

[give me liberty]

Surveillance State

Since September 11, a flood of federal legislation has reduced American freedom without increasing our security.

By James Bovard

PERHAPS YOU'VE VISITED your local library to keep speed with the War on Terror: borrowed a few books on Islamic fundamentalism or did web research on biochemical weapons. Beware.

Last January, an FBI agent entered a branch of the St. Louis Public Library and requested a list of all the sign-up sheets showing names of people who used library computers on Dec. 28, 2002. Even though the FBI agent did not have a warrant or subpoena, the library quickly surrendered the list of all users. The FBI acted because someone phoned in a tip that they "smelled something strange" about a library patron of Middle Eastern descent.

Welcome to America under the Patriot Act. One person claims to "smell something," and the feds can round up everyone's records. From books you check out to credit card purchases, money transfers to medications, your activities are now subject to federal surveillance. Uncle Sam now has a blank check to search and pry—all in the name of security.

Last October, then House Majority Leader Dick Arney branded our own Justice Department "the biggest threat

to personal liberty in the country." And while that characterization of a Republican Justice Department makes many conservatives cringe, the DOJ has been working overtime to expand its power—and the biggest danger may be yet to come.

When John Ashcroft was in the U.S. Senate, he was a leader in the fight to protect Americans' privacy. In an August 1997 op-ed, Ashcroft declared, "This is no reason to hand Big Brother the keys to unlock our e-mail diaries, open our ATM records, read our medical records, or translate our international communications." His early days as attorney general showed a keen appreciation for the Bill of Rights' constraints. That changed on 9/11.

Within days of the Twin Towers' collapse, Ashcroft began strong-arming Congress to enact sweeping anti-terrorism legislation—and Americans seemed ready to trade a measure of liberty to restore their shaken security. The month of the attacks, an NBC/*Wall Street Journal* poll found 78 percent willing to have Internet activity monitored. The administration took this as free rein, moving swiftly to enact the Patriot (Provide

Appropriate Tools Required to Intercept and Obstruct Terrorism) Act. Some of its provisions were simply updates to existing law. As Sen. Russell Feingold (D-Wis.), the only senator to vote against the act observed, "It made sense to stiffen penalties and lengthen or eliminate statutes of limitation for certain terrorist crimes." But the Patriot Act goes far beyond "good government" amendments.

It empowers federal agents to cannibalize Americans' e-mail with Carnivore wiretaps, allows federal agents to commandeer library records, and requires banks to surrender personal account information. It also authorizes federal agents to confiscate bulk cash from travelers who fail to fill out Customs Service forms disclosing how much money they are taking out of or into the U.S. and allows the attorney general to order long-term detentions if he has "reasonable grounds to believe that the alien is engaged in any activity that endangers the national security of the United States." Last year alone, Ashcroft personally issued 170 emergency domestic spying warrants, permitting agents to carry out wiretaps and search homes and offices for up to 72 hours before requesting a



CHRIS HERS

search warrant from the Foreign Intelligence Surveillance Court.

When privacy-minded legislators question these new powers, the Justice Department stonewalls. House Judiciary Chairman James Sensenbrenner (R-Wis.) threatened to subpoena the DOJ last summer to get information to which his committee is specifically entitled. Justice eventually divulged a few fragments of information but has refused to reveal the number of secret searches, the number of libraries whose records have been seized, and how often Carnivore e-mail wiretaps have been used. Freedom has apparently become so fragile that citizens can no longer be permitted to know how often their government invades their privacy.

Some intrusive provisions of the Patriot Act were temporary—set to expire in 2005 absent Congressional reauthorization. But Sen. Orrin Hatch (R-Utah), chairman of the Senate Judiciary Committee, recently proposed making the federal prying powers permanent.

The Wrong Response

The Patriot Act was rushed into law before any effort was made to understand why the feds failed to stop the 9/11 attacks. The government could have done a better job of tracking the terrorist suspects, but the feds had all the relevant information to detect and block the conspiracy to hijack four airplanes. The Joint House-Senate Intelligence Committee observed that the FBI's negligence "contributed to the United States becoming, in effect, a sanctuary for radical terrorists." Its investigation concluded, "It is at least a possibility that increased analysis, sharing and focus would have drawn greater attention to the growing potential for a major terrorist attack in the United States involving the aviation industry."

But the administration rewarded failure by the FBI and intelligence agencies with bigger budgets, more power, and presidential commendations. There is nothing in the Patriot Act that can solve

the problem of FBI agents who do not understand the Foreign Intelligence Surveillance Act or solve the shortage of CIA and National Security Agency employees who can read intercepted messages in the languages of prime terrorist threats. Neither does the legislation compensate for lackadaisical federal agents who failed to add promptly the names of al-Qaeda members to terrorism watch-lists or of analysts who ignored the cascading warnings of terrorists using stolen airplanes as flying bombs. The success of the 9/11 hijackers was due far more to a lack of government competence than to a shortfall in government power. Yet the Bush administration has successfully suppressed investigations and revelations of federal failures, thereby permitting Ashcroft and others to portray new government powers as the key to national safety.

The Justice Department isn't the only agency taking aim at American liberties. The Department of Transportation has compiled secret "no fly" lists of passen-

gers suspected of terrorist ties—or at least those critical of the administration. In one instance, two dozen members of a peace group, students chaperoned by a priest and nun, were detained en route to a teach-in thus missing their flight.

The Department of Defense is piling on with its Total Information Awareness program. TIA's goal is to stockpile as much information as possible about everyone on Earth—thereby allowing government to protect everyone from everything. *New York Times* columnist William Safire warned, "Every purchase you make with a credit card, every magazine subscription you buy and medical prescription you fill, every Web site you visit and e-mail you send or receive, every academic grade you receive, every bank deposit you make, every trip you book and every event you attend—all these transactions and communications will go into what the Defense Department describes as 'a virtual, centralized grand database.'" Columnist Ted Rall noted that the feds will even scan "veterinary records. The TIA believes that knowing if and when Fluffy got spayed—and whether your son stopped torturing Fluffy after you put him on Ritalin—will help the military stop terrorists before they strike."

Congress passed a law seeking to rein in TIA. The Pentagon, however, is bargaining forward, and the congressional provision specifies that if Bush formally certifies that TIA is necessary for national security, the law is null and void.

Coming Soon: Patriot II

In February, the Center for Public Integrity obtained and released an 86-page draft version of the Domestic Security Enhancement Act—quickly dubbed Patriot II. Notations on the Justice Department document—stamped "Confidential—Not for Distribution" on every page—showed that it had already been

sent to Vice President Cheney and House Speaker Dennis Hastert (R-Ill.). Justice Department spokesman Mark Corallo dismisses DSEA as a benign sequel, "filling in the holes" in the Patriot Act.

Section 101 of the proposed bill, titled "Individual Terrorists as Foreign Powers," would revise the Foreign Intelligence Surveillance Act (FISA) to permit the U.S. government to label individuals who are suspected terrorists—including American citizens—as "foreign powers" for the purpose of conducting total sur-

SECTION 106 SEEKS TO NEGATE PRINCIPLES ESTABLISHED IN THE NUREMBERG TRIALS: THAT FOLLOWING ORDERS IS NO EXCUSE FOR VIOLATING THE LAW.

veillance of their activities. This alteration nullifies all Fourth Amendment rights of the target, allowing the government to tap phones, search computers, and read e-mail—even when there is no evidence that a citizen is violating any statute. If Section 101 becomes law, the more people the feds wrongfully accuse of being terrorists, the more power federal agents will receive.

Americans suspected of gathering information for a foreign power could be subject to FISA surveillance even though they were violating no law and the information gathered did not pertain to national security. The administration's confidential explanation of proposed Section 102 notes, "Requiring the additional showing that the intelligence gathering violates the laws of the United States is both unnecessary and counterproductive, as such activities threaten the national security regardless of whether they are illegal." But, as the ACLU noted, "This amendment would permit electronic surveillance of a local activist who was preparing a report on human rights for London-based Amnesty International, a 'foreign political organ-

ization,' even if the activist was not engaged in any violation of law."

While some parts of the new bill would overturn federal court decisions, Section 106 is more visionary, seeking to negate principles established in the Nuremberg trials: that following orders is no excuse for violating the law. As proposed, it would permit federal agents illegally to wiretap and surveil and leak damaging personal information on Americans—as long as they are following orders from the president or the

attorney general. The Senate COINTELPRO investigation revealed how President Johnson and top Nixon aides personally ordered federal agents to conduct illegal surveillance of political opponents and others, though neither the FBI nor LBJ was ever held accountable. This proposal is a further attempt to make federal agents legally untouchable and could encourage law-breaking at every level of the federal government.

Section 129, entitled "Strengthening Access to and Use of Information in National Security Investigations," would empower federal agents to issue "national security letters" that compel businesses and other institutions to surrender confidential or proprietary information without a court order. Anyone hit with such a letter will be obliged to remain forever silent on the demand with disclosure punishable by up to five years in prison. The ACLU noted that this provision would "reduce judicial oversight of terrorism investigations by relegating the role of the judge to considering challenges to orders already issued, rather than ensuring such orders are drawn with due regard for the privacy and

other interests of the target." This turns the Fourth Amendment on its head by creating a presumption that the government is entitled to personal or confidential information unless the citizen or business can prove to a federal judge that the "national security letter" should not be enforced against them. But few Americans can afford the cost of litigating against the world's largest law firm—the U.S. Justice Department—to preserve their privacy.

Secret mass arrests could be the result of Section 201. The provision notes, "Although existing Freedom of Information Act (FOIA) exemptions ... permit the government to protect information relating to detainees, defending this interpretation through litigation requires extensive Department of Justice resources, which would be better spent detecting and incapacitate [*sic*] terrorists." In the wake of 9/11, the feds locked up over 1,200 "special interest" detainees and continually insisted that none of their names or details of their cases could be disclosed without endangering national survival, though federal courts denounced the secret arrests as "odious to democracy" or "profoundly undemocratic." To save the Justice Department the bother of having to defend secret round-ups, the Bush administration now seeks to amend the federal statute book to imitate repressive dictatorships around the globe.

Section 312, "Appropriate Remedies with Respect to Law Enforcement Surveillance Activities," would unleash local law enforcement to spy on Americans, nullifying almost all federal, state, and local court "consent decrees" that restrict the power of local and state police. The administration complains that such decrees result in police lacking "the ability to use the full range of investigative techniques that are lawful under the Constitution, and that are available to the FBI." But, in every case, consent

decrees were imposed after gross abuses of citizens' rights by the police. The administration draft bill explanation declares, "All surviving decrees would have to be necessary to correct a current and ongoing violation of a Federal right, extend no further than necessary to correct the violation of the Federal right, and be narrowly drawn and the least intrusive means to correct the violation." Historically, the Supreme Court has required the federal government to use the "least intrusive means" to achieve some policy in cases involving the First Amendment, in order to prevent any unnecessary restriction of freedom of speech. The administration now demands the "least intrusive" restrictions on government intrusions.

Section 402 would permit U.S. attorneys to prosecute Americans for aiding terrorist organizations even if they made donations to organizations that the U.S. government did not publicly label as terrorist groups. Yale Law School professor Jack Balkin said, "Give a few dollars to a Muslim charity Ashcroft thinks is a terrorist organization and you could be on the next plane out of this country." Robert Higgs of the Independent Institution warns that the feds "can categorize

routinely included on new computers and is commonly used for business transactions. The Justice Department thus seeks to treat use of encryption software the same way that the federal government treats gun possession—something sinister enough to justify routinely doubling or tripling prison sentences for people who violate other federal statutes, regardless of whether the gun was actually used.

Critics label Section 501 of the bill the "citizenship death penalty." Under existing law, an American must state his intent to relinquish his citizenship in order to lose it. Under this provision, intent "need not be manifested in words but can be inferred from conduct," thus empowering the Justice Department to strip Americans of their citizenship if the feds accuse them of supporting terrorism—either domestic or international. The American Immigration Lawyers Association cautions that, under this provision, "targeted [U.S. citizens] potentially could find themselves consigned to indefinite detention as undocumented immigrants in their own country."

Shortly after the text of Patriot II surfaced, the attorney general was asked at a press conference about this expansion

ROBERT HIGGS OF THE INDEPENDENT INSTITUTION **WARNS** THAT THE FEDS
"CAN CATEGORIZE THE **MOST INNOCENT ACTION**"—SUCH AS "SIGNING A
PETITION"—AS AN **ACT OF TERRORISM**.

the most innocent action"—such as "signing a petition"—as an act of terrorism.

Users of Pretty Good Privacy and other common encryption software could face greater perils from Section 404, which creates "a new, separate crime of using encryption technology that could add five years or more to any sentence for crimes committed with a computer," the ACLU notes. Encryption software is

of federal power. He refused to confirm plans formally to propose Patriot II but did declare, "Every day we are asking each other, what can we do to be more successful in securing the freedoms of America and sustaining the liberty, the tolerance, the human dignity that America represents, and how can we do a better job in defeating the threat of terrorism."

Despite Ashcroft's reassurances, resistance is building. Eighty-nine cities have passed resolutions condemning the Patriot Act, and a coalition is stretching across ideological lines to oppose it. Recently the ACLU drafted a letter to Congress and found 67 organizations from the conservative Gun Owners of America to the liberal La Raza eager to sign on. They accuse Patriot II of "new and sweeping law enforcement and intelligence gathering powers, many of which are not related to terrorism, that would severely dilute, if not undermine, basic constitutional rights."

Three months after 9/11, Ashcroft announced, "To those who scare peace-loving people with phantoms of lost liberty, my message is this, your tactics only aid terrorists for they erode our national unity and ... give ammunition to American's enemies." Ashcroft is wrong to portray any criticism of Bush administration civil liberties policies as aiding and abetting terrorism. America is overdue for a searching examination of the powers the Bush administration has seized and the powers it is seeking. ■

James Bovard is the author of the forthcoming Terrorism & Tyranny: How Bush's Crusade is Sabotaging Freedom, Justice, and Peace

STARVING ARTISTS WANTED

The American Conservative seeks politically literate illustrators for freelance work.

Send jpeg samples to
khopkins@amconmag.com

Lessons of Empire

Britain's colonies drained the Mother Country.

By Correlli Barnett

IN HER WAR WITH IRAQ, America has acted much like imperial Britain more than a century ago, when in a very different world she invaded the Sudan, killed the Dervish leader at the 1898 Battle of Omdurman, and, thanks to quick-firing artillery and machine guns, slaughtered 11,000 of his ill-armed followers on the field. This is, therefore, an appropriate moment to compare the United States as the imperial power today to Britain as an empire passed.

During the mercantilist 18th century, trade and territorial conquest advanced together, first at the expense of Holland and then of France. This dual process was exemplified by The Honorable East India Company, which, though a commercial enterprise, also ruled the British dominion in India. By the time of the American Revolution, there had evolved an Atlantic protectionist "common market" under the Union Flag, with complementary flows of commodities between the North American colonies, the West Indian sugar islands, and the Mother Country. The profits from this British Empire paid for the Royal Navy, which in turn promoted and protected the Empire's expansion.

All this changed in the Victorian era when Britain adopted free trade in place of mercantilism, and markets under the Flag lost their old pre-eminence. At the same time, evangelical religion created a new imperial ruling class who believed it their duty to civilize the native races, especially in India, "the jewel in the Crown" of Empire. The poisonous first

fruit of this attempt to impose Western values was the so-called Indian Mutiny in 1857, a violent uprising of the Indian army against its British officers and British rule as a whole, which was crushed by British troops with equal violence. Meanwhile, thanks to the Royal Navy's then mastery of the seas, British settlements had been planted in Australia and New Zealand, more than 10,000 miles from the homeland.

By the 1860s, free-trade Britain enjoyed an apparently permanent hegemony over world commerce and finance. But only two decades later this dominance came under threat from the rise of new continental-scale rivals like America and the German Empire. The response in Britain was to revive the concept of the British Empire. It was argued that in order to remain a pre-eminent world power, Britain must weld her historic rummage-bag of possessions—but especially the English-speaking colonies like Australia and New Zealand—into a single strategic and economic entity masterminded from London.

But this vision of a new oceanic superpower proved impossible to realize. The colonists overseas were swiftly growing into nations in themselves, increasingly jealous of their independence. By the Statute of Westminster in 1930, the Dominions of Canada, Australia, South Africa, and New Zealand became fully independent nations whose only formal link with Britain and each other was a monarchy in common.

By this time too, the attempt to create