1. Introduction

Since the attacks on the US on September 11, 2001, there have been a number of laws passed, in particular in the US, with the goal of making it easier to combat terrorism.

Proponents of these laws say that the highest priority of government is to protect its citizens, and not strengthening the laws is similar to attempting to use a nightstick to control criminals who are armed with automatic weapons.

Opponents of the laws say that the constitution has served the nation well, and that if individual liberties are compromised then we have become like the terrorists, and so they have won.

The most significant law in the US is the USA Patriot Act, which is currently going through negotiations for renewal. In Britain there was the debate on the Anti-Terrorism Act, which led to Prime Minister Blair’s first parliamentary defeat, when a provision to allow 90 day internments without charges was defeated in the Commons. In these notes I’ll concentrate mainly on these two pieces of legislation.

The reason that the legislation is relevant to this course is that much of the legislation is related to access to records that are maintained on computer systems, such as library or financial records.

2. USA Patriot Act

This is an acronym for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. The Patriot Act\(^1\) was passed in October 2001, as a very fast reaction to the September 11 attacks on the USA. The votes on the act were 98-1 in the Senate and 357-66 in the House. The act’s stated

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\(^1\) I’ll follow the usual convention and call it the Patriot Act, as compared to the USA Patriot Act.
goals were to “To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.” It was a huge piece of legislation, with 156 major sections, and so the legislators voting on it, even if they had all of their staff working on it, had no chance to get an understanding of all of the bill. Subsequently many of the legislators who voted for the bill said that they would have voted against some components of the bill if they had seen them. Ultimately only one senator, Russ Feingold, voted against the Act, mainly because he was concerned that the Act could be disproportionately used against immigrants to the US.\(^2\)

A number of communities, counties, and state legislatures throughout the US have passed resolutions opposing the Act or provisions of the Act. In Montana these include the State of Montana as well as Butte-Silver Bow, Lewis and Clark, Helena, Whitefish, and Eureka.

Some of the proposals which became the Patriot Act had been introduced before September 11, but most of the bill was introduced within a week of the attacks. Final passage of the whole bill was on October 26, 2001, which was incredibly fast for such a major change in how the US handles its liberties.


With 156 sections, there are far too many features of the Patriot Act to cover here, so I’ll just look at a few.

There is a new authority under the act to conduct what are called sneak and peak searches. Under old laws, law enforcement agencies had to give the subject of a search warrant with contemporaneous notice of the search. The new "secret search" provision applies where the court "finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse effect." The act requires that notice be given within a "reasonable period" (which is undefined in the act) which can be extended by the court for "good cause."

The Act extends existing wiretapping laws to include a multi-point wiretap known as a roving wiretap. Before the act law enforcement authorities had to specify specific

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\(^2\) Feingold said “To the extent that the expansive new immigration powers that the bill grants to the Attorney General are subject to abuse, who do we think that is most likely to bear the brunt of the abuse? It won't be immigrants from Ireland. It won't be immigrants from El Salvador or Nicaragua. It won't even be immigrants from Haiti or Africa. It will be immigrants from Arab, Muslim and South Asian countries. In the wake of these terrible events our government has been given vast new powers and they may fall most heavily on a minority of our population who already feel particularly acutely the pain of this disaster”
computers or telephones to be tapped. Now they can request a tap on any computer or telephone that a target might use, including those, for example, in a student computer lab.

Section 215 of the act, which overrides state library confidentiality laws, lets the FBI compel production of business records, medical records, educational records, and library records without having to show probable cause. Instead, the government only needs to claim that the records may be related to an ongoing investigation related to terrorism or intelligence activities. Individuals served with a search warrant issued under FISA rules may not disclose, under penalty of law, the existence of the warrant or the facts that records were provided to the government.

Before the Patriot Act, law enforcement agencies could only seek records of individuals who were under suspicion. Now the agencies can obtain the digital records of any individual if they certify that the records are relevant to a terrorist investigation. In addition you will not be informed that your records have been obtained, even if you are not under any suspicion in the investigation.

For a broader analysis of the effects of many parts of the Patriot Act, see the EPIC page at http://www.epic.org/privacy/terrorism/usapatriot/#overview.

The provisions that were proposed before 9/11 had come under considerable criticism in both the house and senate, but after 9/11 these criticisms stopped. John Podesta, who was President Clinton’s White House Chief of Staff from 1998 through 2001 said:

Many of the electronic surveillance provisions in the Patriot Act faced serious opposition prior to September 11 from a coalition of privacy advocates, computer users, and elements of high-tech industry. The events of September 11 convinced many in that coalition and overwhelming majorities in Congress that law enforcement and national security officials need new legal tools to fight terrorism. But we should not forget what gave rise to the original opposition—many aspects of the bill increase the opportunity for law enforcement and the intelligence community to return to an era where they monitored and sometimes harassed individuals who were merely exercising their First Amendment rights. Nothing that occurred on September 11 mandates that we return to such an era. If anything, the events of September 11 should redouble our resolve to protect the rights we as Americans cherish. Therefore, as the new powers granted under the Patriot Act begin to be exercised, we should not only feel more confident that our country has the tools to be safe but we should be ever vigilant that these new tools are not abused.³

The legislation which was developed into the Patriot Act was the Anti-Terrorism Act of 2001, which was proposed by Attorney general Ashcroft is summarized at http://www.epic.org/privacy/terrorism/ata2001_text.pdf#search='AntiTerrorism%20Act'. This had subdivisions on Intelligence Gathering with 19 sections, on Immigration with

³ From http://www.abanet.org/irr/hr/winter02/podesta.html, entitled USA Patriot Act: The Good, the Bad, and the Sunset.
six sections, on Criminal Justice with 15 sections, on Financial Infrastructure with eight sections, and on Emergency Provisions with five sections. I.e., it changed a lot of the law that affects both Americans and temporary or permanent residents of the country. The Patriot Act added some additional oversight to provisions in the Anti-Terrorism Act, and also added a sunset clause for some of its provisions.

Probably the biggest criticism of the Patriot Act has been in the area of judicial oversight. In the past, in order to obtain wiretaps or similar surveillances, agencies have had to persuade a judge that there was probable cause before the judge could approve the warrant. This was replaced with provisions that instead stated that a judge must authorize monitoring upon the certification by a government attorney that the "information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." So the judge cannot look at the merits of the agency’s claim; if a certification is made then the judge is required to approve the warrant.

The biggest arguments in favor of the Patriot Act have been that terrorists have a whole new range of electronic communications available to them, and unless government agencies have broad powers to sift through communications then they will not be able to detect and to react in time to threats to the US.

Many (but not all) of the components of the Patriot Act were subject to a sunset provision, which was not in the Administration’s ATA Act. These provisions were to expire on December 31, 2005, unless renewed by Congress. The debate on this sunset provision was ongoing throughout 2005, and is discussed later in these notes.

Many groups, with a wide range of political and social agendas, have published commentaries on the Patriot Act. These include the American Civil Liberties Union (ACLU): Legislative Analysis of the USA PATRIOT Act, the American Library Association (ALA): Libraries and the Patriot Legislation, the Center for National Security Studies: USA-Patriot Act, and every other major political and legislative lobbying group.

For the very brave, the full text of the USA Patriot Act can be found at http://www.epic.org/privacy/terrorism/hr3162.html. However this isn’t easy to read because it is largely a set of modifications to many existing laws. So it contains clauses like:

by striking `(A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may' and inserting `A governmental entity may require a provider of electronic communication service or remote computing service to';

which is incomprehensible unless you go back to the original acts that are being modified by the Patriot Act.
3. British Anti-Terror Laws

The legislative history of the British Anti-Terror Act, which was first worked on shortly after the July 7, 2005, London bombings, is very different from that of the Patriot Act. The British government of Tony Blair proposed an anti-terror bill which included the ability of the police and intelligence services to process and interrogate suspected terrorists for 90 days without trial. On November 11, 2005, the bill was defeated by 322-291, which was the first major defeat for Tony Blair in his four terms as Prime Minister.

An interesting sidebar to the defeat was that some polls showed that 72% of the British public wanted the 90-day provision of the bill to be passed, but the popular opinion was ignored by the members of parliament, including 49 “rebels” in Blair’s Labour Party. The defeat means that the police and intelligence services have 28 days in which they can hold terrorist suspects. The shorter 28-day rule, which doubled the previous period, passed by 323-290 votes.

There were other provisions in the bill which received less publicity than the 90-day provision, which included new offences of making preparations for a terrorist act, distributing terrorist publications, and undertaking terrorist training, and also methods to combat preachers who have been shown to have “glorified or encouraged” terrorism. The bill would also have made it much easier to deport Britons with dual citizenship. These provisions, which it is generally believed would have passed if the bill hadn’t included the 90-day provision, were also defeated with the bill. Some MPs, however, were also very opposed to these other provisions because they believed that they could give too much discretion to the police and security services, and could be misused. One MP said during the Commons debate that one of the new provisions could have been used to charge the PM’s wife, Cheri Blair, because she had said (immediately after a bomb attack in Jerusalem) that she understood why some Palestinians become suicide bombers, and that this statement could be considered as providing support to terrorists.

There were many reasons for the defeat. The most important was anger at Blair because of his support for the war in Iraq, and the loss of his credibility related to statements that he made before the war. His personal popularity had dropped significantly because of the war, and many people wanted him to have to step down as Prime Minister. Other arguments against the bill were based on whether its passage would help or hinder the efforts of terrorists. The July 7th London bombers were born and raised in England, and it is generally believed in Britain that without the war in Iraq they would never have become suicide bombers. Similarly, many MPs believed that the passage of this bill, with the danger that the detentions might show some racial profiling, would alienate Britain’s large Muslim communities, and would lead to more home grown terrorists, not less.

The extreme unpopularity of the detentions at Guantnamo Bay throughout Britain also led to the defeat of the bill. During the debate MPs shouted questions while Blair talked including “are we to live in a police state?” One newspaper raised the possibility of
becoming “a fascist state like the USA.” So Blair’s relationship with President Bush became a factor in the debate.

Long term factors caused by the failure of the bill included putting additional pressure on Blair to resign as Prime Minister because of this blow to his authority combined with his unpopularity over Iraq and his relationship with President Bush. He stepped down in June 2007, and Gordon Brown took over the party and the premiership. This has affected the relationship between the UK and the US and the commitment of the British to participation in the Iraq conflict. In September 2007 the British completed their withdrawal from their bases in Basra, and the withdrawal of combat troops is expected to be completed in late 2008 or early 2009. On October 12, 2008, Iraqi Prime Minister Nuri al-Maliki said it was time for British combat forces to leave the country because they were no longer needed to maintain security.

The August 2006 alleged terror plot that caused chaos in air transportation in Britain and, to a certain extent, in the US, led to additional discussion of possible future anti-terrorism bills.

Another British anti-terrorism law, Part III of the Regulation of Investigatory Powers Act (RIPA)\(^4\), which went into effect on October 1, 2007, requires that people who are believed\(^5\) to have the decryption keys must decrypt any encrypted data when told to by appropriate authorities\(^6\). An interesting part is that authorities cannot directly enforce the decryption, but there is a two- to five-year penalty for refusing the decryption request\(^7\). So if the target believes that a worse penalty will occur if they decrypt the data (e.g. the disk contains a plan to attack the Houses of Parliament) then their best option is probably to take the two- or five-year penalty for refusing to decrypt it.

RIPA was originally passed in 2000, so would not normally be in notes on Post-9/11, but this part of the act was not implemented by the Home Office until October 2007. Criticism of the section has been primarily from British businesses because of the breadth of the data that could be obtained. E.g., a bank will keep all of their customers’ account data on an encrypted database. If a terror investigation needs access to a suspected terrorist’s financial records the act will effectively give them access to the records of all of the bank’s customers, not just to the target’s records. Since the law only applies if the data is in the UK, and also if the person believed to hold the encryption key is located in the UK, it is expected that many organizations will set up offices outside the UK and give people in those offices the only access to the keys.

Section 54 of the law, which has the title “tipping-off” begins with: (1) This section applies where a section 49 notice contains a provision requiring—(a) the person to whom the notice is given, and (b) every other person who becomes aware of it or of its contents,


\(5\) The phrase from the law is “If any person with the appropriate permission under Schedule 2 believes, on reasonable grounds . . .”

\(6\) The request is called a Section 49 notice from the section of the law.

\(7\) Up to two years for criminal investigations and up to five years for terror investigations.
to keep secret the giving of the notice, its contents and the things done in pursuance of it.
I.e. this is a provision similar to the one in the Patriot Act, which says that the individual
who is told to provide a key, along with anyone else who finds out, cannot tip off anyone
else, including the target of the investigation if the Section 49 notice includes that
restriction. Illegally releasing the information has a penalty of up to five years and/or an
unspecified fine.

4. Renewing the USA Patriot Act

Many legislators were concerned about how much the new provisions in the Patriot Act
would be used. As a result a number of the new powers were made subject to a sunset
clause which meant that they would become invalid after December 31, 2005, unless they
were renewed by Congress; this led to considerable debate and posturing throughout
2005. The administration said that the powers granted under the Patriot Act were
necessary if the President were to be able to protect the American people, while critics
said that there has been a significant loss of liberty with no noticeable gain in security.

On November 16, 2005, negotiators for the Senate and House reached a deal which
would leave most of the Patriot Act untouched. The President announced that if the
compromise agreement was approved by the full Senate and House then he would sign
the bill. Most of the sections of the Patriot Act that were subject to the Sunset clause
would become permanent under the agreement, while a few would be subject to sunset
again unless they were renewed by December 31, 2012. The seven year sunset clause
was vehemently opposed by the Democratic leadership because both the House and the
Senate had agreed on four years in their separate bills. Also the four year sunsetting
matched the original Patriot Act.

The only sections that would not be made permanent, but would be subject to sunsetting
again, are two amendments to the Foreign Intelligence Surveillance Act (FISA) related to
wiredtapping and obtaining business records, and a new addition to the Act for monitoring
potential terrorists who are not acting for a foreign agent or power. These are called lone
wolf terrorists.

The agreement required the Justice Department to give an annual report to congress on
how many national security letters have been issued. These are the secret demands for
phone, business, and internet records of citizens. Congress has been requesting these
records, but DoJ has been refusing to provide them citing security issues. Even though
the number has not been reported there seems to be uniform agreement that the number
of national security letters has been about 30,000 per year.

The compromise began to fall apart in November 2005. Senator Feingold threatened a
filibuster because many of the increased restrictions on the FBI in the bill passed by the
Senate were left out of the compromise wording. He was joined in the filibuster threat by
both Democrats and Republicans, often for very different reasons. At the same time the
President’s domestic wiretapping program was made public for the first time, which led to increased concern among the Senators who were already expressing concern about the broad powers granted to the President by the Act. To avoid the possibility of most of the Act dying, a new compromise was reached extending the sunset provisions for three months. Ultimately in March 2006 the Senate and the House passed a renewal of the Act with some modifications. All 16 of the sunset provisions were renewed, but the three most significant changes were that people who received subpoenas for information could legally challenge the requirement that they couldn’t tell the target of the investigation (or anyone else) about the subpoena, remove the requirement that any recipient of a demand for records (through a national Security Letter) must give the FBI the name(s) of any lawyer who they have consulted, and no longer require libraries to give information about their customers.

Of the sixteen provisions of the Act that were sunsetted under the original bill, 14 were made permanent and the other two are subject to a four year sunset or renewal requirement.