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PROVIDING MATERIAL SUPPORT TO VIOLATE THE CONSTITUTION: THE USA PATRIOT ACT AND ITS ASSAULT ON THE 4TH AMENDMENT

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“They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”¹

I. INTRODUCTION

In October 2001, President Bush signed the USA PATRIOT Act (Patriot Act) into law.² The legislation made broad changes to U.S. intelligence efforts and statutes directed at terrorism. Many of the changes were instigated by what was considered to be the inability of the intelligence community to assess and address impending terrorist threats in the months leading up to September 11, 2001.³ This was

* Faculty, Cornell University ILR School, International Human Rights Lecturer. This article was written with exceptional assistance from Anita Hughes and Wynton Sharpe. It would not have been possible without their intellectual heft, research prowess and research expertise.

1. BENJAMIN FRANKLIN (this quotation, slightly altered, is inscribed in a stairwell plaque of the Statue of Liberty).

2. USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism), Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

3. See The 9-11 COMM’N, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, “THE SYSTEM WAS BLINKING RED,” at 254 (2004).

partially due to the legal restrictions prohibiting a free exchange of information between agencies. The Patriot Act removed many of those barriers and provided law enforcement agencies with new tools to combat terrorism. The fundamental problem with those new tricks and tools is that they fail to adequately take into account the constitutional protections guaranteed by the Fourth Amendment. Whether it was their zeal to respond to the largest attack on American soil in history or it was simply a willful disregard of constitutional protections in favor of greater government authority, Congress created problems not previously contemplated in Fourth Amendment jurisprudence. This article will address those problems.

The first section will be a review of the Fourth Amendment. It will follow the trajectory of searches and seizures from seventeenth century England to post September 11th Fourth Amendment applications. This article will then turn to a review of the Patriot Act. It will first consider the governmental interest in creating the Patriot Act, as well as previous examples in American history, in which drastic measures were taken in response to perceived threats. The next section will discuss the inherent difficulties with some of the sections of the Patriot Act. Then, a Fourth Amendment analysis will be applied to the problematic sections of the Patriot Act. Next, the article will provide predictions as to the long-term effects of leaving the Patriot Act in tact. Finally, suggestions for correcting the problems created by the Patriot Act are discussed.

II. THE FOURTH AMENDMENT: WHY THIS PROTECTION?

Implemented as a safeguard against the Writs of Assistance that were commonplace in England, the Fourth Amendment protects individuals against “unreasonable searches and seizures” and warrants not supported by “probable cause.”⁴ Writs of Assistance were orders issued under executive authority and “granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.”⁵ The 1662 Act of Frauds authorized the use of Writs of Assistance and legalized an authorized individual’s ability to “enter . . . any House . . . or other Place, and in case of Resistance to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize [sic] whatsoever, *prohibited* and uncustomed. . . .”⁶

4. U.S. CONST. amend. IV.

5. *United States v. Chadwick*, 433 U.S. 1, 8 (1977).

6. M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 43* (Berkeley: University of California Press 1978) (1761) (emphasis added).

Although the text of the 1662 Act of Frauds allowed for the seizure of prohibited *and* uncustomed items, the practice applied was to seize anything the officer deemed prohibited, regardless of the customs status or whether the items were the basis for the original entry.⁷ The framers of the Constitution having endured these invasive practices at the hands of the English government prior to the American Revolution had these very practices in mind when crafting the Fourth Amendment. The Supreme Court case *Boyd v. United States* best illustrates this statement.⁸

In *Boyd v. United States*, the Court found a statute that allowed the government to compel a suspect to produce personal effects to be unreasonable in violation of the Fourth Amendment.⁹ Under the statute in question, if the suspect did not produce the papers, all allegations of the government regarding the contents were considered admitted.¹⁰ In its opinion, the Court referenced several debates and discussions about the practice of Writs of Assistance in England. It stated that the framers were mindful of the “struggles against arbitrary power in which they had been engaged for more than twenty years. . . .”¹¹ Specifically, the Court did not believe men who had been subjected to such capricious actions by the laws of England would then “approve of such insidious disguises of the old grievance which they had so deeply abhorred.”¹²

The concerns of the Court in *Boyd* are as real as they were then. Fourth Amendment challenges have typically focused on two areas: probable cause and reasonableness. Probable cause is that elusive concept which is a prerequisite to a valid warrant. Reasonableness is not only required for a search to be deemed valid, but also is the Court’s preferred analysis for a Fourth Amendment question.¹³

A. Probable Cause

As recently as 2003, the Court described probable cause as “a fluid concept . . . ‘not readily, or even usefully, reduced to a neat set of legal rules.’”¹⁴ Such a statement is not new to the Court’s review of this topic. In 1813, the Court explained that probable cause means “less than evidence which would justify condemnation . . . ,” and it simply

7. See *id.* at 44-46.

8. *Boyd v. United States*, 116 U.S. 616 (1886).

9. *Id.*

10. *Id.* at 621.

11. *Id.* at 630.

12. *Id.*

13. See *Whren v. United States*, 517 U.S. 806 (1996); see also *Ohio v. Robinette*, 519 U.S. 33 (1996).

14. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

stated that “combined circumstances” are used to make that determination.¹⁵ The Court’s decisions thus demonstrated the lack of a workable definition.

In *Nathanson v. United States*, the Court reversed the conviction of an individual whose search warrant was granted based on the affidavit that merely stated the officer’s belief that contraband was on the defendant’s premises.¹⁶ The warrant affidavit was absent any explanation for the officer’s belief. The search was authorized under the Tariff Act, which the Third Circuit said allowed for the issuance of warrants based solely on suspicion.¹⁷ The Supreme Court, rejecting that holding, stated that the Fourth Amendment prohibited warrants issued on mere suspicion, and no act of Congress could allow what the Constitution forbids.¹⁸

Similarly, in *Giordenello v. United States*, the Court held probable cause did not exist when a magistrate granted a warrant based on a complaint that simply recited the elements of the crime but contained nothing to support the officer’s belief the defendant committed the crime.¹⁹ Additionally, the officer had no personal knowledge of the crime. The Court stated that although a magistrate makes the determination of the “persuasiveness of the facts relied on by the complaining officer . . . , [h]e should not accept without question the complainant’s mere conclusion that the person whose arrest is sought has committed a crime.”²⁰

In contrast, in *Jaben v. United States*, the Court found a complaint with minimal information was sufficient to satisfy the probable cause requirement.²¹ The defendant claimed the Tax Commissioner issued a warrant based on a complaint that was as deficient as the one in *Giordenello*.²² In *Jaben*, the defendant was charged with tax evasion.²³ The complaint contained allegations that the defendant filed false tax returns, statements of the actual and reported income, as well as the names of potential witnesses.²⁴ The Court distinguished the two complaints. The Court began by dividing the allegations in a complaint into two categories: “(1) that information which, if true, would directly indicate commission of the crime charged, and (2) that which relates

15. *Locke v. United States*, 11 U.S. 339, 348 (1813).

16. *Nathanson v. United States*, 290 U.S. 41, 44 (1933).

17. *Id.* at 45-46.

18. *Id.* at 46-47.

19. *Giordenello v. United States*, 357 U.S. 480 (1958).

20. *Id.* at 486.

21. *Jaben v. United States*, 381 U.S. 214 (1965).

22. *Id.* at 222.

23. *Id.* at 216.

24. *Id.* at 221-22.

to the source of the directly incriminating information.”²⁵ In *Giordenello*, the complaint summarily discussed the former and was devoid of the latter. In *Jaben*, the complaint contained information to demonstrate the former and a statement that the swearing officer had conducted an investigation to satisfy the latter.²⁶

The Court surmised that the nature of some crimes lend themselves more readily to simple factual allegations while others, like tax evasion, require further investigation not required to establish probable cause.²⁷ The crime of tax evasion requires the investigation of financial holdings, documents, and possible witnesses.²⁸ The crime of narcotics possession could be easily supported by witness statements, but the warrant application in *Giordenello* did not provide any such information, but merely stated there were individuals who *may* be witnesses.²⁹ The Court therefore concluded that a warrant application “simply require[d] that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.”³⁰

The test to determine probable cause is as imprecise as its definition. There is no bright-line standard for identifying probable cause. Probable cause exists when “there is a fair probability that contraband or evidence of a crime will be found in a particular place.”³¹ However, a court can derive little guidance from that language. The analysis is purely a case-by-case inquiry.

For a time, the Court applied a two-part test, specifically analyzing the probable cause requirement under circumstances in which a warrant was sought based on an informant’s tip. In *Aguilar v. Texas*, the Court said such a warrant application should be supported by proof of credibility and reliability of the informant.³² In *Spinelli v. United States*, the warrant application included corroborated statements from an informant as well as an FBI investigation that supposedly supported the informant’s tip.³³ The Court concluded that the informant’s tip must survive the two-part test independent of the corroborating statements.³⁴ The warrant application needed to include some explanation of the informant’s knowledge. Otherwise, it

25. *Id.* at 223.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Giordenello*, 357 U.S. at 481.

30. *Jaben*, 381 U.S. at 224.

31. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

32. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

33. *Spinelli v. United States*, 393 U.S. 410, 413 (1969).

34. *Id.* at 417-18.

would be indistinguishable from a police officer's statement of a suspect's criminal activity without demonstration of the officer's knowledge.³⁵

In *Illinois v. Gates*, the Court moved away from the two-part test and articulated "the totality of the circumstances" test for questions of probable cause, which the Court felt was better suited to a Fourth Amendment analysis.³⁶ The Illinois Supreme Court suppressed the evidence obtained because the search warrant was granted on the basis of a "partially corroborated anonymous tip."³⁷ The police department received a letter that alleged the defendants were drug dealers and described some of their habits of traveling to and from Florida to obtain drugs. The Illinois court based its decision on the fact that the informant's tip did not meet the Aguilar-Spinelli two-part test.³⁸

The United States Supreme Court agreed that the informant's tip alone was not enough to demonstrate probable cause because the letter contained no explanation as to how the informant came by his information, nor could the police attest to the credibility of the informant.³⁹ However, the Court said the information obtained by the officer could supplement the tip "with information sufficient to permit a determination of probable cause."⁴⁰ The police officer applying for the warrant confirmed some of the information in the informant's letter with the assistance of a DEA agent.⁴¹ The Court reaffirmed its position that probable cause is not subject to rigid standards because it requires a determination based on probabilities not legal certainties.⁴² Therefore, the individual considering a warrant application should consider all of the information to determine whether there is a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more."⁴³

The concept of probable cause has always been an elusive one and no easy resolution exists. Varying circumstances and subjective impressions make it impossible to establish a bright-line standard. With such an imprecise standard, the Government should exercise great caution when passing laws, such as the Patriot Act, that will rely heavily on probable cause determinations. This is especially true when the analysis for the other portion of a Fourth Amendment analysis, reasonableness, is as imprecise as its probable cause counterpart.

35. *Id.* at 416-17.

36. *Illinois v. Gates*, 462 U.S. 213 (1983).

37. *Id.* at 217.

38. *Id.* at 228-29.

39. *Id.* at 227.

40. *Id.* at 227-28.

41. *Id.* at 226.

42. *Id.* at 231.

43. *Id.* at 236 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

Reasonableness is the touchstone of Fourth Amendment analysis.⁴⁴ The Fourth Amendment does not prevent all warrantless searches, only unreasonable warrantless searches. The reasonableness of a search balances the privacy interests of the individual on one hand and the degree to which the search is necessary to promote a legitimate government interest on the other.⁴⁵ The stop and frisk practice reviewed in *Terry v. Ohio*,⁴⁶ is a primary example of the effective balancing of those two interests.

B. *The Terry Doctrine*

Terry v. Ohio established the validity of evidence obtained during a “stop and frisk” even in the absence of probable cause.⁴⁷ In *Terry*, a police officer approached the defendant and his companion because they “didn’t look right to [him].”⁴⁸ The men were standing on a corner at approximately two-thirty in the afternoon. The officer (dressed in plain clothes) observed the men for several minutes and determined they were “casing” a nearby store.⁴⁹ The officer approached the men and questioned their activities. The men were evasive as to their purpose for being in front of the store. The officer also suspected that if the men were planning on robbing the store, they were likely armed.⁵⁰ The officer searched the men and found guns on both men. During the search, the officer only patted down their outer garments and never placed his hand inside their clothes.⁵¹

The Court determined the evidence seized during the search was admissible because the application of the exclusionary rule in such a situation would not serve the purpose of protecting citizens from “overbearing and harassing” police conduct.⁵² The Court noted the wide range of occasions that give rise to interactions between police officers and citizens. Some interactions are predicated by the officer’s desire to interrogate or arrest a suspect, but just as many are initiated by innocuous contact that are in no way related to the desire to investigate a crime.⁵³ Therefore, strict application of the exclusionary rule to evidence seized during a stop and frisk because the tactic resembled unconstitutional conduct would be to “exclude the products of legiti-

44. *United States v. Knights*, 534 U.S. 112, 118 (2001).

45. *Id.* at 119 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

46. *Terry v. Ohio*, 392 U.S. 1 (1968).

47. *Id.*

48. *Id.* at 5.

49. *Id.* at 6.

50. *Id.*

51. *Id.*

52. *Id.* at 15.

53. *Id.* at 13-14.

mate police investigative techniques. . . ."⁵⁴ To avoid unnecessarily excluding evidence which was obtained during a stop and frisk, the Court outlined two questions to determine the reasonableness of a law enforcement officer's actions: first, "whether the officer's action was justified at its inception, and [second] whether it was reasonably related in scope to the circumstances which justified the interference in the first place."⁵⁵

The first part of the *Terry* two-part test focuses on the reasonableness of the officer's suspicion. Reasonable suspicion is demonstrated by the totality of the circumstances (similar to the analysis for probable cause). In assessing reasonable suspicion, officers may consider circumstances such as unprovoked flight from the police,⁵⁶ the suspect's presence in a high-crime area,⁵⁷ information from an informant⁵⁸ and nervous behavior of the suspect.⁵⁹

The second part of the *Terry* test focuses on the scope of the intrusion. The intrusion must be related to the suspicion that caused the initial seizure. For instance, the officer in *Terry* believed the suspects were armed; therefore, his scope of the intrusion was limited to a cursory search of the suspects to dispel his suspicions.⁶⁰

One of the challenges to the reasonableness of a *Terry* stop is the length of the detention. In *Terry*, the stop consisted of several minutes of questioning and a brief pat down of the suspects.⁶¹ However, not every encounter is so brief. Are police then expected to forgo an investigation because a time limit lies in wait to label the investigation unreasonable?

In *United States v. Sharpe*, the Court rejected the Fourth Circuit's decision that a forty-minute detention of two suspects was unreasonable thereby transforming the detention into a *de facto* arrest.⁶² A DEA agent observed the suspects in *Sharpe* driving in tandem along a highway during early morning hours. The agent also noticed that one of the vehicles was riding low and did not bounce when it drove over bumps in the road. This led the agent to believe the vehicle was possibly overloaded with drugs.⁶³

54. *Id.* at 13.

55. *Id.* at 20.

56. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

57. *Adams v. Williams*, 407 U.S. 143 (1972).

58. *Id.* The police officer knew the informant. The Court stated such an informant provides a stronger case for reasonable suspicion than would a telephone tip from an unknown informant.

59. *Maryland v. Wilson*, 519 U.S. 408, 410-12 (1997).

60. *Terry v. Ohio* 392 U.S. 1, 19-20 (1968).

61. *Id.* at 6-7.

62. *United States v. Sharpe*, 470 U.S. 675, 683 (1985).

63. *Id.* at 677.

The agent observed the suspects for twenty miles then decided to make an investigatory stop. He contacted the state law enforcement officials for assistance. Shortly after the state trooper arrived, he signaled the cars to pull over. One of the drivers complied; the driver of the overloaded vehicle drove away in an attempt to escape. The agent pulled over behind the stopped car, called for additional assistance, and obtained the identification of the driver while he waited. The state trooper followed and subsequently apprehended the fleeing vehicle. When the additional patrol cars arrived, the agent left to assist the trooper with the fleeing vehicle.⁶⁴

The identification of one driver and the registration of the other vehicle bore the same name, and this further aroused the suspicion of the agent. During a cursory search of the outside of the second vehicle, the agent detected the odor of marijuana. A search of the vehicle uncovered several bags of marijuana. Both suspects were detained during the apprehension and search of the second vehicle.⁶⁵

The Court distinguished the facts of *Sharpe* from cases where it found lengthy detentions to be unreasonable. First, the Court considered *Dunaway v. New York*, in which a murder suspect was picked up by police and driven to the police station where he was interrogated for an hour before confessing to the crime.⁶⁶ Second, in *United States v. Place*, DEA agents detained a suspect in an airport for ninety minutes while they transported his seized luggage to a narcotics dog for a sniff test.⁶⁷

The unreasonableness of the detentions in these cases was not based on the length of the detention but in the events occurring during the detention.⁶⁸ The officers in *Dunaway* had no probable cause to obtain a warrant against the suspect and the suspect did not accompany the police willingly, so the interrogation resulted from an illegal seizure.⁶⁹ In *Place*, the Court reasoned that the agents' foreknowledge of the suspect's arrival at the airport several hours before the encounter provided ample time to have the narcotics dog readily available rather than forcing the suspect to wait for ninety minutes.⁷⁰

In *Sharpe*, however, the lengthy detention was not the officers' fault. It was due to the co-defendant's attempt to elude the officers, which caused them to separate.⁷¹ The Court reasoned that were it not

64. *Id.* at 678.

65. *Id.*

66. *Dunaway v. New York*, 442 U.S. 200 (1979).

67. *United States v. Place*, 462 U.S. 696 (1983).

68. *Sharpe*, 470 U.S. at 684.

69. *Dunaway*, 442 U.S. at 212-13.

70. *Place*, 462 U.S. at 709.

71. *Sharpe*, 470 U.S. at 687.

for those evasive acts, the detention would have been brief and keeping with the standards established in *Terry*.⁷² The Court concluded that when considering the reasonableness of the length of a suspect's detention, the question must not be merely how long the suspect was detained but whether the police acted diligently to pursue their investigation allowed within the scope of *Terry*.⁷³

C. *The Fourth Amendment since September 11, 2001*

Since September 11, 2001, the Supreme Court has heard nineteen cases that raised a Fourth Amendment question.⁷⁴ The Court upheld the constitutionality of the challenged searches in fifteen of those cases.⁷⁵ The cases in which the Court found the searches to be constitutional include challenges to an anticipatory search warrant,⁷⁶ the use of a drug sniffing dog around the outside of a legally stopped vehicle,⁷⁷ and the forced entry into a residence mere seconds after police officers announced their presence.⁷⁸ Of the four instances in which the Court found the challenged actions to be unconstitutional, three involved residential searches,⁷⁹ and the fourth involved the illegal seizure of an individual from his home in the middle of the night.⁸⁰

In one of the four aforementioned cases regarding unconstitutional searches, the search involved a warrant that did not include the specifics of the items to be searched.⁸¹ The affidavit submitted in support of

72. *Id.* at 688.

73. *Id.* at 686.

74. See *Georgia v. Randolph*, 126 S. Ct. 1515 (2006); *United States v. Grubbs*, 126 S. Ct. 1494 (2006); *Meuhler v. Mena* 544 U.S. 93 (2005); *Illinois v. Caballes*, 543 U.S. 405 (2005); *Devenpeck v. Alford*, 543 U.S. 146 (2004); *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004); *Thornton v. United States*, 541 U.S. 615 (2004); *United States v. Flores-Montano*, 541 U.S. 149; *Groh v. Ramirez*, 540 U.S. 551 (2004); *Illinois v. Lidster*, 540 U.S. 419 (2004); *United States v. Banks*, 540 U.S. 31 (2003); *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701 (2003); *Kaupp v. Texas*, 538 U.S. 626 (2003); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Kirk v. Louisiana*, 536 U.S. 635 (2002); *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001); *Overton v. Ohio*, 534 U.S. 982 (2001).

75. See *United States v. Grubbs*, 126 S. Ct. 1494 (2006); *Meuhler v. Mena* 544 U.S. 93 (2005); *Illinois v. Caballes*, 543 U.S. 405 (2005); *Devenpeck v. Alford*, 543 U.S. 146 (2004); *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004); *Thornton v. United States*, 541 U.S. 615 (2004); *United States v. Flores-Montano*, 541 U.S. 149; *Illinois v. Lidster*, 540 U.S. 419 (2004); *United States v. Banks*, 540 U.S. 31 (2003); *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701 (2003); *Kaupp v. Texas*, 538 U.S. 626 (2003); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001).

76. *United States v. Grubbs*, 126 S. Ct. 1494 (2006).

77. *Illinois v. Caballes*, 543 U.S. 405 (2005).

78. *United States v. Banks*, 540 U.S. 31 (2003).

79. *Georgia v. Randolph*, 126 S. Ct. 1515 (2006); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Kirk v. Louisiana*, 536 U.S. 635 (2002).

80. *Kaupp v. Texas*, 538 U.S. 626 (2003).

81. *Groh v. Ramirez*, 540 U.S. 551 (2004).

the warrant application included the information, but the warrant did not incorporate the affidavit.⁸² The Court said the warrant was facially invalid; therefore, the search was unreasonable.⁸³ That unreasonableness was not cured by the fact that the officers orally notified the defendants of the items to be searched nor could it be cured by the fact that the officers limited their search to those items that were included in the affidavit.⁸⁴

An interesting consideration is a case in which the Court denied certiorari and did not grant a reversal. In October 2001, the Court denied certiorari on a decision from the Ohio Supreme Court that appeared to be in direct contradiction to the Court's opinion in *Gior-denello*. In *Overton v. Ohio*, the defendant challenged a search warrant granted based on an officer's affidavit that included the following information:

The defendant, being the owner, lessee, or occupant of certain premises, did knowingly permit such premises to be used for the commission of a felony drug abuse offense, to-wit: Desarie Overton being the lessee, owner, or occupant of 620 Belmont, Toledo, Ohio 43607, knowingly permitted Cocaine, a Schedule Two controlled substance to be sold and possessed by the occupants, there, both being in violation of the Ohio Revised Code, a felony drug abuse offense. This offense occurred in Toledo, Lucas County, Ohio.⁸⁵

The officer did not make any statements as to how or why he believed the defendant committed the crimes charged.⁸⁶

The Ohio Supreme Court determined the officer had probable cause to obtain the warrant because the complaint contained both a "specific code section" and "specific factual" information sworn to by a fellow detective, and the officer recognized the defendant when he arrived to serve the warrant due to previous encounters with her.⁸⁷ The Ohio court did not say what "specific factual information" was present nor did it indicate how listing a "specific code section" in any way demonstrated probable cause. Additionally, the officer's familiarity with the defendant should only have been relevant if it supported his belief of the defendant's commission of the crime, which was not the claim. Although the Supreme Court denied certiorari, four Justices joined in a dissent regarding that denial. The dissenters believed

82. *Id.*

83. *Id.* at 557.

84. *Id.* at 558, 560.

85. *Overton v. Ohio*, 534 U.S. 982, 983-84 (2001).

86. *Id.* at 984.

87. *State v. Overton*, No. L-99-1317, 2000 Ohio App. LEXIS 3919 (Ohio Ct. App. 2000), *cert. denied*, *Overton v. Ohio*, 534 U.S. 982 (2001).

that since the case clearly contradicted precedent, the Court should have summarily reversed the decision.⁸⁸

The cases in which the Court rejected a Fourth Amendment challenge grant more liberty to law enforcement officials. For instance, in *Illinois v. Lidster*, the Court upheld the constitutionality of a highway checkpoint established to obtain information regarding a hit-and-run suspect.⁸⁹ The police arrested the defendant in *Lidster* for driving under the influence of alcohol after swerving and nearly hitting a police officer at a highway checkpoint. The defendant argued that the police obtained evidence of his insobriety primarily because of the existence of the checkpoint, which he claimed was unconstitutional.⁹⁰

The police used the checkpoint in *Lidster* to gather information about a fatal hit-and-run accident. The accident occurred a week earlier. In an effort to find witnesses, the police partially blocked a highway, stopped passing cars, questioned the occupants for fifteen to twenty seconds, provided each driver with a flyer that described the accident, and requested anyone with information to contact the proper authorities.⁹¹

The Court focused on the reasonableness of the stop in its opinion.⁹² The factors relevant to that question are “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”⁹³ The three brief paragraphs the Court used to analyze these factors show no clear distinction from cases where the Court found a checkpoint to be unconstitutional. This suggests the Court had a particular outcome in mind when it penned the opinion and glossed over the analysis to suit its purpose.

The Court said the investigation of a human death is of grave public concern.⁹⁴ The Court pointed to the fact that the investigation pursued the police at the checkpoint included questions that were directed toward solving a specific crime rather than toward general crime control.⁹⁵ A checkpoint that hopes to identify criminals versus

88. *Overton v. Ohio*, 534 U.S. 982, 986 (2001).

89. *Illinois v. Lidster*, 540 U.S. 419 (2004).

90. *Id.* at 422.

91. *Id.*

92. *Id.* at 427.

93. *Id.*

94. *Id.* But see *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (the gravity of illegal narcotics trafficking was insufficient to justify the established checkpoint).

95. *Lidster*, 540 U.S. at 427. The Court compared the facts in *Lidster* to those in *City of Indianapolis v. Edmond*, in which the police set a checkpoint as part of a drug interdiction. *Edmond*, 531 U.S. at 32 (2000). In *Edmond*, the police stopped a predetermined number of vehicles, requested the driver's identification and registration information, did an open-view inspection of the vehicle and walked a drug-sniffing dog around the exterior of the vehicle. *Edmond*, 531 U.S. at 34-35. The Court found the checkpoints in *Edmond* to be unconstitutional

a checkpoint that hopes to identify witnesses bears no critical differences. Specifically, police are not assured that one vehicle over another will more likely to produce the desired result. Also, curiously absent from the Court's analysis was any notion of exigency consistent with prior opinions.⁹⁶ The crime in *Lidster* occurred a week prior to the police establishing the checkpoint, and there was no indication the hit-and-run driver had struck or was likely to strike again, thereby generating a pressing need to locate the suspect.

Next, the Court held, "[t]he stop advanced this grave public concern to a significant degree."⁹⁷ The police department's "appropriately tailored" checkpoint was relevant to the investigation.⁹⁸ The Court noted the police department's belief that the checkpoint might produce witnesses because workers from a local industrial park might have been in the vicinity of the crime the night it occurred.⁹⁹ However, the Court did not consider whether this was a valid assumption.¹⁰⁰ Additionally, the Court did not provide an example of what type of police action may not have advanced the public concern.

Finally, the Court said the brevity of the detention was the most important factor in its determination.¹⁰¹ The stop required drivers to wait a few minutes and have a brief conversation with police. While there is no disputing that the interaction with the police was brief, in none of its previous decisions did the Court indicate the brevity of the interference was the most important factor.¹⁰²

because there was no "individualized suspicion" present that instigated the stops. *Edmond*, 531 U.S. at 44.

96. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), recognizing the immediate need to remove drunk drivers from the road. *Id.* at 451. See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (hypothesizing that "thwarting an imminent terrorist attack" or apprehending a "dangerous criminal who is likely to flee by a particular route" would justify a checkpoint that would otherwise relate to ordinary crime control).

97. *Lidster*, 540 U.S. at 427.

98. *Id.* The police set up the checkpoint *about* a week after the accident, *near* the location of the accident, at *around* the same time of day as the accident.

99. *Id.*

100. In *Mich. Dep't of State Police v. Sitz*, the Court considered statistical data regarding the amount of damage caused by drunk drivers, as well as the number of drunk drivers likely to be caught by the checkpoint when validating the drunk driver checkpoint established in that case. 496 U.S. 444, 451, 455 (1990). In *Lidster*, however, the police did not demonstrate how efficient the checkpoint was at reaching the targeted pool of potential witnesses.

101. *Lidster*, 540 U.S. at 427.

102. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 35 (2000) (giving little weight to the fact that the stop was only two to three minutes long when finding an illegal narcotics checkpoint unconstitutional); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (discussing for the bulk of the opinion, the gravity of public concern in regards to drunk drivers and the relevant effectiveness of the checkpoints in apprehending offenders – with relevant statistical data to support the observations); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (stating in passing that brief detentions are allowable but spent the majority of its analysis reviewing the relevant effectiveness of border checkpoints to curbing illegal aliens from entering the country).

A recent decision sure to attract a substantial amount of attention is the case in which the Court upheld a stop and identify statute.¹⁰³ In *Hiibel v. Sixth Judicial District Court*, the Court held that a Nevada statute requiring the defendant to identify himself to a police officer was constitutional because the officer had reasonable suspicion for the initial stop (as required by *Terry*), and the request for identification was a “commonsense inquiry” in light of the circumstances.¹⁰⁴

In *Hiibel*, an officer responding to a report of an assault approached the defendant and explained he was investigating the report. The defendant was parked alongside the road when the officer approached. The defendant appeared intoxicated so the officer asked him for identification. The defendant refused to provide identification and demanded to know why the officer wanted it. The officer again told the defendant he was investigating an assault complaint. The exchange continued for several minutes; the officer made eleven requests for the defendant’s identification. The officer made a final request for the defendant’s identification and warned the defendant that failure to comply would result in his arrest. The defendant refused and was arrested.¹⁰⁵

The Court identified the true question as being whether the Fourth Amendment prohibits the arrest and prosecution of an individual for failure to answer questions regarding his identity under Nevada state law.¹⁰⁶ The Court stated that previous cases demonstrate that inquiries concerning a person’s identity are a routine part of a *Terry* stop.¹⁰⁷ However, the Court was careful to reject statements in earlier opinions that suggest the Fourth Amendment establishes a right to refuse to answer questions during a *Terry* stop.¹⁰⁸

The Court recognized that the concurrence in *Terry* stated that subjects of a *Terry* stop cannot be compelled to answer questions, and that a refusal to answer questions cannot be the basis for an arrest.¹⁰⁹ Yet, the Court concluded that while the Fourth Amendment does not compel an individual to provide information to the police, a state statute might do so as long as it complies with the requirements of reasonableness established in *Terry*.¹¹⁰ The Court suggested that if an officer can inquire as to a person’s identity, but has no authority to respond to a refusal, the authority to make the request becomes a legal nul-

103. *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004).

104. *Id.* at 188-89.

105. *Id.* at 180-81.

106. *Id.* at 186-87.

107. *Id.* at 186. (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985); *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

108. *Id.* at 187.

109. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring)).

110. *Id.* at 187-89.

lity.¹¹¹ Conversely, if a question is not reasonably related to the purpose of the initial stop, it is unreasonable, and a subsequent arrest based on the refusal to answer is invalid.¹¹² The conclusion in *Hübel* allowing a state to require a suspect to disclose his name during the course of a *Terry* stop has instigated a barrage of articles which claim that a slippery slope to the total erosion of Fourth Amendment rights has begun.¹¹³

III. THE PATRIOT ACT: THE APPEARANCE OF "PROTECTION"

On October 23, 2001, barely a month and a half after the September 11th attacks, the Patriot Act was introduced in the House of Representatives.¹¹⁴ Less than seventy-two hours later, the President signed the bill into law. The Patriot Act was the third piece of anti-terrorism legislation presented in Congress after the September 11th attacks.¹¹⁵ The sweeping legislation brought much of the nation's intelligence community under the purview of the Justice Department. In considering and passing the law, Congress gave little credence to the long-term effects the Patriot Act would have on Fourth Amendment protections.¹¹⁶ Constitutional scholars and civil rights groups were fearful of the far-reaching, liberal and largely unchecked liberties granted to law enforcement officials under the Patriot Act. However, most Americans were so fearful of another terrorist attack that they were happy for the "security" regardless of whether it would actually help combat terrorism or require that citizens relinquish Constitutional protections. Congress's efforts resulted in a hastily drafted, vague piece of legislation that allows law enforcement officials to overstep Constitutional limitations with impunity.

Though the timeframe to draft the Patriot Act was limited, the breadth of the Patriot Act is not. The Patriot Act traded constitutional protection for a false sense of security and a vast majority of the American people willingly complied. The Patriot Act, which was over

111. *Id.* at 188.

112. *Id.*

113. See Jamie L. Stulin, Comment, *Does Hübel Redefine Terry? The Latest Expansion Of The Terry Doctrine And The Silent Impact Of Terrorism On The Supreme Court's Decision To Compel Identification*, 54 AM. U.L. REV. 1449 (2005); Arnold H. Loewy, Article, *The Cowboy And The Cop: The Saga Of Dudley Hübel, 9/11, And The Vanishing Fourth Amendment*, 109 PENN ST. L. REV. 929 (2005); William R. Snyder, Jr., Case Comment, *Slipping Down The Slope Of Probable Cause: An Unreasonable Exception To What Was Once A Reasonable Rule: Hübel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451 (2004), 57 FLA. L. REV. 445 (2005).

114. *Supra* note 2.

115. Provide Appropriate Tools Required To Intercept And Obstruct Terrorism (Patriot) Act of 2001, H.R. 2975, 107th Cong. (2001); International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, S. 1511, 107th Cong. (2001). Both of these legislative items were ultimately incorporated into the Patriot Act.

116. See 147 Cong. Rec. S10990-02 (2001) (statements of Sen. Leahy).

300 pages in length, affected nearly a dozen government agencies and revised no less than 100 federal statutes.¹¹⁷ The Patriot Act grants the following powers: authority to intercept wire, oral, and electronic communications, and to delay notice of the execution of a warrant.¹¹⁸ In effect, the Patriot Act reaches the disclosure of financial transactions information,¹¹⁹ DNA evidence cataloging and reporting,¹²⁰ changing wiretapping application procedures,¹²¹ and assessing compensation for victims of terrorist acts.¹²²

Two things happen in a time of war. First, the power of the Executive branch increases as it seeks to preserve its own interests. Second, citizens have the opportunity to see the true nature of their government as its interests subsume their own. There is often tension between these two entities.¹²³ The framers of the Constitution recognized that tension. That tension is simply more pronounced during a time of conflict.

A. *Governmental Interests*

On the side of the government, there exists an independent desire to promulgate its ideas and to survive, and it will take whatever actions it deems necessary to do so. The events of September 11th challenged the United States government as never before. The images of lawmakers in front of the Capitol singing "God Bless America" was as much an act of government self-preservation as it was one of patriotism. As such, there exists the need to protect the individual from the government because the government has its own mandates. Those mandates reach further than any individual who may infringe on personal liberties. The Patriot Act, coupled with new technology, provides the government with a greater ability to achieve its goals through intrusion into the private sphere. Many Americans seem unconcerned about this startling development.

Is it possible that the government responds differently to protecting individual rights, or is the Patriot Act simply a protection of the government's ideology of the American way of life? When viewed as a whole, the Patriot Act does not improve the day-to-day safety of any American. It does do a good job of protecting the American way of

117. See generally Patriot Act § 207 (expanding timeframes for surveillance), § 214 (email and wiretaps), §§ 201-202 (expanding scope of wiretapping act), §§ 209-210 (voicemail, Internet and telephone), and § 213 (revising "Knock and Announce" warrant notification).

118. Patriot Act §§ 201, 213 (2001) (amending 50 U.S.C. § 1805, 50 U.S.C. § 1824(d)(1) (2006)).

119. §§ 301-377.

120. § 503 (amending 42 U.S.C. § 14135A (2006)).

121. § 207 (amending 50 U.S.C. § 1805 (2006)).

122. § 624 (amending 42 U.S.C. § 10603 (2006)).

123. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

life because now what you say and to whom you say it can be secretly monitored, and if either is contrary to traditional American values, an individual could find himself jailed for suspicion of terrorism. Tension always exists between government ideology and individuals' rights to espouse their thoughts on that ideology. Traditionally, an opposing ideology from outside of our borders was given greater scrutiny. Now, with the passage of the Patriot Act, Americans face the same level of scrutiny as known terrorist groups.

The reason Congress enacted the Patriot Act so quickly was the perceived imminent danger of another attack that could be detected and prevented more readily by police agencies with open lines of communication. While the desire to improve the functions among the federal police agencies is a laudable goal, it is unnecessary to concentrate so much police power to accomplish that goal. It seems that if this was the case there would be more focus on communication between police organizations, which were the inefficiencies that allowed the 9/11 attackers to remain here so long to train for the mission. Yet, there is nothing in the Patriot Act that directly addresses these problems.

The Patriot Act is not the first hasty reaction to a domestic threat. The government's response is consistent when faced with the peril of war or the possibility of a significant change in the American way of life. As a general rule, that response means that the flag of fear is raised, the people are cautioned of the impending doom, and individual rights are thrust aside.

Likely, the most controversial of government actions prior to the Patriot Act occurred during World War II when Japanese living in the United States were required to live under imposed curfews or in relocation camps because of forced exclusion from their homes. In *Hirabayashi v. United States*¹²⁴ and in *Korematsu v. United States*,¹²⁵ the Supreme Court considered challenges to those government actions. The government claimed the action was necessary to prevent future attacks against U.S. interests.¹²⁶ The Court recognized the highly suspect nature of the orders because they were directed at a particular racial group. Regardless, the Court upheld the actions. The Court was more concerned with the safety of American citizens as a whole than it was with the intrusions into the liberties of the affected individuals. The Court demonstrated this by stating, "When under conditions of modern warfare our shores are threatened by hostile forces,

124. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

125. *Korematsu v. United States*, 323 U.S. 214 (1944).

126. *Hirabayashi*, 320 U.S. at 86-87.

the power to protect must be commensurate with the threatened danger.”¹²⁷

During the Vietnam Era, the government used surveillance as a prophylactic measure against the internal threats that appeared in the form of the ideology of anti-war demonstrators, the resurgence of socialist thought, and the radical civil rights groups.¹²⁸ There was no external threat and no real threat of any large-scale attacks. However, the government feared an ideological shift in the body politic and responded by infringing upon rights of association and labeling individuals and political groups as subversive.

The expendability of rights is more than a government contrivance. Americans have been willing to relinquish their individual rights (1) in response to fear, or (2) when the government has been able to convince Americans that it is in their best interest to forgo their liberties in lieu of their safety. For instance, in response to heightened gang activity and resulting violence, the citizens of Chicago, Illinois passed a local ordinance, which made it a crime for individuals to continue loitering after a police officer ordered them to disperse. The ordinance was challenged in *Chicago v. Morales*.¹²⁹ Although the Court struck down the ordinance for vagueness, Justice Scalia’s dissent touted the ability of citizens to relinquish their rights willingly in favor of safety and freedom from an unwanted criminal element.¹³⁰ However, he was careful to note that citizens should not sacrifice constitutional protections for the sake of safety.¹³¹ Furthermore, the citizens in *Morales* made their decision based on what they saw in their daily lives. It was not a reaction to a single, albeit horrific, event.

The obvious difference between the above examples and the Patriot Act is that the American people had never seen such a large scale attack on a non-military target such as the events of September 11th. There is no way to diminish the realities of the horrors of September 11th, nor is that the intention. However, a piece of legislation that offers no more protection for daily living than existed prior to September 11th cannot alleviate the fear experienced by every American who witnessed the attacks and its subsequent results.

Americans are willing to forgo their rights during wartime, but there is a quiet expectation that once the threat has subsided, homeo-

127. *Korematsu*, 323 U.S. at 220.

128. See generally *Socialist Workers Party v. Attorney General*, 419 U.S. 1314 (1974).

129. *Chicago v. Morales*, 527 U.S. 47 (1999).

130. *Id.* at 98 (Scalia, J., dissenting) (“The citizens of Chicago have decided that depriving themselves of the freedom to “hang out” with a gang member is necessary to eliminate pervasive gang crime and intimidation — and that the elimination of the one is worth the deprivation of the other.”).

131. *Id.*

stasis returns.¹³² While there is a line of reasoning that the war on terrorism is an ongoing one, because of the very nature of this war and its duration, our government should exercise greater care in passing laws that affect constitutionally protected rights. Congress must consider that laws in response to a continuous threat have the potential to become firmly entrenched in our criminal justice system. Therefore, such laws should be focused and temporary. The Patriot Act is neither. It is not a routine response during a time of turmoil. This particular piece of legislation subverts checks and balances, ignores constitutional conflicts, and assumes a permanent place in American law.

B. *Problems with the Patriot Act*

One result of the speed with which the Patriot Act was drafted is the vagueness of many of its sections and provisions. The lack of specificity and particularity means necessarily that there is a greater likelihood of abuse by law enforcement officials who will undoubtedly interpret the text in the manner that gives them the most leeway. Courts will compound the abuse by giving deference to officers who must often make split-second decisions to execute ambiguous duties.¹³³

The Patriot Act expanded 18 U.S.C. § 2339A, which makes providing material support to terrorists and terrorists organizations a crime.¹³⁴ Whereas the statute previously required the support of terrorist activity to occur within the United States, the Patriot Act eliminated that requirement. Now material support provided to any terrorist, anywhere, is prosecutable under the statute. Two problems exist in regards to this edict. First, what qualifies as material support and, second, what level of intent is required to demonstrate that support?

The statute defines material support as:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities,

132. See generally William J. Stuntz, *Local Policing After Terror*, 111 YALE L.J. 2137 (2002) (stating that after September 11th heightened police powers should continue “at least for a while”). *Id.* at 2138.

133. See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.”). See also *Brinegar v. United States*, 338 U.S. 160, 167 (1949) (stating that police officers must be allowed “room . . . for some mistakes” because their duties are “more or less ambiguous . . .”).

134. Patriot Act § 805 (2001).

weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials[.]¹³⁵

While several of the items are easily identified (e.g. explosives, lethal substances and weapons), just as many are not as easily explained (e.g. service, facilities and personnel). The statute does not provide any guidance other than to say that personnel may be one or more people.

The statute also does not indicate the required nexus between (1) the material support, (2) the terrorist, and (3) the activity.¹³⁶ In *Boim v. Quranic Literacy Institute*, the Seventh Circuit clearly rejected the notion that material support requires a close connection between the support provided and the terrorist activity.¹³⁷ In *Boim*, there was a three-year gap between the financial support and the terrorist act.¹³⁸ However, in *Singh-Kaur v. Ashcroft*, the Third Circuit said that for support to be material, it must be significant or essential and have a logical connection with the terrorist activity.¹³⁹ Although the defendant in *Singh-Kaur* was charged under an immigration statute, the language regarding material support is substantially similar to section 2339A.¹⁴⁰

In *Boim*, the court of appeals also corrected the district court's erroneous statement that "the term 'material' in the context of sections 2339A and 2339B . . . mean[s] substantial or considerable."¹⁴¹ According to the circuit court, "the term *relates to the type of aid provided* rather than whether it is substantial or considerable."¹⁴² The Seventh Circuit's rationale was that Congress's efforts to combat terrorism would be hindered greatly if liability could be avoided by the pooling of small donations.¹⁴³

Section 213 of the Patriot Act expands the circumstances under which providing notice of the execution of a warrant may be delayed.¹⁴⁴ The section amends 18 U.S.C. § 3103a to specifically allow for delay in providing notice if there is reasonable cause to believe providing notice would have an adverse result.¹⁴⁵ Again, the problem is two-fold. First, under the reasonable cause standard established in

135. 18 U.S.C § 2339A(b)(1).

136. See *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 567 (D.N.Y. 2005) (A satellite phone battery that was used in a phone when ordering terrorist attacks was sufficient to establish material support).

137. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1015 (7th Cir. 2002).

138. *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1019 (D. Ill. 2001).

139. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004).

140. See 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006).

141. *Boim*, 291 F.3d at 1015.

142. *Id.* (emphasis added).

143. *Id.*

144. See Patriot Act § 213.

145. See *id.*

the Patriot Act, it is difficult to imagine a situation in which it would not be reasonable to delay notice when the focus of the search is to obtain evidence of suspected terrorism. The very nature of terrorism requires the government to be as discreet as possible in its investigation so as not to alert a would-be terrorist which would spur him into action or alert him of the investigation and hasten his escape.¹⁴⁶

Second, even if permission to delay notice is denied by the magistrate at the time the warrant is issued, the executing officers may still withhold notice. Based on the Supreme Court's reasoning in *Richards v. Wisconsin*, the time when it is most appropriate to determine if notice is required is at the time of the execution of the warrant.¹⁴⁷ Officers are allowed to judge the circumstances independent of the magistrate's objective decision. The executing officer need only reasonably believe the circumstances negate the need for notice.¹⁴⁸ Since reasonable belief is such a low threshold, it is highly unlikely a court would subsequently find action based on that belief to be in contravention to either the Patriot Act or the Fourth Amendment.¹⁴⁹

Another area in which the Patriot Act has generated a lot of controversy is in its amendments to the Foreign Intelligence Surveillance Act (FISA). In 1978, the FISA created a narrow exception to the Fourth Amendment probable cause requirement when the purpose of obtaining a wiretap was solely for gathering foreign intelligence.¹⁵⁰ The rationale was to loosen the probable cause standard where the objective of the wiretap was not to gather evidence for trial. However, there is nothing in the text of the Fourth Amendment that supports this sort of exception. The Fourth Amendment prohibits not only unreasonable searches and seizures where the evidence is used in a trial, but unreasonable searches and seizures in general. Even if there were support for this rationale, the Patriot Act goes beyond this narrow exception to allow for wiretaps and searches for the purpose of using the information in domestic criminal cases.

146. See generally *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (recognizing the need for governmental secrecy in investigating and responding to terrorist threats).

147. *Richards v. Wisconsin*, 520 U.S. 385 (1997) (stating the standard for executing a warrant without the standard knock and announce is a "reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence This showing is not high . . ."). *Id.* at 394.

148. *Id.* at 394-95.

149. See *id.* at 395.

150. See 50 U.S.C. § 1801(a)(4)-(5) (2006) (Originally, those groups subject to surveillance under FISA were foreign powers, including groups engaged in international terrorism or activities in preparation thereof, and foreign-based political organizations not substantially composed of United States persons.).

Section 218 of the Patriot Act changes the scope for obtaining warrants and orders of surveillance under FISA.¹⁵¹ Prior to the passage of the Patriot Act, FISA allowed for surveillance orders when the purpose of the investigation was “foreign intelligence.”¹⁵² Under the Patriot Act, warrants and orders of surveillance may be issued so long as gathering foreign intelligence is “a significant purpose” of the investigation.¹⁵³ There is no explanation within the Patriot Act as to how foreign intelligence would constitute a significant purpose within an investigation. The definition section within the applicable portion of the United States Code is also silent as to this question.¹⁵⁴ The only guidance in this area was from brief statements made on the Senate floor prior to the vote on the Patriot Act. For instance, Senator Diane Feinstein said that:

In many cases, surveillance will have two key goals - the gathering of foreign intelligence, and the gathering of evidence for a criminal prosecution. Determining which purpose is the “primary” purpose of the investigation can be difficult, and will only become more so as we coordinate our intelligence and law enforcement efforts in the war against terror.

Rather than forcing law enforcement to decide which purpose is primary - law enforcement or foreign intelligence gathering, this bill strikes a new balance. It will now require that a “significant” purpose of the investigation must be foreign intelligence gathering to proceed with surveillance under FISA. The effect of this provision will be to make it easier for law enforcement to obtain a FISA search or surveillance warrant for those cases where the subject of the surveillance is both a potential source of valuable intelligence and the potential target of a criminal prosecution. Many of the individuals involved in supporting the September 11[th] attacks may well fall into both of these categories.¹⁵⁵

No matter how convincing Senator Feinstein and others appeared during floor statements, one year later no one was applauding the changes to FISA. In a statement before the Judiciary Committee, Senator Leahy said that the change to require that foreign intelligence be only a significant purpose of an investigation in which an order of surveillance or warrant is sought did not mean the Fourth Amendment standard of probable cause was being subverted.¹⁵⁶ Senator Leahy went on to say there was nothing in the text of the Patriot Act

151. Patriot Act § 218.

152. 50 U.S.C. § 1804(a)(7) (2006).

153. Patriot Act § 218.

154. See 50 U.S.C. § 1821 (2006).

155. 147 CONG. REC. S10547, S10591 (daily ed. Oct. 11, 2001) (statement of Sen. Feinstein).

156. *The USA PATRIOT Act in Practice: Shedding Light on the F.I.S.A. Process: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (2002) (statement of Sen. Patrick J. Leahy).

to support the contention that information gathered in a FISA investigation could be used in a criminal prosecution.¹⁵⁷

Even the government has been unable to articulate a workable definition when called on to defend the statute. In response to a challenge that the amendments to FISA were unconstitutional, the government provided a “wholly benign interpretation” of the significant purpose language.¹⁵⁸ The government simply stated that “the ‘significant purpose’ amendment recognizes the existence of the dichotomy between foreign intelligence and law enforcement, but it contends that it cannot be said to recognize (or approve) [the] legitimacy [of the amendment].”¹⁵⁹

Since none of the typical legislative precautions were taken in passage of the Patriot Act, ample room is available to sidestep Fourth Amendment protections.¹⁶⁰ Congress could have avoided the back peddling it has done in subsequent discussions regarding the Patriot Act had committee reports been filed or hearings held.¹⁶¹ Additionally, Congress had at its disposal the legislative history from earlier bills of similar context. For instance, when considering the Omnibus Crime Control and Safe Streets Act of 1968, there was discussion of whether the Act was expanding the constitutional powers of the executive to allow for domestic surveillance without warrant application:

Mr. HOLLAND. . . . The section [2511 (3)] from which the Senator [Hart] has read does not affirmatively give any power We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such power as the President has under the Constitution. . . . We certainly do not grant him a thing There is nothing affirmative in this statement.

Mr. McCLELLAN. Mr. President, we make it understood that we are not trying to take anything away from him.

Mr. HOLLAND. The Senator is correct.

Mr. HART. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.

Mr. McCLELLAN. Even though intended, we could not do so.

Mr. HART. . . . However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now In addition, Mr. President, as I think our exchange makes clear, nothing in section

157. *Id.*

158. *In re Sealed Case No. 02-001*, 310 F.3d 717, 734 (D.C. Cir. 2002) (citing supplement brief of the United States).

159. *Id.* at 734-35 (internal quotations omitted).

160. See 147 CONG. REC. H7159 (daily ed. Oct. 23, 2001) (No committee reports were filed with the bill. No hearings were conducted. The only delay in passing the act was the vote to suspend the rules in the House so that the bill could be put to an immediate vote.).

161. See generally *The USA PATRIOT Act in Practice: Shedding Light on the F.I.S.A. Process: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (2002).

2511 (3) even attempts to define the limits of the President's national security power under present law, Section 2511 (3) merely says that if the President has such a power, then its exercise is in no way affected by title III.¹⁶²

Congress also had case precedent at its disposal that interpreted the Omnibus Crime Control and Safe Streets Act. The guidance found is not necessarily in the Court's interpretation of the actual meaning of the statute. Rather the instruction gleaned is in how the Court considered Congress would act in drafting such a sensitive piece of legislation:

[I]t would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.¹⁶³

IV. THE TENSION BETWEEN THE PATRIOT ACT AND THE FOURTH AMENDMENT

With safeguards and resources available, not to mention the U.S. Constitution itself, Congress had no excuse for producing such a sloppily crafted piece of legislation.¹⁶⁴ This hastily drafted legislation provides law enforcement officials several techniques to avoid the Fourth Amendment and in some cases to simply ignore it. Those techniques are camouflaged nicely within the voluminous Patriot Act.

For instance, section 805 of the Patriot Act allows for the prosecution of individuals who provide material support to terrorists anywhere in the world.¹⁶⁵ The statute simply criminalizes the conduct in a manner similar to an aiding and abetting statute. However, these individuals are not charged as principals, as would be under an aiding and abetting statute.¹⁶⁶ Also, in contrast to an aiding and abetting statute, there is a question about the knowledge an individual allegedly providing material support must possess. In an aiding and abetting statute, the government must show that the "defendant willfully and

162. *United States v. United States Dist. Ct.*, 407 U.S. 297, 306-07 (1972) (quoting Senate hearings on PL 90-351(1968)).

163. *Id.* at 306.

164. Congress also had at its disposal the Offices of Legislative Counsel for House and Senate as well as the Congressional Research Service. Each of these offices exists to provide guidance for and review of potential legislation.

165. See Patriot Act § 805 (Section 805 explicitly eliminated the requirement that the support be provided to terrorists "within the United States.").

166. See 18 U.S.C. § 2 (2005).

knowingly associated himself with the unlawful venture *and* willfully participated in it as he would in something he wishes to bring about or to make succeed.”¹⁶⁷ Yet, while the statute indicates that material support must be provided with knowledge or intent that it will be used in the preparation of or in the carrying out of a terrorist activity,¹⁶⁸ the fact that the support does not have to be linked to any specific terrorist act directly contradicts that requirement.¹⁶⁹ These inconsistencies lead to the conclusion that by itself providing material support is insufficient to demonstrate criminal action. Rather, it is a piece of evidence which suggests the individual may have aided and abetted in a crime. This, however, would require a demonstration of probable cause under a Fourth Amendment analysis.

Were material support simply a piece of evidence in an investigation, an officer would be required to show how the support is proof of terrorist activity. Presumably, proof of material support would require more than the fact that an individual made a single donation to (1) a group or (2) an individual who later carried out a terrorist act. In the absence of a link between support and a crime, it would be difficult to demonstrate probable cause for a search or arrest based on material support. The problem lies within the *definition* of material support, which is no definition at all. The statutory definition is simply a list of what types of items (or materials) can provide support. As it stands, law enforcement officials may detain and charge suspects with a crime even if there is no nexus between the support and the crime, regardless of the size of the support.¹⁷⁰

Section 207 of the Patriot Act extends the time for surveillance under FISA from 90 to 120 days, and it extends the time to execute a search warrant under FISA from 45 to 90 days. This statute, combined with the revisions in section 218, which allows for warrants when foreign intelligence is a “significant purpose” of the search, means a criminal investigation may ensue without any demonstration of probable cause. Judges are not required to consider whether probable cause of a crime exists when issuing a warrant under these provisions. Judicial determination requires that judges issue a warrant so long as the government can demonstrate a foreign power is involved and that the property to be searched is used or possessed by a foreign power.¹⁷¹

167. *United States v. Palmer*, 604 F.2d 64, 76 (10th Cir. 1979) (emphasis added).

168. 18 U.S.C. § 2339A(a) (2006).

169. See discussion of section 805; See also *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002).

170. See discussion of section 805 *supra* note 165.

171. 50 U.S.C. § 1824 (a)(3)(A)-(B) (2006).

The FISA warrant is nothing more than a statement of status of the focus of the investigation. As previously indicated, no probable cause regarding neither the commission of a crime nor the likelihood of the commission of a crime is proven under FISA warrant. This powerful instrument allows the government to obtain information that may subsequently be used in any criminal prosecution as long as criminal prosecution was not the sole purpose of obtaining the warrant.¹⁷² As this information is a warrantless acquisition, it will be reviewed as such.

The section of FISA amended by the Patriot Act meets none of the standard exceptions to the warrant requirement that would otherwise allow the information obtained under the FISA warrant to be admissible. No crime was committed in the presence of law enforcement officials. If that were the case, the government would simply seek a standard search or arrest warrant. No exigent circumstances exist of an impending crime or possible escape by a person of interest. Indeed, there is no evidence that a crime will ever be committed or that the person of interest is anything more than a tourist exists. Obviously, a *Terry* stop would not apply in the search of a residence. One recent development in Fourth Amendment analysis allows for warrantless searches when special needs exist. It is a relaxed standard that even allows for blanket searches of individuals using public transportation.¹⁷³

When measuring if a search is allowable based on special needs, the court has said that "what is required is a fact-specific balancing of intrusion . . . against the promotion of legitimate governmental interests."¹⁷⁴ In making this determination, courts consider "[1] the character of the intrusion imposed by the [challenged conduct] . . . [2] the nature and immediacy of the [state's] concerns and [3] the efficacy of the [governmental conduct] in meeting them."¹⁷⁵

The character of the intrusion for a FISA warrant is as intrusive as any warranted search; and while a FISA warrant requires a statement of minimization, this simply requires the Attorney General to make a reasonable attempt to avoid non-targeted information.¹⁷⁶

Second, the immediacy of the concern under FISA is the general concern of a terrorist attack. This is not an attempt to diminish the real possibility of a terrorist attack. But the Supreme Court made a

172. See *In Re Sealed Case No. 02-001*, 310 F.3d 717, 726 (2002) (discussing how evidence of ordinary crimes is admissible when the information is inadvertently discovered or the crime is inextricably linked to a terrorist act).

173. See *Macwade v. Kelly*, 2005 U.S. Dist. LEXIS 39695 (S.D.N.Y. Dec. 7, 2005).

174. *N.G. v. Connecticut*, 382 F.3d 225, 231 (2d Cir. 2004) (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002)).

175. *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-34 (2002).

176. See 50 U.S.C. § 1801(h) (2006).

distinction in *Illinois v. Lidster* between conducting a search into general crimes versus specific crimes.¹⁷⁷ Though the Court's analysis was a bit tortured, its basic premise is that warrantless searches are not allowed when police are gathering information to help in crime prevention rather than aiding in the resolution of a crime.¹⁷⁸ Clearly, with no evidence a crime has been or ever will be committed, a FISA warrant falls under the former category.

Finally, the efficacy of the government's conduct would seem to provide the greatest support for the FISA searches. However, even if one concedes that point, what remains is an intrusive search that may or may not produce evidence of a crime, which may or may not be a crime of terrorism, but which definitely may be used in a criminal prosecution – so long as that prosecution was not the primary purpose of the search. It is the quintessential fishing expedition, which the Fourth Amendment forbids.¹⁷⁹

A. *The Long Term Effects*

There is no question that the Patriot Act opens the door to Fourth Amendment intrusions. The question is simply the nature of the ramifications of those intrusions. One author describes the current state of Fourth Amendment protections as being in flux, which is a necessary response to the “mass murders” of September 11th.¹⁸⁰ To the extent that Congress has subverted the checks and balances of the Constitution and eliminated judiciary oversight of the statutes amended by the Patriot Act, the commentator's analysis rightly describes the current state of criminal procedure. However, if the commentator's analysis is followed to its logical conclusion, the equilibrium, the commentator claims may return, will actually remain an elusive concept because the war on terrorism is ongoing. The threats against society are ever-changing. The need to protect ourselves is unending. Therefore, to restore equilibrium, the judiciary will have to step in and make some tough decisions regarding the Patriot Act.

It is only a matter of time before the Patriot Act becomes the basis of our criminal law. This statement is true for two reasons. The first reason is because of the manner in which state police agencies are already employed to fight the war on terrorism.¹⁸¹ The second reason

177. See generally *Illinois v. Lidster*, 540 U.S. 419 (2004).

178. See *Lidster*, 540 U.S. at 427.

179. See *Doe v. United States*, 487 U.S. 201 (1988).

180. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2142-43 (2002).

181. See *MacWade v. Kelly*, 2005 U.S. Dist. LEXIS 31281 (S.D.N.Y. 2005) (discussing Container Inspection Program implemented by the City of New York).

is that the courts will make decisions that effect not only terrorism but also domestic crimes.¹⁸²

State police agencies are the first line of defense against terrorism. They are responsible for the day-to-day efforts of rooting out would-be terrorists. They monitor subways, sporting events and even schools. They conduct searches and investigate potential threats. They are the daily presence the public sees as protecting their lives. This reality combined with the need to improve relations between law enforcement agencies provides the perfect environment for the Patriot Act to thrive as “the” domestic criminal law. The Patriot Act has already arranged the federal law enforcement agencies under one umbrella. The federal government already provides funding to states to enhance their DNA facilities and grants the states access to the federal DNA database.¹⁸³ Additionally, the definition of domestic terrorism can apply to crimes that are historically state enforced offences. Based on the broad powers granted under the Patriot Act and the desire to improve the communication and cooperation between police agencies, it is quite foreseeable that the Patriot Act (or a similar creation) could become the governing document for our nation’s police agencies.

The potential for abuse of constitutional protections by focused police efforts is heightened because of the technological advances such as DNA testing, wiretapping, email and voicemail monitoring. The law has never been written in such a way that considers how technological advances will affect the breadth of government intrusion.

Domestic crimes that are now run-of-the-mill criminal offenses could easily fall under the purview of the Patriot Act, especially if joint efforts between local and federal law enforcement agencies increase. The Patriot Act added a definition of domestic terrorism to the United States Code to include crimes that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion;
 - or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

182. See Stuntz, *supra* note 180, at 2140-41.

183. The National Institute of Justice administers the DNA Capacity Enhancement Program. 42 U.S.C. 14132 (2006) provides the scope of what agencies are allowed to receive assistances under the program.

(C) occur primarily within the territorial jurisdiction of the United States.¹⁸⁴

The gangs that were the motivation behind the ordinance in *Chicago v. Morales* would meet this definition. The gangs were said to be “largely responsible for the city’s rising murder rate, as well as an escalation of violent and drug related crimes. . . [and] the . . . presence of street gang members in public places has intimidated many law abiding citizens.”¹⁸⁵ Murders and drug crimes are obviously crimes “dangerous to human life.”¹⁸⁶ The City Council, with the assent of the citizens, through the vote in favor of the ordinance, expressed a feeling of intimidation.¹⁸⁷ Finally, the events in *Morales* took place completely within the United States (the definition of domestic terrorism only requires acts to occur *primarily* within the United States). Are all gangs then to be labeled domestic terrorists groups? Are cities such as Chicago and Los Angeles in danger of being placed under a state of emergency because of wide-spread terrorist activity? Gangs are not the only ones subject to prosecution as domestic terrorists. Criminals such as the so-called Beltway Snipers who killed several people in the Washington D.C. metropolitan area would also be subject to such prosecution. The Columbine High School shooting incident would also meet the definition of domestic terrorism. If these acts are subsumed under the Patriot Act, they will be exposed to the same Fourth Amendment violations as others within the scope of its provisions.

B. *Repairing the Patriot Act*

Since the road from the Patriot Act is paved with unchecked governmental intrusions on Fourth Amendment protections, what must be done to fix the paving? The most obvious answer is to repeal the Act and its provisions – which is the consummate act of throwing the baby out with the bathwater. Therefore, less drastic measures are required. Those measures include (1) looking to the judiciary to identify where the Patriot Act has run afoul of Fourth Amendment protections and (2) to apply the proper Fourth Amendment analysis to Patriot Act provisions. Some restructuring of the Patriot Act is required to eliminate potential abuses and to properly define terrorism.

184. 18 U.S.C. § 2331 (2006).

185. *Chicago v. Morales*, 527 U.S. 41, 46 (1999) (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 58 (Ill. 1997)) (internal quotations omitted).

186. 18 U.S.C § 2331(A) (2006).

187. *Morales*, 527 U.S. at 46.

When testifying regarding the power of the Justice Department to enforce the provisions of the Patriot Act, former Attorney General Ashcroft stated:

Congress's power of oversight is not without limits In some areas . . . I cannot and will not consult you I cannot and will not divulge the contents, the context, or even the existence of such advice to anyone - including Congress - unless the President instructs me to do so. I cannot and will not divulge information, nor do I believe that anyone here would wish me to divulge information, that will damage the national security of the United States, the safety of its citizens or our efforts to ensure the same in an ongoing investigation.¹⁸⁸

The problem inherent in that statement is the elimination of the checks and balances provided for in the U.S. Constitution. Courts will have to make a determination of the constitutionality of those practices. The Attorney General may take such a bold stance with no oversight whatsoever. Indeed, during his statements in support of the Patriot Act, Senator Leahy recognized that there were areas in which the powers of the Executive Branch to enforce the act were unclear. Speaking specifically in regards to FISA, Senator Leahy stated that "it will be up to the courts to determine how far law enforcement agencies may use FISA for criminal investigation and prosecution *beyond* the scope of the statutory definition of 'foreign intelligence information.'"¹⁸⁹ One can only hope that the judiciary carries out that same duty in regard to any of the Patriot Act provisions which grant broad leeway to law enforcement officials and result in Fourth Amendment violations.

Courts will also need to address the sections that bind their hands and either force or preclude judicial action. No court should issue warrants absent probable cause and demonstration that the warrant meets recognized exceptions. This is not the time to give law enforcement officials greater leeway; rather, it is time to reinforce the original purpose of the Fourth Amendment, limiting government action.

The other necessary action is to amend the statutes that now allow for the constitutional violations. Congress should reinstitute the requirement that foreign intelligence be the primary purpose of surveillance and warrants under FISA. Additionally, if Congress truly wishes to criminalize material support, there needs to be a nexus between the support and the terrorist act as well as a clear demonstra-

188. DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism Before the Senate Comm. on the Judiciary, 107th Cong. (2001) (Dec. 6, 2001) (written statement of the Honorable John Ashcroft, Attorney General), available at: http://judiciary.senate.gov/print_testimony.cfm?id=121&wit_id=42.

189. 147 Cong. Rec. S11004 (emphasis added) (statement of Associate Deputy Attorney General Kris).

tion of intent. This would allow the government to charge the offender as a principal and it would also provide leverage in investigations of those actually carrying out the terrorist acts. The reasonable belief standard for delaying notice of the execution of a warrant should only be allowed when considered by a magistrate. The statute should close the loophole created by *Richards v. Wisconsin*.¹⁹⁰ Closing this loophole would prevent abuse by unrestrained law enforcement agencies.

Finally, Congress must correct the definition of “domestic terrorism” so that crimes typically enforced by the states do not rise to the level of a terrorist act. In particular, the subsection that makes intimidating the general population a terrorist act requires clarification. What level of intimidation is necessary? Intimidation caused by gangs loitering on a street corner is not equal to the nationwide intimidation caused by the September 11th attacks. As the statute currently reads, both are acts of terrorism.

V. CONCLUSION

In the aftermath of September 11th, the government had the unique opportunity to extend its protection to the people within its borders. The protection was not to take the form of armed soldiers quartered in civilian homes nor was it to be a state of emergency that called for curfews or encampments. The protection was to identify and stop would-be terrorists from launching another assault against American citizens. The government crafted the Patriot Act in response to that need. Unfortunately, the practical application of the Patriot Act is not the grand proposition first presented to the American public. That sad reality coupled with the erosion of constitutional protections has left the country more vulnerable than it was before the attacks.

Now, in the aftermath of a botched legislative effort, the government once again has the opportunity to protect the people within its borders. This time, however, the protection is not from an unknown, external threat, but from our own government. This time, the physical protection of the people should not be at the cost of their constitutional protections.

190. See *Richards v. Wisconsin*, 520 U.S. 1154 (1997); see also *supra* discussion note 147.