



4-1-2013

The Patriot Act & Constitutionality of Electronic Surveillance

Michael Hayden

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

BYU ScholarsArchive Citation

Hayden, Michael (2013) "The Patriot Act & Constitutionality of Electronic Surveillance," *Brigham Young University Prelaw Review*: Vol. 27 , Article 11.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol27/iss1/11>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

THE PATRIOT ACT & CONSTITUTIONALITY OF ELECTRONIC SURVEILLANCE

*Michael Hayden*¹

The idea that government officials can listen to private conversations with impunity is unsettling at best. As new forms of acquiring intelligence have come to light, more and more people have questioned the permissibility of such methods. Some congressmen as well as some security experts deplore the government's use of wiretapping and other forms of electronic surveillance, while others consider it unfortunate, but necessary to effectively control crime and gather intelligence.²³ Although it may be an invasion of privacy, electronic surveillance is both constitutional and necessary. In an ideal world, a government would be able to ensure its citizens an unqualified right to privacy, while still flawlessly providing for their safety. However, in an ideal world there would be no terrorist threats to the United States. Certainly the government should seek for the ideal and strive to provide both liberty and security to its people; unfortunately, neither can be provided unconditionally and without regard to the other.

-
- 1 Michael is a senior studying both psychology and English at Brigham Young University. After graduation, he plans to attend law school and eventually hopes to practice constitutional law. He would like to thank Morgan Lyons, Kaitlyn Naegle, Tanner Camp, Kristen Danner, and Gustavo Pinto for their contributions to this paper. Their hard work and guidance was invaluable.
 - 2 James Bamford, *Security Expert Slams Bush's Surveillance Program*, 43 IEEE SPECTRUM 8, 9 (2006).
 - 3 Mickie Edwardson, *James Lawrence Fly, the FBI, and Wiretapping*, 61 HISTORIAN 361, 370 (1999).

Under ordinary circumstances, a person is entitled to the right of privacy under the Fourth Amendment. However, provisions exist, even within the Fourth Amendment itself, which allow the government to circumvent certain civil liberties in order to protect the nation as a whole from danger. The Fourth Amendment states that a person's privacy may be invaded if it is not "unreasonable" and if there is "probable cause".⁴ To be candid, there are instances where personal liberties must be abridged in order to ensure the security of the United States. When the temporary abridgment of an individual's right to privacy may reasonably result in the preservation of innocent American lives, the use of electronic surveillance is justified. In such a circumstance, this action should not be deplored, because it is both legal and necessary. An individual's personal liberties cannot always precede the safety of the community or nation as a whole. Many of the current guidelines for electronic surveillance are found within the USA PATRIOT ACT, commonly referred to as the Patriot Act. Though some wrongfully question its constitutionality, it remains in effect and clearly provides legal grounds for electronic surveillance.

The provisions in the Patriot Act that provide for the use of electronic surveillance are necessary in order to ensure national security and should remain in force. Although controversies exist surrounding the Patriot's infringement upon the rights of some to privacy, this is in accordance with the Fourth Amendment, which stipulates such limitation.⁵ The Patriot Act is constitutional. However, it is by no means perfect, and if steps were taken to clarify its more vague aspects, much of the existing controversy could be dispelled. In addition, if the executive branch was made more accountable for the electronic surveillance that it conducts, few valid concerns would remain. In some instances this would seem impractical, because certain threats require decisive action and therefore, the executive cannot always be held accountable prior to the use of electronic surveillance. However, a review committee should be put into place to regularly review electronic surveillance performed by the executive branch. In particular, the committee would review surveillance con-

4 U.S. CONST. amend. IV

5 *See id.*

ducted without a warrant. This would make the Executive accountable for all electronic surveillance that it conducts, without limiting its ability to respond quickly to national security threats.

I. ORIGIN, HISTORICAL CONTEXT, AND RATIONALE FOR ELECTRONIC SURVEILLANCE

As with any legal issue in the United States, the ultimate source for determining the legality of electronic surveillance is the Constitution. The second article of the Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and against warrants issued without “probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”.⁶ Innovations in technology have allowed for machines to invade the electronic possessions of others, such as phone calls and e-mails, making the invasion of privacy a serious concern.⁷ As a result, the Fourth Amendment has been interpreted to encompass the protection of all forms of privacy, especially against government surveillance.⁸ Those who argue that wiretapping violates the Fourth Amendment’s implied protection of privacy overlook the provision in the Fourth Amendment that allows this right to be abridged if there is probable cause and proper documentation.⁹

In addition, Article Two of the Constitution states that the President is to be Commander in Chief, and as such, he must have certain powers to fulfill this role.¹⁰ As the anonymous author of a note in the Harvard Law Review expressed, “regardless of what the Fourth Amendment may require, the Executive must be permitted the use

6 *Id.*

7 Christopher J. Seline, *Eavesdropping on the Compromising Emanations of Electronic Equipment: the Laws of England and the United States*, 23 CASE W. RES. L. REV. 359, 366 (1991).

8 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

9 U.S. Const. amend. IV

10 U.S. CONST. art. II, §2, cl. 1.

of warrantless National Security electronic surveillance if he is to fulfill his responsibilities as Commander in Chief.”¹¹ Although the use of such surveillance on citizens of the United States requires careful regulation, wiretapping seems to be within the bounds of the Constitution under certain circumstances. Where criminal acts and security threats exist, electronic surveillance is permissible, but not without limitation. With the exception of war or another imminent national threat, wiretapping can be performed only after the executive has received a judicially issued warrant.

In the 1972 case, *United States v. U.S. District Court*, the Supreme Court held that it was indeed legal for the government to use electronic surveillance on United States citizens so long as there was some sort of threat to domestic security.¹² This ruling established a clear legal sanction for wiretapping under certain conditions, but provided no specific criteria for those conditions nor did it enumerate the proper procedures that should be undertaken. Much of this ambiguity was cleared up in the 1978 Foreign Intelligence Surveillance Act (FISA) which established specific guidelines for how the government could utilize electronic surveillance. Most notably, FISA included a provision that allowed the President to authorize electronic surveillance without a court order, for the period of one year, only if used to acquire foreign intelligence information.¹³ This not only provided a legal standard for international electronic intelligence gathering, but also set a precedent for similar surveillance to take place within the United States. When Congress passed the Patriot Act in 2001, they essentially “tore down ‘the wall’ between foreign intelligence and criminal law enforcement”.¹⁴ One of the Patriot Act’s provisions allowed for information to move more easily between different government entities. Also, where FISA had

11 Note, *The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1130 (1972).

12 *United States v. United States Dist. Ct.* 407 U.S. 297, 298 (1972).

13 See Foreign Intelligence Surveillance Act, 50 U.S.C. §§95-511 (1978).

14 Richard H. Seamon & William D. Gardner, *The Patriot Act and the Wall between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL’Y 319, 327 (2005).

strictly limited the use of covert electronic surveillance, the Patriot Act only required that the government have a “significant purpose,” before obtaining the necessary judicial approval.¹⁵ This leniency allowed the Executive to use electronic surveillance more liberally and more frequently, in part because the Executive itself could decide what constituted a “significant purpose.” As a result, one of the major controversies over the Patriot Act involves the exact definition of a “significant purpose” and whether or not the Executive adheres to that definition.

Despite the controversy surrounding the Patriot Act, it has been renewed repeatedly, with several of the more controversial sections left intact. In February of 2010, President Obama signed a bill to extend three of these “controversial” provisions found in the act for one year: conducting court-approved roving wiretaps, seizing records and property during operations against terrorism, and conducting surveillance on “lone-wolf” entities or individuals involved in terrorism who are not affiliated with a recognized terrorist group. Recently, in May of 2011 President Obama signed another bill, extending the same provisions for an additional four years.¹⁶

The changes made to the Patriot Act thus far have attempted to limit individual rights as little as possible while still facilitating the government’s ability to maintain national security, and many controversies have been resolved. However, the Patriot Act is still not perfect, nor should it cease to be improved. One possible improvement would be to increase the executive’s accountability to other branches of government by instituting a committee to periodically review the Executive’s use of electronic surveillance. This would enhance the Patriot Act’s consistency with constitutional checks and balances, and help to regulate the balance of safeguarding the nation and protecting the rights of its citizens.

15 115 Stat. 272 (2001).

16 Patriot Sunsets Extension Act of 2011, § 990.

II. CONTROVERSIES SURROUNDING THE PATRIOT ACT

The Patriot Act has sparked and sustained a wide variety of controversies. Many of these controversies have been centered around specific sections and provisions of the Patriot Act, some of which have been amended whereas others have remained in place.

One such section is Section 215, which “authorizes the government to obtain ‘any tangible thing’ relevant to a terrorism investigation.”¹⁷ Some of the controversy surrounding this section stems from exaggeration and misinterpretation. The American Civil Liberties Union (ACLU) claims that this section authorizes the government to do so “even if there is no showing that the “thing” pertains to suspected terrorists or terrorist activities.”¹⁸ However, this contradicts the actual wording of the Patriot Act. Specific justification may not be made public, but that does not mean that it has not been shown and approved. Admittedly, it is difficult for the public to know whether the Executive is following proper procedures, but by implementing a committee to review the Executive’s use of electronic surveillance, the public would be assured that the Executive was checked by an outside source.

Another controversial section allows for “roving wiretaps,” meaning that the government may employ electronic surveillance on “a foreign power or agent of a foreign power” as opposed to being required to explicitly list each of the individuals involved.¹⁹ The ACLU argues against this section, because it “permits the government to obtain intelligence surveillance orders that identify neither the person nor the facility to be tapped” and does not require the government “to state with particularity what it seeks to search or seize.”²⁰ While this is indeed what this section does, the ACLU has yet to

17 115 Stat. 272 (2001), § 215.

18 REFORM THE PATRIOT ACT, (May 2011) <http://www.aclu.org/reform-patriot-act>.

19 115 Stat. 272 (2001), § 206; see also FISA Pub. L. No. 95–511, 92 Stat. 1783.

20 REFORM THE PATRIOT ACT, (May 2011) <http://www.aclu.org/reform-patriot-act>.

offer a preferable alternative. Furthermore, individuals who are in communication with known terrorist groups have chosen to associate themselves with that group, and obtaining warrants for each individual within such a group is a dangerous and needless waste of resources.

Although in a limited government, such as in the United States, the Executive must be checked by other branches, it must retain some autonomy. Otherwise it cannot effectively make decisive decisions during a time of crisis. It must also be remembered that the Executive cannot disclose certain aspects of its decision-making to the public due to security concerns. This is a fundamental difficulty when assessing the validity of the Executive's decisions to override the requirement of a court warrant. Much of the information that contributes to the Executive's decision to exercise special powers is strictly classified. If terrorists and other criminals are to be apprehended, every effort must be made to prevent them from knowing the government's methods and sources for acquiring information. Other information cannot be disclosed because its general knowledge could jeopardize the safety of the individuals who obtain it and potentially the nation as a whole. However, if a review committee were to be appointed, no such decisions would be left for the executive to make alone. They would still be able to act with a certain level of autonomy (at least initially) but they would do so knowing that they would be held accountable for all decisions at a future date.

III. IMPLEMENTATION OF AN ELECTRONIC SURVEILLANCE REVIEW COMMITTEE

As has been discussed, much of the controversy surrounding the Patriot Act revolves around the concern that it enables the Executive to act without accountability. This has been a particular concern with regard to instances where it is expedient to circumvent traditional procedures for obtaining a warrant prior to the use of electronic surveillance. While the provisions of the Patriot Act that pertain to the authorization of electronic surveillance are presently constitutional, it would be beneficial for the Executive to be more accountable for such surveillance. If Congress formed a review com-

mittee that periodically evaluated the Executive's use of electronic surveillance, any valid concerns over the Executive's accountability would be eliminated.

It is not entirely without precedent for a review committee to so closely scrutinize the actions of government entities that have significant investigative privileges. In fact, the investigations and intelligence operations of the FBI are reviewed by nine separate review committees to ensure that the Bureau is not infringing upon any civil liberties or privacy rights.²¹ Since the Patriot Act grants the Executive similar investigative powers, it is logical that it should be subject to similar review. This would reduce concern over the Executive's authority and help to improve the Patriot Act so as to more fully ensure civil liberties.

This review committee would, by necessity, consist of members outside of the Executive Branch. This would ensure that the committee remains insulated from the Executive and allow the committee to provide an efficient check upon the Executive's authority. It is even possible that the function of the Foreign Intelligence Surveillance Court, which is to approve the Executive's requests for warrants, could be expanded to encompass the responsibilities of this review committee.²² If this Court were used, the review committee would be separate from the Executive and even its selection would be insulated, because the Foreign Intelligence Surveillance Court is selected by the Chief Justice and composed of members of the Judicial Branch. If the Foreign Intelligence Surveillance Court were unable to perform this additional function, then a committee could be assembled from other members of the Judiciary or Congress. If such were the case, the Foreign Intelligence Surveillance Court would be in a good position to appoint the members of this special review committee, because of its unique function and its isolation from other branches of government.

With such a committee in place, even if the need for decisiveness required the Executive to bypass them initially, it would be with the

21 Responding to Your Concerns: Checks and Balances on the FBI, http://www.fbi.gov/news/stories/2004/october/responding_100404.

22 FISA Pub. L. No. 95-511, 92 Stat. 1783.

knowledge that it would soon be required to disclose and justify its actions to that same court. The creation of this committee would substantially increase the accountability of the Executive, while still allowing the Executive some level of autonomy. The Executive would retain the freedom to investigate terrorist threats immediately, but would be tempered by the knowledge that it must answer for all such action.

In order for such a committee to be effective, it would also be granted the power to punish any culpable member of the Executive branch and, if necessary, impeach the President. As only two U.S. Presidents have ever been impeached, such an action would be an extremely dramatic public event with lasting consequences. While it is true that neither of the two Presidents who have been impeached were removed from office, the possibility of such a removal still exists. Also, even if a President were impeached and later acquitted, it is certain that the public's opinion of the President would suffer and likely that it would be devastated. Considering such ramifications, granting this review committee power to impeach the President, if necessary, would likely be adequate to deter the Executive from improperly abridging civil liberties. It is hoped that such power would never need to be exercised, but would simply act as a deterrent. However, if the need ever arose, this committee would be capable of holding the Executive responsible for any unlawful invasion of privacy. As this committee would primarily fall under the Judicial Branch, its power would be limited to penalizing any unlawful action discovered during periodic review sessions. In this way, although the committee would have substantial power to check the president, its actions would also be checked.

This committee would further eliminate controversy by increasing the transparency of the Executive's actions, even if only to a closed review committee. The extent of the Executive's powers might be disconcerting to some, particularly when such powers interfere with an individual's right to privacy. However, it is far more disconcerting to think that the Executive may employ those powers entirely in secret. If the Executive is permitted to act independent of all other entities, no one can be entirely certain of what it does. It is in such a situation, that the abuse of power is most likely to oc-

cur. With greater transparency and thus greater accountability, any government entity will be more likely to act in accordance with the law. Furthermore, even when abuse is in truth absent, a greater level of transparency assures the public that abuse is indeed absent. The institution of a review committee to oversee the Executive's use of electronic surveillance would achieve this.

IV. CONCLUSION

The Patriot Act has been shown to be constitutional in spite of many of the controversies that have surrounded it. However, the implementation of a committee to review the Executive's unwarranted electronic surveillance would not only help to dispel many of the controversies that surround the Patriot Act, but could also improve the lawful execution of many of the provisions found within the Patriot Act. Such a committee would help to ensure that civil liberties would not be unduly limited, while still allowing the Executive the power to ensure national security.

According to the parameters set forth by the Constitution and various congressional acts, electronic surveillance is legal, provided that proper procedures are followed. It is not the most favorable means to acquire information, but in certain circumstances it is the only means to gather the information that is essential to the preservation of national security. There have been instances of unwarranted wiretapping and the Executive has admitted to the use of such presumably illegal surveillance. However this is also legal if there is a strong enough national risk. The need for the Patriot Act is certainly unfortunate, but it is nevertheless ever present.

As stated by Senate Majority Leader Harry M. Reid, "The raid that killed Osama bin Laden also yielded an enormous amount of new information that has spurred dozens of investigations yielding new leads every day. Without the Patriot Act, investigators would not have the tools they need to follow these new leads and disrupt terrorist plots, needlessly putting our national security at risk". The Patriot Act is an effective weapon against terrorism, but can be improved upon to ensure that the Executive does not abuse its powers. By implementing a review committee as has been described,

both national security and individual rights can be upheld. With this change, the people of the United States will be able to feel more secure, both in safety and in freedom.