)).

[391] 315 F.3d 748 (7th Cir. 2002).

[392] *Id.* at 753.

[393] *E.g.*, Charlie Savage, *Democratic Senators Issue Strong Warning About Use of the Patriot Act*, N.Y. TIMES, Mar. 16, 2012, at A12 ("[A] Justice Department official last month told a judge that disclosing anything about the program [conducted under the Patriot Act] 'could be expected to cause exceptionally grave damage to the national security of the United States.'"); Goitein, *supra* note 381 ("For seven years, the government deemed that releasing its legal interpretation of the Patriot Act could cause grave harm to national security.").

[394] *Hamdi*, 542 U.S. at 528–29 (referring to *Mathews v. Eldridge*, 424 U.S. 319 (1976)). The *Matthews* Test is the standard test for balancing one's procedural due process rights with the government's interests, including those involving national security. *See id.*

cannot be understated. We owe unique deference to the executive branch's determination" that an organization was a global terrorist.[395] All the while, the executive branch has been asserting the inadequacy and impropriety of courts to act as a check on its power, noting the courts' "limited institutional capabilities" in matters involving national security and foreign affairs.[396] Even Associate Justice Thomas conceded that courts have an "institutional inability to weigh competing concerns correctly" when discussing national security.[397] While fears of terrorism may have subsided slightly since 9/11, national security was at the forefront of the American conscience in the immediate aftermath of 9/11, and the "unique deference" still continues.[398] As a result of such deference, courts rarely deny FISA requests[399] or organizational terrorist designations.[400]

Judicial and congressional oversight of the executive branch has not been totally absent since 9/11,[401] but it has not been restrictive by any stretch.[402] A failure to reign in executive power during times of crisis is a

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[395] Al Haramain Islamic Found. v. U.S. Dep't of the Treasury, 660 F. 3d 1019, 1033 (9th Cir. 2011) *reh'g denied*, 686 F.3d 965 (9th Cir. 2012) (analyzing the balance of interests for the first and third Mathews factors under).

[396] *Hamdi*, 542 U.S. at 527 (quoting Brief for Respondents 26).

[397] *Id.* at 579 (Thomas, J., dissenting).

[398] *See*, *e.g.*, *Al Haramain Islamic Found.*, 660 F. 3d at 1033 ("We owe unique deference to the executive branch's determination that we face 'an unusual and extraordinary threat to the national security' of the United States.").

[399] *See supra* notes 355–59 and accompanying text (FISC courts review of FISA requests).

[400] *See, e.g.*, Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) ("We acknowledge that the unclassified record evidence is not overwhelming, but we reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential.").

[401] *E.g.*, *Hamdi*, 542 U.S. at 535–37 ("reject[ing] the Government's assertion that separation of powers principles mandate a heavily circumscribed role" in reviewing the detention of an "enemy combatant"); *In re* All Matters Submitted to the Foreign Int. Surv. Ct., 218 F. Supp. 2d 611 (2002).

[402] CHANG, *supra* note 373, at 48 ("Congress granted the Bush administration its longstanding wish list of enhanced surveillance tools, coupled with the right to use these tools with only minimal judicial and congressional oversight."). *See also* 147 CONG. REC. 19,541 (2001) (statement of Sen. Paul Wellstone, a Democrat from Minnesota) ("Still, I do have concerns about the possible effect on civil liberties of the bill's measures to enhance electronic surveillance and information sharing of criminal justice information, while at the same time reducing judicial review of those actions."); *id.* at S10,588 (statement of Sen. Maria Cantwell, a Democrat from Washington) ("We are giving broad new

typical response by the judiciary.[403] "When the government asserts a claim of national security, the courts consistently defer to the Executive, and the due process rights of criminal defendants are seriously compromised."[404] Judicial oversight is especially crucial in the wake of crisis because the executive branch tends to celebrate its powers by abusing using them,[405] such as using terrorism powers on domestic targets "not suspected of any criminal activity or membership in any terrorist group."[406]

Though the United States is embroiled in a struggle to maintain its safety and security against the menace of terrorism, this does not justify a blatant disregard for the Constitution, as some courts have prudently pointed out.[407]

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powers . . . without the traditional safeguards of judicial review and congressional oversight."); *Patriot Act Extension, supra* note 379 (quoting Sen. Dick Durbin, a Democrat from Illinois) ("I soon realized it gave too much power to government without enough judicial and congressional oversight."); O'Harrow Jr., *supra* note 4, at 21 ("There was no longer any question that the Patriot Act would include some court oversight, though not as much as [Sen. Patrick] Leahy and [Rep. Richard] Armey wanted.").

[403] *See, e.g.*, Halperin & Woods, *supra* note 283, at 130, 133. *See also In re* Krogh, 536 P.2d 578, 592–93 (Wash. 1975) ("In past times of crisis, courts have, unfortunately, not always shown the ability to remove themselves sufficiently from the emotions of the times to render what history has since understood to be considered justice.").

[404] Halperin & Woods, *supra* note 283, at 130.

[405] *See, e.g.*, *Dragnet*, *supra* note 239 (explaining "the truism that the executive branch will use any power it is given and very likely abuse it").

[406] Halperin & Woods, *supra* note 283, at 137 (revealing that a 1990 study requested by Sen. Don Edwards, a Democrat from California, on the FBI's terrorism program found that nearly 40 percent of its investigations involved U.S. citizens or permanent resident aliens). *See also* Greenwald, *supra* note 381 ("The document shows for the first time that under the Obama administration the communication records of millions of US citizens are being collected indiscriminately and in bulk—regardless of whether they are suspected of any wrongdoing.").

[407] *See* Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 660 F. 3d 1019, 1023 (9th Cir. 2011), *reh'g denied*, 686 F.3d 965, 993 (9th Cir. 2012) ("The government's interest in preventing terrorism and the funding of terrorism is extremely high. But the sensitive subject matter is no excuse for the dispensing altogether with domestic persons' constitutional rights."); Hamdi v. Rumsfeld, 542 U.S. 507, 510, 532 (2004) ("Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or the privilege that is American citizenship.").

In past "circumstances of dire[] emergency and peril," the Supreme Court has declined to act as a check on the other two branches.[408]

Associate Justice Souter succinctly explained the quandary: "The defining character of American constitutional government is its constant tension between security and liberty."[409] Associate Justice Thomas, while explaining the judiciary's inability to second guess the President, astutely noted the hypocrisy of demanding judicial review in one matter while the ongoing war effort involved at least one instance in which a "Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of the United States, and four others" without any judicial check on the action.[410]

In many instances, the executive branch has dodged rigorous judicial review using the clandestine nature of any evidence that could provide a legal argument against their actions. *ACLU v. U.S. Department of Justice*[411] exemplified the challenges in determining how much deference has been granted to the executive branch on uses of Patriot Act powers, where the Department of Justice was permitted to withhold information in light of the department's "expert judgment that . . . [the information] is reasonably connected to the protection of national security."[412] In this way, the

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[408] *See*, *e.g.*, Korematsu v. United States, 323 U.S. 214, 219–20 (1944) (declining to decide the validity of Japanese relocation centers created during World War II); Debs v. United States, 249 U.S. 211, 211 (1919) (upholding the conviction of known socialist Eugene Debs under the Espionage Act of 1917). *But see* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (denying the executive branch's attempt to enjoin publication of the Pentagon Papers).

[409] *Hamdi*, 542 U.S. at 545 (Souter, J., dissenting).

[410] *Id.* at 597 (Thomas, J., dissenting). Notably, the President's powers to conduct foreign affairs and act as commander-in-chief allow for much more discretion overseas than domestically, even in wartime. *See New York Times Co*., 403 U.S. at 741 ("Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief.") (citations omitted). As a result, it is much more unusual for the judiciary to rule on the legality of a drone strike in Yemen than, say, the indefinite detention of an American citizen without formal charges or proceedings. *See Hamdi*, 542 U.S. at 510–11 (O'Connor, J., plurality opinion).

[411] 265 F. Supp. 2d 20 (D.D.C. 2003).

[412] *Id.* at 30. The court also found the withholdings proper because "disclosure of the materials would expose [the] agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* at 33 (quoting Formaldehyde v. Dep't. of Health and Human Servs., 889 F.2d 1118, 1122 (D.C. Cir. 1989) (internal quotation marks omitted)).

Department of Justice has effectively insulated its own confidential actions from reviews for abuse via the Freedom of Information Act or standing arguments.[413] Additionally, the FISC review court found the changes to FISA to be constitutional even though the confidential FISA requests themselves may "not meet the minimum Fourth Amendment warrant standards"—they are "close" enough, after all.[414]

Although released a full decade ago, *The 9/11 Commission Report* sagely observed an enhancement of executive power in the years following 9/11 and that power's implications.[415] The report recommended checks on Patriot Act powers, such as a board within the executive branch to oversee adherence and placing the burden of proof on the executive branch to prove that a proposed measure increases national security without eviscerating civil liberties.[416] Congress is yet to adopt serious oversight measures in the changes to national security law since the Patriot Act.[417] Where executive

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[413] *E.g.*, Siobhan Gorman et al, *U.S. Collects Vast Data Trove*, WALL ST. J., June 7, 2013, http://www.wsj.com/articles/SB10001424127887324299104578529112289298922 ("Federal courts largely have rebuffed efforts that target NSA surveillance programs, in part because no one could prove the information was being collected."). *But see, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1154 (2013) ("It would be wrong, [respondents Amnesty International] maintain, to 'insulate the government's surveillance activities from meaningful judicial review.' Respondents' suggestion is both legally and factually incorrect.") (quoting Brief for Amnesty Int'l USA, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (No. 11-1025), at 26).

[414] *In re* Sealed Case, 310 F.3d 717, 746 (Foreign Int. Surv. Ct. Rev. 2002) ("[W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly, applying the balancing test drawn from *Keith,* that FISA as amended is constitutional because the surveillances it authorizes are reasonable.") (referring to United States v. U.S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 297 (1972) (requiring compliance with the Fourth Amendment in cases of domestic surveillance targeting a domestic suspect)).

[415] *See* 9/11 COMMISSION REPORT, *supra* note 30, at 394 (noting the Patriot Act's "substantial new powers in the investigative agencies of the government").

[416] *Id.* at 395 ("Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.").

[417] *E.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638; USA Patriot Improvement and Reauthorization Act of 2005, Pub L. No. 109-177, 120 Stat. 192; Patriot Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216. *But See* USA Patriot Improvement and Reauthorization Act of 2005, § 106(f) (authorizing recipient of business records ordered under the business records provision of the Patriot Act to judicial review); § 106A(a) (imposing audit requirements upon the Department

abuse of powers created to fight an emergency is a risk inherent in crisis legislation, congressional and judicial oversight offer a potential solution—one that could curtail objectionable uses of the Patriot Act.[418]

C. Since 2001, several members of Congress have changed their views on Patriot Act while others maintain its importance to national security.

Despite vocal and impassioned detractors, the Patriot Act still enjoys broad bipartisan support.[419] Senator Mitch McConnell found the Patriot Act's tools "have kept us safe for nearly a decade and Americans today should be relieved and reassured to know that these programs will continue."[420] Other groups, activists, and writers praise the law's success.[421] The former attorney general writes that the arrests of several aspiring terrorists "ha[ve] already confirmed the value of . . . the intelligence-gathering tools that protect this country from Muslim fanatics."[422] Even though many of the Patriots Act's provisions are controversial, the ones plainly adapted to deal with the failures leading to 9/11 have proven to probably be worth the consequences.[423] According to *The 9/11 Commission Report*, "[t]he provisions in the act that facilitate the sharing of information among intelligence agencies and between law enforcement and intelligence appear, on balance, to be beneficial."[424]

The decrease in transparency has not only made building a case against government impropriety more difficult,[425] it has made congressional oversight frustrating as well. Despite promises to Congress in 2009 from

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of Justice and for uses of the business records provision of the Patriot Act, to be submitted to Congress and including any "improper or illegal use").

[418] *See, e.g.*, *supra* Part IV.C.

[419] *See Patriot Act Extension*, *supra* note 379.

[420] *Id.* (internal quotation marks omitted).

[421] *See, e.g.*, Deroy Murdock, *Patriot Protections: A Post-9/11 Law Could Have Prevented the 9/11 Attacks*, NATIONAL REVIEW ONLINE (Jan. 27, 2006), http://old.nationalreview.com/murdock/murdock200601270937.asp (asserting that the Patriot Act would have prevented 9/11); Andrew C. McCarthy, *The Patriot Act Under Siege: Americans Need to Understand It Before We Add To It*, NATIONAL REVIEW ONLINE (Nov. 13, 2003), http://www.nationalreview.com/articles/208569/patriot-act-under-siege/andrew-c-mccarthy (finding the outrage over the Patriot Act "maddening" and urging that its reversal would "endanger national security").

[422] Michael B. Mukasey, *supra* note 308.

[423] *See supra* Part II.C.

[424] 9/11 COMMISSION REPORT, *supra* note 30, at 394.

[425] *See supra* Part IV.D.

Attorney General Eric Holder to release "significant opinions" from the FISC, "not a single redacted opinion has been released."[426] Senator Feinstein, Chairman of the Senate Intelligence Committee, promised Democratic critics of the Patriot Act in 2011 that she would ensure that law enforcement and intelligence officials were properly implementing the law.[427] Less than a year later, Senators Ron Wyden and Mark Udall revealed that the government has been interpreting the laws in alarming ways, and that Americans would be "stunned" to learn the Justice Department's "secret legal interpretations" of the Patriot Act, especially the business records provision.[428]

Senator Mitch McConnell, a Republican from Kentucky and Senator Harry Reid, a Democrat from Nevada, praised the Act for keeping Americans safe for the decade after its enactment and denounced Senator Paul for filibustering its renewal.[429] In the face of Senator Paul's crusade against extending the Patriot Act, Senator Reid accused him of "threatening to take away the best tools we have for stopping [terrorists]."[430] Despite the sunset clause that required renewal of several parts of the Patriot Act, the Department of Justice appears intent that the Patriot Act remains a permanent fixture of American law.[431]

Some of the Patriot Act's original supporters have expressed regrets over its passage. Senator Dick Durbin, lamenting that he voted for the

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[426] Savage, *supra* note 393 (quoting a letter from Sens. Ron Wyden, a Democrat from Oregon, and Mark Udall, a Democrat from Colorado, to Att'y Gen. Eric H. Holder Jr. complaining of failure to comply with the promises).

[427] *Patriot Act Extensions*, *supra* note 379.

[428] *See* Savage, *supra* note 393 (quoting Sens. Ron Wyden, a Democrat from Oregon, and Mark Udall, a Democrat from Colorado) (internal quotation marks omitted). "The court order [for indiscriminate, ongoing phone records] appears to explain the numerous cryptic public warnings by two US senators, Ron Wyden and Mark Udall, about the scope of the Obama administration's surveillance activities." Greenwald, *supra* note 381. Sen. Ron Wyden bemoaned that the government's official interpretation of the Patriot Act remains classified, as "[a] significant gap has developed now between what the public thinks the law says and what the government secretly claims it says." *Patriot Act Extensions supra* note 379.

[429] CBS/AP, *Congress Sends Patriot Act Extension Bill to Obama*, CBS NEWS May 26, 2011, http://www.cbsnews.com/news/congress-sends-patriot-act-extension-bill-to-obama/ [hereinafter *Congress Sends Bill to Obama*].

[430] *Id.* (internal quotation marks omitted).

[431] *See, e.g.*, Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, 322 F. Supp. 2d 1, 2 (D.D.C. 2003) (denying requests for information that the Executive Office of U.S. Attorneys encouraged lobbying against restrictions of the Patriot Act).

Patriot Act in 2001 "while ground zero was still burning," now sees it as granting too much power without enough oversight.[432] Ten years after it passed, former Senator Feingold (the only senator who voted against the Patriot Act) complained of a "climate of fear" that led to the law's passage as the neighborhood he lived in became an "armed camp" right before his eyes.[433]

In response to the last year's confirmation of widespread monitoring of Americans' phone records, President Obama expressed that "we're going to have some problems" if there is a lack of trust of the executive branch, Congress, and the judiciary.[434] On investigating Americans suspected of no criminal activity, Senator Feinstein dismissively said, "It's called protecting America."[435]

Civil libertarians and privacy-minded organizations, such as the ACLU, oppose the Patriot Act as aggressively as ever, contending that it "has blurred the line between investigations of actual terrorists and those not suspected of doing anything wrong."[436] The ACLU has denounced the Obama administration for institutionalizing "some of the Bush administration's most egregious national security policies . . . permanently into law."[437]

D. While the sunset clause was critical to the Patriot Act's passage and calmed fears that it would be permanent, the Patriot Act firmly established the legal infrastructure for the War on Terror.

If crisis legislation is the combustion sparked by fear and fueled by need, should it continue to burn after the fear, the need, or both have been depleted? When the asserted need is the exigency of a "war"—as was the case in the Cold War[438] and the War on Drugs[439]—then crisis legislation risks becoming a permanent part of the legal system.[440] This permanence

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[432] *Congress Sends Bill to Obama*, *supra* note 429 (internal quotation marks omitted).

[433] Hulse, *supra* note 188.

[434] Johnson, *supra* note 370 (internal quotation marks omitted).

[435] *Id.*

[436] *Congress Sends Bill to Obama*, *supra* note 429.

[437] Zarate, *supra* note 308 (quoting a report released by the ACLU) (internal quotation marks omitted).

[438] *See supra* Part II.A. *See also generally* 9/11 Commission Report, *supra* note 30; Halperin & Woods, *supra* note 283.

[439] *See supra* Part IV.B.

[440] *See* Carr, *supra* note 4, at 1313 ("The use of the word 'emergency' . . . instead of the word 'war' is significant; nations cannot nowadays wait for hostilities before arming

may or may not be desirable, but the legal changes brought by the Patriot Act appear to have settled in as entrenched pillars in the new war against a faceless enemy: the War on Terror.

The "War on Terror" was a novel term in 2001 and became, with numerous variants, the convenient way to encapsulate the entire September 11th/terrorism crisis the United States faced.[441] Congress supposedly furnished the U.S. Government with the Patriot Act to, as Senator Hatch put it, "win" the war against terrorism.[442] But when does the War on Terror end? Does it continue until "all those responsible for those attacks and their sponsors . . . are brought to justice"?[443] The War on Terror is a war on an idea. Not only does the Patriot Act struggle to precisely define

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themselves with crisis powers. There have been doubts whether the legislative machine of a democracy moves fast enough in a crisis."). Instead of "emergency," the new trend appears to be use of the term "war," even though the efforts to fight the crises are not "wars" in the conventional sense.

[441] *See, e.g.*, 147 CONG. REC. 19,494 (2001) ("war against terrorism") (statement of Sen. Patrick Leahy, a Democrat from Vermont); *id.* at 19,535 ("war on terror") (statement of Sen. Maria Cantwell, a Democrat from Washington); *id.* at 19,507 ("war against terrorism") (statement of Sen. Orrin Hatch, a Republican from Utah); *id.* at 20,443 ("war on terrorism") (statement of Rep. Mike Oxley, a Republican from Ohio); Licthblau, *supra* note 151 ("war on terrorism") (quoting Justice Department guide to seminar on financial crimes); Milbank, *supra* note 50 ("war against terror") (quoting Att'y Gen. John Ashcroft); Murphy & Purdum, *supra* note 39 ("war on terror").

[442] "These tools are vital to our ability to effectively wage the war against terrorism, and ultimately to win it." 147 CONG. REC. 19,507 (2001) (statement of Sen. Orrin Hatch, a Republican from Utah).

[443] USA Patriot Act of 2001, Pub. L. No. 107-56, § 1002, 115 Stat. 272, 391–92 ("Congress finds . . . that all Americans are united in condemning, in the strongest possible terms, the terrorist who planed and carried out the attacks against the United States on September 11, 2001, and in pursuing all those responsible for those attacks and their sponsors until they are brought to justice."); 147 CONG. REC. 20,448 (2001) (statement of Sen. Mike Oxley, a Republican from Ohio) ("Nothing could be more important in our careers here in the Congress, no matter how long we stay, than to . . . make certain that the people who seek to terrorize us and to kill our citizens are brought to justice . . . .").

"terrorism,"[444] but the international community as a whole.[445] There are at least four federal statutes that attempt to define terrorism.[446] A prolonged battle with an existential threat like the terrorism is not definitively terminable.

While it sounds irrational, the nebulous definition of terrorism suggests that the War on Terror could exist in perpetuity—the government even conceded the possibility to the Supreme Court.[447] Many of President Obama's supporters believed and hoped he "would reverse a host of the Bush administration's legal stances and counterterrorism practices," but his administration has continued nearly all of the policies adopted by the Bush administration.[448]

One of the most important provisions in the Patriot Act was the "sunset clause," which provided an expiration date for many of the Act's wiretapping amendments.[449] The Patriot Act's most controversial provisions were initially seen as measures that, if not temporary, would at

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[444] The Patriot Act defines "domestic terrorism" as "activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" or "appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States." USA Patriot Act of 2001 § 802 (amending 18 U.S.C. § 2331).

[445] *See* Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) ("While this nation unequivocally condemns all terrorist acts, that sentiment is not universal . . . . [T]he nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus.").

[446] *See* 18 U.S.C. § 2331(1) (2014); 50 U.S.C. § 1801(c) (2014); 6 U.S.C. § 444(2) (2014); 8 U.S.C. § 1182(a)(3)(B) (2014). Though every approach has failed to provide a unifying definition of terrorism, most agree "acts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror in their targeted audience . . . ." Stethem v. Islamic Republic of Iran, 201 F. Supp. 2d 78, 89 (D.D.C. 2002).

[447] Hamdi v. Rumsfeld, 542 U.S. 507, 519–20 (2004) ("We recognized that the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable. As the Government concedes, 'given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.'") (quoting Brief for Respondents 3).

[448] Zarate, *supra* note 308. *See also* Goitein, *supra* note 381 (suggesting that collecting records of Americans' domestic phone calls began under President Bush and continued under President Obama).

[449] USA Patriot Act of 2001, Pub. L. No. 107-56, § 224 , 115 Stat. 295.

least be probationary pending evaluation during the sunset period.[450] The sunset clause guaranteed that most of the provisions pertaining to surveillance would expire at the end of 2005 unless Congress acted to renew them.[451] Nevertheless, those provisions have since been renewed[452] despite efforts from some individuals in Congress to prevent it.[453] When it was renewed in 2011, Senator Rand Paul filibustered, adamant that the government's abilities to monitor citizens be reduced.[454]

So does it end, or is the War on Terror and the Patriot Act the "new normal"?[455] Legislation building on the Patriot Act's amendments has "allow[ed] the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. Citizens and residents."[456] The Patriot Act is not the only law from the War on Terror limiting the civil liberties of American citizens,[457] and there

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[450] *See supra* Part III.C.

[451] *Id.* Notably, nearly all of the provisions subject to the sunset clause would later be renewed. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub L. No. 109-177, 120 Stat. 192; PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216.

[452] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub L. No. 109-177, 120 Stat. 192; PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216.

[453] *See Patriot Act Extension*, *supra* note 379.

[454] *Id.*

[455] Zarate, *supra* note 308 (quoting a report released by the ACLU).

[456] Amnesty Int'l USA v. Clapper, 638 F.3d 118, 121 (2d Cir. 2011) (quoting Plaintiffs' brief) (internal quotations omitted), *rev'd by*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (challenging FISA, 50 U.S.C. § 1881(a)(2)). The FISA Amendments Act of 2008 (FAA) built upon the Patriot Act's additions to of section 1881(a)(2) by permitting mass FISA applications, eliminating the "foreign power" requirement, and limited court authority over FISA surveillance. *Clapper,* 133 S. Ct. at 1156 (Breyer, J., dissenting).

[457] Many of the supposedly unconstitutional surveillance programs are only loosely based on *any* specific legal authority. Whether these programs would or could have existed without the initial softening of resistance from the Patriot Act is difficult to say, but the national security changes being used on domestic suspects since 2001 tend to build on the Patriot Act's additions to FISA. For example, the now notorious PRISM program, which allows the NSA to obtain private information on Internet users, is conducted pursuant to section 702 of the FISA Amendments Act. Timothy B. Lee, *Here's Everything We've Learned About the NSA's Secret Programs Work*, WASH. POST, June 25, 2013, www.washingtonpost.com/blogs/wonkblog/wp/2013/06/25/heres-everything-weve-learned-about-how-the-nsas-secret-programs-work/ (referring to FAA, Pub. L. No. 110-261, 112 Stat. 2436, 2438–48 (2008)).

are still many legal battles remaining over the Patriot Act and its progeny.[458] Describing the transformation that occurred at the NSA in the immediate aftermath of September 11th, a former NSA official-turned-whistleblower explained, "FISA ceased to be an operative concern, and the individual liberties preserved in the U.S. Constitution were no longer a consideration."[459] But the Patriot Act effectively kicked off the War on Terror. Hence the special considerations for crisis legislation enacted as part of an ongoing war effort on an abstract concept like communism, drugs, or terror: that the legal changes will be lasting and an incremental step in a framework to lessen civil liberties.

E. In light of recent revelations on how the Patriot Act's powers have been wielded, the American public and press have an opportunity to finally have a full, informed debate on whether Congress should undo the deeds of the Patriot Act.

With the protracted discussion of the unintended and enduring consequences of crisis legislation, this Article may be mistaken as a condemnation of Congress or the Patriot Act. If crisis legislation imposes such substantial risks on our legal system—maybe even threats to our democracy—is this a clamorously bleak and dismal call to *in*action? On the contrary, this is both a cautionary tale on the concerns of crisis legislation and an appeal to the American public and press to fulfill their supportive role in the lawmaking process.

The first step is recognition. Loaded terms like "War on Terror" or "War on Drugs" may be used to conjure fear, exaggerate the immediacy of danger, or reduce an unwinnable assault on the abstract to a traditional military campaign people better understand. In the war over semantics, those preaching restraint and caution in times of crisis must be better equipped. If "crisis legislation" can become a part of the legal vernacular,

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[458] *E.g.*, Klayman v. Obama, Nos. 13-0851, 13-0881 (D.D.C. filed June 6, 2013) (challenging the constitutionality of the business records provision created under section 215 of the Patriot Act); First Unitarian Church of L.A. v. NSA, No. CV:13-3287 (N.D. Cal. Filed July 16, 2013) (challenging the constitutionality of collecting telephone records under the business records provision created under section 215 of the Patriot Act).

[459] Binney Decl. at 2, Jewel v. NSA, (N.D. Cal. Sept. 18, 2008) (No. CV-08-04373-JSW), available at http://www.eff.org/document/binney-declaration-support-plaintiffs-motion. Though *Jewel* has been ongoing for years and the procedural history is exhausting, as of late 2014 the First and Fourth Amendment claims made by AT&T customers against the NSA remained. ELECTRONIC FRONTIER FOUNDATION, *Jewel v. NSA*, https://www.eff.org/cases/jewel (last visited Aug. 20, 2014).

then discussions over the phenomenon this Article depicts and others have observed in the past[460] can be more educated and complete. In a short concatenation of words, crisis legislation reminds the hearer of the United States' long struggle between reaction and overreaction; for "[w]hat keeps us oriented, and alert, and out of shock, is our history."[461] Crisis legislation can accomplish through terminology what more imprecise descriptions have done inadequately in the past.

The next step for the American public and press is discussion. Crisis legislation is hurried through the legislative process through fear and urgency. Swift congressional response to a problem is not to be chastised—but it seldom makes for sound policy. Either before or after passage, a full, informed debate on the crisis legislation ought to take place. This requires a lack of complacency and a commitment to vigilance by the American public and press. The press must act as the "bulwark[] of liberty" that has long been its responsibility.[462]

After recognition and debate comes action. There is no shortage of examples of crisis legislation,[463] but examples of the public, the press, the judiciary, or Congress acting to undo crisis legislation are sparser.[464] Action can come in many forms, however. One way to prevent long-reaching effects of crisis legislation is precisely what Congress did with the Patriot Act: a sunset provision.[465] Through a sunset provision, by which certain provisions are meant to expire in a specified time unless renewed,[466] bold broad steps may be taken to remedy a crisis with the proper, more complete debate to come before the sunsets expire. Another way to prevent the

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[460] *See, e.g.*, Klein, *supra* note 5, at 6–8 (describing "disaster capitalism"). *See also* O'Harrow Jr., *supra* note 4 (describing the "classic dynamic" that is crisis legislation in a nutshell).

[461] Klein, *supra* note 5, at 6–8.

[462] N.Y. Times Co. v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring) ("The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; *and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable*.") (quoting 1 ANNALS OF CONG. 434 (1789)). *See also id.* at 717 ("The press was to serve the governed, not the governors . . . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.").

[463] *See supra* Part IV.

[464] *See e.g.*, Pub. L. No. 92-128, 85 Stat. 347, 347–48 (1971) (amending 18 U.S.C. § 4001.

[465] USA Patriot Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295.

[466] *See id*.

unintended, harmful effects of crisis legislation is transparency, which may be the Patriot Act's most complete deficiency.[467] Without transparency, the public, press, and even most of Congress are disabled of their ability to monitor the executive branch.

But the most obvious way to rectify the Patriot Act's perceived issues is a new piece of legislation that diverts the law down a different path than the original crisis legislation. Herein lies the promise of the USA Freedom Act,[468] the 2013 and 2014 versions of which were sponsored in the House by Representative Sensenbrenner and in the Senate by Senator Leahy respectively—both chief contributors of the Patriot Act.[469] A version of the USA Freedom Act was initially introduced in October 29, 2013,[470] in response to the news of the indiscriminate collection of phone records against Americans suspected of no crimes and other programs such as PRISM.[471] Congress passed the USA Freedom Act in June 2015 after several members of Congress stalled attempts to renew the Patriot Act provisions due to sunset, causing them to expire.[472]

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[467] *See supra* Part IV.D.

[468] USA FREEDOM Act, H.R. 3361, 113th Cong. (2014) (as passed by the House of Representatives 303-121) [hereinafter USA Freedom Act]. The USA Freedom Act is "[a]n act [t]o reform the authorities of the Federal Government to require the production of certain business records, conduct electronic surveillance, use pen registers and trap and trace devices, and use other forms of information gathering for foreign intelligence, counterterrorism, and criminal purposes, and for other purposes." *Id* . Among other things, the USA Freedom Act would require law enforcement to follow additional procedures to make requests under the business records provision, *id.* § 101, prohibit bulk collection under the Patriot Act, *id.* § 103, 201, revive judicial review of minimization procedures, *id.* §104, allow for the appointment of amicus curiae by the FISC, *id.* § 401, and declassify some FISC opinions, *id.* § 402.

[469] CONGRESS.GOV, *H.R. 3361–USA FREEDOM Act*, www.congress.gov/bill/133th-congress/house-bill/3361/text (last visited May 29, 2015) (died in Congress after passing the House 231-190); CONGRESS.GOV, *S. 2685–USA FREEDOM Act of 2014*, https://www.govtrack.us/congress/bills/113/s2685 (last visited May 29, 2015) (died in the Senate) Rep. Sensenbrenner was on the House Committee on the Judiciary during the Patriot Act's passage, and Sen. Leahy was on the Senate Committee on the Judiciary during the Patriot Act's passage, and is considered one of its main authors. *See also supra* Parts III.B–C.

[470] CONGRESS.GOV, *H.R. 3361–USA FREEDOM Act*, *supra* note 469.

[471] *See* Greenwald, *supra* note 381. *See also* Lee, *supra* note 457 (the indiscriminate phone records collection program is pursuant to section 215 of the Patriot Act and PRISM is pursuant to section 702 of the FAA).

[472] USA FREEDOM Act of 2015, Pub. L. No. 114-23 [hereinafter USA Freedom Act]. *See* CONGRESS.GOV, *H.R. 2048–USA FREEDOM Act of 2015*, https://www.congress.gov/bill/

The USA Freedom Act may not be the perfect bill some civil libertarians desire,[473] but such a piece of legislation is nonetheless an affirmative "first step"[474] toward empowering Congress and the judiciary to act as a check on the executive branch on Patriot-related matters. Crisis legislation poses serious long-term risks to civil liberties and Americans' constitutional values. But by understanding history, the political forces in the United States—both in- and outside the government—can act to recognize crisis legislation, fully discuss its implications, and then maintain pressure over time to ensure that democracy continues to function as vibrantly as it was designed to.

VI. CONCLUSION

As of this writing, Congress had only just taken the first steps to rein in the national security apparatus established by the Patriot Act over thirteen years earlier.[475] Whether the Patriot Act was a necessary sacrifice of civil liberties to wage the War on Terror or a monstrous overreach of federal authority, there is no arguing that the Act exploited a crisis to gain passage. Since Congress passed the Patriot Act, it has become a pillar of governmental authority with no timeline for an end to the War on Terror.

114th-congress/house-bill/2048/text (enacted June 2, 2015) (last visited June 5, 2015). *See also* Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 Is Sharply Limited*, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/2015/06/03/us/politics/senate-surveillance-bill-passes-hurdle-but-showdown-looms.html.

[473] *E.g.*, Cindy Kohn & Rainey Reitman, *USA Freedom Act Passes: What We Celebrate, What We Mourn, and Where We Go From Here*, ELEC. FRONTIER FOUND. (June 2, 2015), https://www.eff.org/deeplinks/2015/05/usa-freedom-act-passes-what-we-celebrate-what-we-mourn-and-where-we-go-here ("Today's Senate vote did not accomplish [our long-term goals], but it did move us a bit closer."); *Senate Passes USA Freedom Act*, ACLU (June 2, 2015), https://www.aclu.org/news/senate-passes-usa-freedom-act ("The passage of this bill is an indication that comprehensive reform is possible, but it is not comprehensive reform in itself.").

[474] Cindy Cohn & Nadia Kayyali, *Understanding the New USA FREEDOM Act: Questions, Concerns, and EFF's Decision to Support the Bill*, ELECTRONIC FRONTIER FOUND. (Aug. 7, 2014), https://www.eff.org/deeplinks/2014/08/understanding-new-usa-freedom-act-questions-concerns-and-effs-decision-support. *See also* Steinhauer & Weisman, *supra* note 472 ("Senator Mike Lee, a Utah Republican, and Senator Leahy made it clear after passage that curtailing the phone sweeps might be only the beginning [of reform].").

[475] *See* USA Freedom Act; Steinhauer & Weisman, *supra* note 472 ("The [USA Freedom Act] signaled a cultural turning point for the nation, almost 14 years after the Sept. 11 attacks heralded the construction of a powerful national security apparatus.").

But, as this Article shows, much of the Patriot Act had nothing to do with terrorism.

Nevertheless, there have been no attacks as disastrous as 9/11 since the Patriot Act's passage. This could be evidence supporting the efficacy of its sections—such as those promoting inter-agency sharing of information[476]—or probative that it was unnecessary to begin with. *The 9/11 Commission Report* suggested that the 2001 U.S. Government was ill-equipped to handle Al Qaeda and perhaps nothing could have prevented the September 11th attacks.[477]

Though legislation unrelated to a crisis which it claims to address is not necessarily more oppressive, ineffective, or extreme simply because it is unrelated to the law's stated agenda, such legislation should be regarded with skepticism.[478] Governments should proceed with extra caution in dire times to avoid acting recklessly, lazily, or stealthily to create the appearance of purpose and conviction—just as one should drive slower and *more* carefully in a school zone, not blindfolded at white-knuckle speeds.[479] And the Patriot Act was driven at warp speed through the legislative process[480] and replete with hitchhikers seeking a ride on an antiterrorism bill.[481] Popular bills that enjoy bipartisan support, like the Patriot Act in October 2001, may camouflage great abuses of power—such as the "other purposes" of the Patriot Act.[482] While this Article does not go as far as to argue "gridlock is good,"[483] the Constitution relies on the notion that unchecked

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[476] *E.g.*, USA Patriot Act of 2001, Pub. L. No. 107-56, § 203, 115 Stat. 272, 278–81 (permitting the sharing of grand-jury information regarding foreign intelligence information). *See also, e.g.*, Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 GEO. WASH. L. REV. 279, 295 (2010).

[477] *See generally* 9/11 COMMISSION REPORT, *supra* note 30.

[478] *See* Carr, *supra* note 4, at 1314 ("Legislative speed is not to be confused with legislative efficiency, nor is it suggested that a House of Commons, containing several hundred members, can sit down and think out the necessary laws at a moment's notice.").

[479] *See Ex Parte* Milligan, 71 U.S. 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

[480] *See supra* Part III.C.

[481] *See supra* Parts III.B–C, V.A–C.

[482] *See, e.g.,* USA Patriot Act § 1.

[483] Lawrence Summers, *Sometimes, Gridlock is Good for America*, WASH. POST, Apr. 15, 2013, at A17. "In American history, division and slow change has been the norm rather than the exception. While often frustrating, this has not always been a bad thing." *Id.*

and concentrated authority is inherently dangerous and undemocratic.[484] To defend against flagrant abuses of democracy, the American people and its elected officials must be fastidious to ensure that legislation is appropriate and the product of our best judgment and not simply overreactions or previously-rejected ideas that are just "lying around." Otherwise, we have a scenario where the President is signing a hastily-conceived wiretapping bill into law merely weeks after he was casually reading *The Pet Goat* to schoolchildren.[485]

Senator Corzine, in the midst of debating the Patriot Act, summarized why we must tread in the waters of crisis lightly:

> This is a bill that raises fundamental questions that go to the very essence of our democracy, and our freedoms. It's not something that should be done in haste, with so little opportunity for input from outside experts, the public, and all senators.
>
> Perhaps because the legislation was developed so quickly, and in an environment so dominated by great public anxiety about security, there is a real risk that we will make serious mistakes.[486]

Controversial to this day, there is rampant disagreement over the wisdom of the Patriot Act. Civil libertarians will continue to deplore its effects.[487] Meanwhile, members of Congress across the political spectrum laud its accomplishments.[488] When congressional leaders Senator Reid and his diametric opposite Senator McConnell both endorse a piece of

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[484] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274 (1964) (quoting James Madison, 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION, 570 (1876)) ("'The people, not the government, possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels.").

[485] Ron Charles, *Another Tale from Sept. 11: 'Pet Goat,'* WASH. POST, Sep. 10, 2011, at C2.

[486] 147 CONG. REC. 19,535 (2001) (statement of Sen. Jon Corzine, a Democrat from New Jersey). "In the end, while I do have serious concerns about certain aspects of this legislation, I have decided to support the effort to move it to conference." *Id.*

[487] *See* David Rocah, *Civil Liberties In The Wake Of September 11*, 35 MD. BAR J. 34, 39. *See also, Surveillance Under the Patriot Act*, ACLU, https://www.aclu.org/surveillance-under-patriot-act (last visited Jan. 20, 2015).

[488] *See Patriot Act Extension*, supra note 379.

legislation twelve years after it was signed into law,[489] it is compelling evidence that it's a good law. However, criticism from one of its authors who is "troubled" by the FBI's interpretation of the law is a serious condemnation of the legislation and the lack of oversight created by it.[490] Like the War on Terror, the War on Drugs, and the Cold War, public and congressional opinions of the Patriot Act are marked with ambivalence and uncertainty.

It is important to observe that none of this determines whether the Patriot Act is necessarily a "good" or "bad" law—there is nothing inherently "bad" about crisis legislation. But crisis legislation exploits disaster or tragedy to gain passage, preying on the emotions and fears of the American people. The examples of crisis legislation in this Article each contain several provisions that were not related to the calamity that they were ostensibly stopping, using the disaster—be it communism, drugs, or terrorism—as a pretext for "other purposes" unrelated to the crisis.[491] Panic seldom produces good policy: "If hard cases make bad law, emergencies may make worse."[492]

In the case of the Patriot Act, Congress used terrorism and the exigencies of 9/11 as a cloak to pass a "wish list"[493] for prosecutors complete with wiretapping and surveillance abilities subsequently used against the unwitting American public and "garden-variety criminals."[494] The Patriot Act could be the "best" addition to U.S. law since the Bill of Rights, but it was passed on to the American public as an antiterrorism bill, which was inaccurate and disingenuous. The Patriot Act has helped catch terrorists and protect Americans, but abuses of its powers and concerns over its breadth are real, not "paranoid fantasies."[495]

If the Patriot Act strikes an appropriate balance between the needs of national security and civil liberties, does it do so permanently and irrevocably? Do terrorist attacks from nearly fourteen years ago justify an

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[489] *See id.*

[490] *Dragnet*, *supra* note 239.

[491] *See supra* Part IV.

[492] Carr, *supra* note 4, at 1309.

[493] *See* Lichtblau, *supra* note 151.

[494] *Id.* (quoting Mark Corallo, Justice Department Spokesman) ("There are many provisions in the Patriot Act that can be used in the general criminal law . . . . And I think any reasonable person would agree that we have an obligation to do everything we can to protect the lives and liberties of Americans from attack, whether it's from terrorists or garden-variety criminals.").

[495] *See* Mukasey, *supra* note 308.

ongoing sacrifice of civil liberties? Will, or even *can*, the United States "win" the War on Terror? If so, what is the score right now? Or does the War on Terror rage on for the foreseeable future, until every terrorist and threat to American national security has been eliminated or brought to justice?

Such questions may be difficult or impossible to answer. However, the time is ripe to have a "full and robust national security debate," to discuss whether the Patriot Act is "sound, informed policy":[496] A good law that grants the government an appropriate amount of power, or an irrational overreaction that butchers civil liberties. What is certain is that The Patriot Act will not be the last time that American lawmakers exploit a crisis for legislative purposes, and it is not too late to realize "[w]hat keeps us oriented, and alert, and out of shock, is our history. So, a period of crisis . . . is a very good time to think about history."[497] The time for a debate about whether the Patriot Act strikes the proper balance between Americans' safety and their civil liberties is now, while it is not too late to write an alternate ending to the script.[498] If Americans are not aware of the history of the Patriot Act and crisis legislation, then they are doomed to repeat its mistakes, with only the "court of history" to carry the day.[499]

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[496] Halperin & Woods, *supra* note 283, at 143. When this Article was sent to publication, a "full and robust national security debate" may have been contemporaneously beginning in Congress, but is unclear if the USA Freedom Act would end that debate or make national security reform an ongoing focal point of domestic politics. *See* Editorial Board, Opinion, *Let Patriot Act Provisions Expire*, N.Y. TIMES (May 28, 2015), http://www.nytimes.com/2015/05/29/opinion/let-patriot-act-provisions-expire.html?_r=0 ("The looming expiration of a handful of provisions of the Patriot Act, which gave federal authorities vast surveillance powers, has stirred a long-overdue debate over the proper balance between investigative tactics in national security cases and civil liberties. That debate should be allowed to continue . . . ."); Steinhauer & Weisman, *supra* note 472 ("Senator Mike Lee, a Utah Republican, and Senator Leahy made it clear after passage that curtailing the phone sweeps might be only the beginning [of reform]"). *See also* ACLU v. Clapper, No. 14-42-cv, slip op. at 93 (2d Cir. May 7, 2015) ("[T]he primary role that should be played by our elected representatives in deciding, explicitly and after full debate, whether such [mass surveillance] programs are appropriate and necessary.").

[497] SHOCK DOCTRINE film, *supra* note 6 (quoting Naomi Klein during a lecture at Loyola University, Chicago, 2009) *available at* http://www.youtube.com/ watch?v=7iW1SHPgUAQ.

[498] *See* Goitein, supra note 381 ("A public debate on the government's surveillance authorities is long overdue. The silver lining to this week's revelations is that we may finally begin to have it."). *See also* Greenwald, *supra* note 381 ("The disclosure [on the seizure of phone records] is likely to reignite longstanding debates in the US over the proper extent of the government's domestic spying powers.").

[499] *See supra* note 1.