



Security and Freedom After September 11

The Institutional Limits and Ethical Costs of Terrorism Prosecutions

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Abstract

Preventing terrorism is a high priority after September 11, but few studies have investigated the limitations and costs of prosecuting suspects under antiterror laws. This article examines PATRIOT Act oversight and its relationship to prosecutions. Three topics are analyzed—the Act’s origins and oversight provisions, along with major criticisms; trends in antiterrorism prosecutions and convictions; and inspector general oversight of the act—together with the ethical implications of using antiterror laws in ordinary criminal prosecutions.

What are the institutional limits of policing antiterror legislation? Does the lack of sufficient oversight built into antiterrorism law exact unanticipated costs to agencies or citizens? These questions are relevant because there has been an unprecedented accumulation of prosecutorial authority in the aftermath of September 11, but diminishing oversight by Congress and the courts (Aberbach 2008, p. 115; Johnson 2008; Ornstein and Mann 2006; Pfiffner 2008). Congressional oversight, defined as that part of the political process which lets the legislature control agency behavior (Aberbach 1990, p. 219; McCubbins and Schwartz 1984, p. 165), is an essential check in a system of separated powers (Howell 2003, p. 136; Lobel 2007, p. 62) and a key to preventing executive abuse of power.

As a result, trends established in the second Bush administration toward increased executive authority and reduced interbranch oversight have important ethical implications in regard to maintaining the integrity of criminal prosecutions commenced against suspected terrorists after September 11. Enhanced criminal law enforcement facilitates a wider range of terrorism investigations and prosecutions using preemptive rationales. Minimal oversight likewise prevents fewer checks on

executive authority, thus creating the dilemma of how to best achieve the goal of stopping terrorist acts before they occur while respecting civil rights and liberties in antiterrorism prosecutions.

The problems of governmental overreaching in the post-9/11 legal landscape are clear. The lack of oversight may negatively affect laws favoring open access and accountability (e.g., the Freedom of Information Act), or permit other laws (e.g., the Foreign Intelligence Surveillance Act and the PATRIOT Act) to be used by agencies as a generalized national security exemption that prevents the disclosure of information about how they are prosecuting the War on Terror (U.S. House of Representatives Committee on Government Reform 2004). In this regard, insufficient oversight has the potential to transform the presidency into an institutional “defender of the homeland” in national security matters, sometimes at the peril of personal freedom and other democratic values (Owens 2006, p. 294). For Donahue (2008, p. 2), ceding powers to the executive makes antiterrorism policies counterproductive because less oversight creates dysfunctional imbalances in the political state: it fosters bureaucratic inefficiencies, narrows the scope of individual liberties, and alters the fundamental relationship of citizen to government by routinely using antiterrorist laws to prosecute ordinary crimes (Donahue 2009, p. 359). These views raise the possibility that the true but uncalculated cost of antiterrorism policies lies in the adverse effect of unchecked executive power in a democracy committed to the rule of law (*ibid*).

The present study examines the origins and oversight provisions of the USA PATRIOT Act in the context of some of the major criticisms of the legislation by civil libertarians. Its presentation of empirical data showing how the act and other antiterror laws have been used in federal terrorism prosecutions of suspected terrorists is followed by an outline of the major conclusions from reports by the Justice Department’s inspector general, the principal agent tasked by Congress to monitor the act’s civil rights and liberties compliance, in order to ascertain its effect on criminal justice administration and citizen freedom. The discussion concludes with a survey of the implications, which speak to Congress’s attempt to provide meaningful and ethical limitations on the exercise and integrity of executive power in criminal prosecutions of suspected terrorists.

Origins and Oversight

This section examines the origins of the USA PATRIOT Act (the name is an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism), some of the major criticisms of the act, and Congress’s attempt to create meaningful oversight provisions in response to the criticisms.

The PATRIOT Act departs from the legal policy of “consequence management” in managing threats—that is, simply reacting to terrorist acts by identifiable state sponsors of terror (Lee and Perl 2002; McCarthy 2002, p. 441). Instead, because the enemy is unconventional and cannot be defeated under traditional law-enforcement rules, it uses preemption as a guiding philosophy to stop terrorism because “[t]here are no second chances in the campaign to prevent another September 11” (Gorman 2002, p. 3713). Under the preemption philosophy, antiterrorist policies are designed to vanquish foes as part of an ongoing military struggle. George W. Bush thus invoked his full constitutional powers as commander-in-chief and chief executive to

overcome the pre–September 11 legal constraints that dulled their exercise (Banks 2004, pp. 32–33).

Bush relied on White House advisers and legal interpretations by the Department of Justice’s Office of Legal Counsel (OLC) to bolster his presidential powers under Article II of the Constitution and expand them unilaterally (Baker 2002, p. 765). The advice the president was given favored creating a strong, unitary presidency in foreign affairs, a theory originating in the legal arguments of David Addington, a former CIA attorney, and then-congressman Richard Cheney. Both men drew on those constitutional principles to produce the Minority Report of the Congressional Committee investigating the 1987 Iran–Contra Affair. The report maintained that

Congress, and not President Reagan, had weakened the country’s foreign policy by disrupting the president’s decision to divert monies to the Nicaraguan Contras in a secret arms deal with Iran (Goldsmith 2007, pp. 87–89; U.S. House of Representatives

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1988). Cheney, then chief of staff to President Gerald Ford, embraced Addington’s belief that the modern presidency had been damaged in the post-Watergate era (Suskind 2007). During the G. W. Bush administration, he sought to restore it to its rightful place in national security affairs—an approach that took root in other legal arguments establishing the president’s constitutional rights to use executive privilege, presidential signing statements, aggressive interrogation techniques on detainees, warrantless searches without interference from the Foreign Intelligence Surveillance Court, and the decision to invade Iraq (Fisher 2007; Goldsmith 2007; Savage 2006).

As framed by legal interpretation, the PATRIOT Act encapsulates the notion of protecting order through law, a principle put into the legislation by Deputy Attorney General Viet Dinh (2005). Dinh was one of the law’s chief architects in the early stages of the legislative process (Gorman 2002). The nature of the crisis operationalized the rule while accelerating the legislative process. After declaring a war on terror and invoking his constitutional powers within three days after the attacks, President Bush, Attorney General John Ashcroft, and Dinh began an intense congressional behind-the-scenes and public campaign to rewrite antiterrorism law. The initial spirit of compromise and bipartisanship in drafting it was soon replaced by enormous administration pressure to broker a deal with Congress that greatly and quickly centralized law-enforcement power in the executive branch (Howell 2004; O’Harrow 2002). Amid growing concerns among civil libertarians over the speed with which the antiterrorism package was moving, in late September Ashcroft appeared briefly (and for the only time) before the House and Senate Judiciary Committees to lobby in support of the administration’s proposal. At both hearings he reiterated the need to act quickly, while offering little defense of the specifics of the legislation and its civil liberty ramifications. At the same time, Vice President Cheney conveyed to Republican leaders that he wanted Congress to finish its work by October 5 (Howell 2004, pp. 1158–1162).

By mid-October, pressure from the Department of Justice and the White House worked in conjunction with the Afghanistan invasion (October 7) to encourage the Senate and House to pass separate versions of the bill (S. 1510; H.R. 2975, as amended by H.R. 3108). These took shape as the final version of the bill after intense

bipartisan negotiations and compromises that extended the legislative process to the end of the month. Many of the ordinary protocols that ensure complete congressional deliberation, including full committee review, extended debate on the floor, and a joint conference to reconcile the differences between the House and Senate bills, were truncated or bypassed altogether. The final bill, H.R. 3162, was ratified by the House of Representatives by a vote of 357 to 66, and then approved by the Senate 96–1. President Bush signed the USA PATRIOT Act on October 26, 2001, a mere six weeks after September 11 (Farrier 2007, p. 94).

While the act had sunset provisions designed to eliminate some of its most controversial surveillance provisions in 2005, the law substantially changed a host of existing statutes and legal procedures governing domestic law enforcement, foreign intelligence, immigration and border control, antiterrorist funding, and individual privacy rights (Mailman et al. 2002). For Whitehead and Aden (2002), Cole and Dempsey (2002), and civil libertarians (Leone and Anrig 2003), the law had a negative impact on civil rights and liberties. The legislation contributed to this perception by reducing oversight, not only in the way it was legislatively created but also in how it was to be administered (Rudalevige 2005, p. 245). A brief summary of the act's most controversial provisions, and how they changed existing law, illustrates the complexity of the antiterrorism policy it fostered and the consternation it caused for opponents.

By expanding statutory definitions of domestic terrorism and increasing punishments for such activities, the law centralizes executive authority by allowing the unfettered capture and prolonged detention of a wider class of citizens or immigrants who have not engaged in terrorist acts, a possibility that implicates associational First Amendment and due process rights (Cole and Dempsey 2002, pp. 153–156). Traditional constitutional principles of Fourth Amendment searches—which require the issuance of warrants based on probable cause and advance judicial review—were relaxed by new sections of the PATRIOT Act amending the 1978 Foreign Intelligence Surveillance Act (FISA) and a plethora of privacy laws regulating government wiretaps, Internet usage, and other electronic surveillance methods in domestic and foreign intelligence investigations, including those permitting sneak-and-peek (i.e., delayed notification) warrants, national security letters (administrative subpoenas issued on agency certification only), roving wiretaps (allowing searches on the person instead of the device being used), and trap/trace or pen register taps (monitoring incoming and outgoing phone information) (Whitehead and Aden 2002, pp. 1101–1113). The FISA amendments, which regulate securing *ex parte* government wiretap applications issued from a secret Foreign Intelligence Surveillance Court (using a less rigorous standard of probable cause in foreign intelligence matters), expand the possibility of executive misfeasance by allowing FISA to be used in criminal investigations unrelated to foreign intelligence or terrorism activities (Mailman et al. 2002, pp. 8–9).

The revisions to pre–September 11 law, including one affecting Fifth Amendment self-incrimination rights by permitting foreign intelligence information derived from grand jury investigations to be shared with federal law enforcement or intelligence officials, helped topple the wall between domestic and foreign intelligence agencies, perceived by many as a principal cause of the failure to prevent the tragedy (Banks 2004, p. 35; Whitehead and Aden 2002, pp. 1113–1115). Bringing down the wall, which had originally been created as a barrier to prevent executive abuses of

power in criminal and intelligence investigations (Cole and Dempsey 2002) enabled federal officials to gain unprecedented access to personal, consumer, and business information, but with few checks or balances (Sullivan 2003, pp. 136–137). Critics saw these and other provisions of the PATRIOT Act as compromising personal liberties by increasing executive power in terrorism investigations that are not carefully monitored (in advance or otherwise) by Congress or the courts (Etzioni 2004, pp. 69–72).

Congress's minimal role in establishing, or conducting the means for performing, adequate oversight in regard to the design and implementation of the PATRIOT Act is illustrated by how it handled its review of the legislation after 2001. Aberbach (1990) reports that legislative hearings to monitor the activities of the executive branch are an oversight mechanism that allows Congress to respond to perceived abuses of executive authority (1990, pp. 41, 194). Yet, few specific PATRIOT Act hearings were held until the reauthorization process began shortly before 2005. The act's legislative history shows that the House and Senate held only two hearings up until September 2004 (Rudalevige 2005, p. 245). Rudalevige's (2005, p. 245) observation that "Little oversight was expected—or accepted—in the process" of reviewing how the law was administered is confirmed by other independent data. Only 39 percent of the hearings specifically named the law as the cause of oversight review; and the bulk (88%) of the hearings were part of the reauthorization process in the 109th Congress, the last legislative session before the time the sunset clauses were set to expire.¹ This may be explained by Congress's ambivalence in asserting itself against the executive in times of exigency, especially when the same party controls Capitol Hill and the White House (Farrier 2007; Johnson 2008; Rudalevige 2005, pp. 245–246). While many hearings concerned the act indirectly, less than half of the total hearings (45%) were held in the 107th and 108th Congresses. This may be seen as indicating that the assembly was more interested in ratifying its existing antiterror policy than in reforming it.

Even so, between 2003 and 2005 Congress sponsored a few bills increasing oversight (Farrier 2007, pp. 94–95). In the Senate, the Patriot Oversight Restoration Act and the SAFE (Security and Freedom Ensured) Act were introduced. The House considered several amendments to appropriation bills designed to limit sneak-and-peak and other FISA searches. Still, Congress ceded further powers to the White House with its enactment of the Intelligence Reform and Terrorism Prevention Act (IRPA) of 2004. This act established the new post of director of national intelligence and expanded FISA searches over lone-wolf terrorists. Also, with the USA PATRIOT Reauthorization and Improvement Act of 2005 Congress made permanent fourteen of sixteen expiring search-related sunset provisions of the original law; and it extended for another four years the sunset for conducting FISA roving wiretaps and business records searches, as well as for lone-wolf terrorist-related searches (Farrier 2007; Yeh and Doyle 2006).² These gains were offset, somewhat, by Reauthorization Act provisions that instituted more congressional and judicial oversight over roving-wiretap orders, business record searches, and national security letter requests (administrative subpoenas for select e-mail, financial, and business records) (Yeh and Doyle 2006).

On balance, the period leading up to the reauthorization process indicates that Congress did not put enough controls on the executive administration of antiterrorism laws when it had the opportunity to do so (Farrier 2007, p. 96). Such lost chances

are historically the norm. Since the 1970s, few legislators have assumed a more proactive “guardian” role in implementing national security reform in the executive branch (Johnson 2008). To illustrate, both President Bush, at first through executive order, and later Congress, through the 2004 IRPA, acted on the 9/11 Commission’s recommendation to create an executive oversight board to monitor abuse of civil liberties in the course of applying antiterrorism policy (9/11 Commission 2004, pp. 394–395). The Privacy and Civil Liberties Oversight Board’s purpose was to report to the president and Congress any abuse of freedom in carrying out terrorism laws. Yet the board was neither fully staffed nor funded until legislation was signed in August 2007, the time when Congress actually implemented the 9/11 Commission recommendations (Relyea 2008).³

Arguably, a more significant provision of oversight was provided by Congress through the PATRIOT Act reauthorization statutes. Under these laws, the Department of Justice’s inspector general is obligated to make regular reports to Congress about how the act is being administered by federal officials. The inspector general has authority, for example, to conduct performance audits in regard to how agencies use their expanded powers to conduct searches with national security letters (a form of administrative subpoena issued by the FBI that does not get advance judicial approval) or, similarly, searches involving business records that implicate privacy interests (U.S. Department of Justice, Federal Bureau of Investigation 2006; Yeh and Doyle 2006). The inspector general reports will be analyzed after a discussion of trends in antiterrorism prosecutions and convictions.

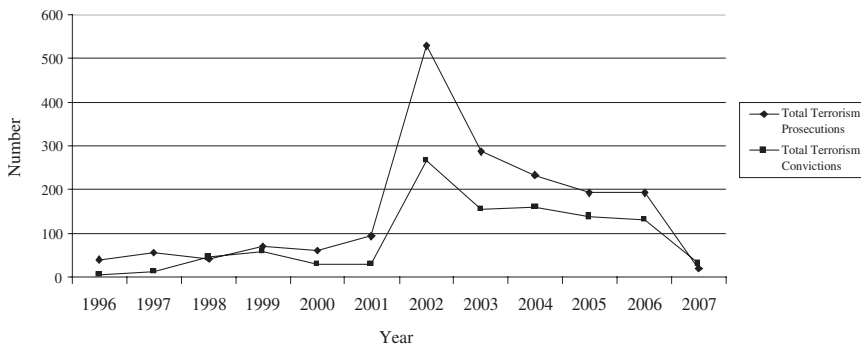
Trends in Antiterrorism Prosecutions and Convictions

This section presents empirical data showing how the USA PATRIOT Act and other antiterror laws have been used in federal antiterrorism prosecutions against suspected terrorists since September 11.

A consideration of the law’s purpose is important in understanding the manner in which antiterror legislation is legally administered by federal officials. Whether the goal of stopping terrorists through a preemptive strategy is achieved may be discovered by analyzing PATRIOT Act terror-related prosecutions and convictions. Yet identifying prosecutions that qualify as PATRIOT Act cases or terrorism cases in general is problematic. The act amended multiple statutes relating to criminal enforcement, immigration control, border protection, antiterrorist funding, and other areas (Mailman et al. 2002). Researchers acknowledge that “there is no ready, comprehensive list of terrorism prosecutions” because different government agencies, such as the Justice Department’s Executive Office for United States Attorneys or the Administrative Office of U.S. Courts, report the data underlying terror classifications differently (Zabel and Benjamin 2008, p. 31; see also The Center on Law and Security 2007, 2008a, 2008b; Dalmer 2005; Eggen and Tate 2005; Transactional Records Access Clearinghouse 2007). Nonetheless, a fair assessment of the leading sources of prosecution and conviction data may indicate that the classifications are not as important as seeing what trends the data establish. In other words, distinct patterns emerge from the data and reveal how post–September 11 antiterrorism laws are legally administered by prosecutors. Three sets of data are discussed in order to identify the general pattern of prosecutions under antiterror laws.

In response to the G. W. Bush administration’s public claims that it convicted

Figure 1
Total Terrorism Prosecutions & Convictions, 1996–2007

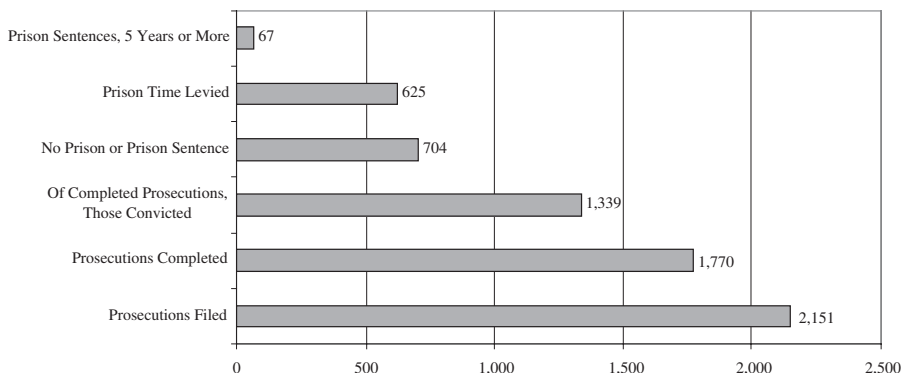


more than 50 percent of terrorism suspects, the *Washington Post* found that there was no link to terrorism in more than half of the cases, whereas less than a fifth had terrorism or national security convictions.⁴ Instead, the bulk of convictions were for less serious, nonterrorism offenses including making false statements, violating laws relating to travel documents, and conspiracy, racketeering, or immigration violations. The median sentence imposed, too, was only eleven months. On balance, the media studies plausibly infer that whereas a higher proportion of those charged and convicted of terrorist acts were from Al-Qaeda (66%), more than half (55%) of prosecution charges brought, and 85 percent of convictions, were unrelated to terrorism. In defending their work, government officials argued that a demonstrated link to terrorism is inconsequential because it serves the public interest to use prosecutorial discretion preemptively in the post-9/11 era. (“A Case-by-Case” 2005; see also Eggen and Tate 2005).⁵

Syracuse University’s Transactional Records Access Clearinghouse (TRAC) corroborates identical trends, but its analyses are more nuanced. Figure 1 juxtaposes the total number of terrorism prosecutions and convictions between 1996 and 2007. It shows that the number of prosecutions and convictions spiked sharply after 9/11; but the rate of each returned to the levels first recorded in 1996. Also, with the exception of three years (1998, 1999, and 2007) the rate of prosecutions significantly outpaced the number of convictions. The TRAC analysis (March 19, 2007) reveals another pattern: In the past five years, prosecutions and convictions precipitously declined for international and terror-financing cases, but the rates remained significantly elevated for domestic cases. The TRAC analysts saw these findings as anomalous because domestic and terror-financing cases dominate the government’s terrorism enforcement priorities in spite of official statements suggesting that stopping the threat against international terrorists is a high priority in the War on Terror (Transactional Records Access Clearinghouse 2007, pp. 2, 4).⁶

Figures 2 and 3 provide a more detailed assessment of domestic and international terrorism prosecution trends in reference to “antiterrorism program activities,” an enforcement category the Justice Department created after 9/11. Figure 2 concerns criminal-enforcement activity of federal terrorism and antiterrorism programs between 2001 and 2006. It shows that a large number of filed prosecutions were offset by a diminishing number of completed prosecutions and actual terrorism offense convictions. Likewise, slightly more than half of convictions from completed pros-

Figure 2
Criminal Enforcement of Federal Terrorism
and Anti-Terrorism Programs, 2001–2006



ecutions did not result in prison time. Very few of those convicted were punished for serious criminal violations by sentences of five or more years.⁷ The data in Figure 3 capture analogous trends in criminal enforcement of international terrorism laws.⁸

Data trends from New York University Law School’s Center on Law and Security mirror the patterns visible in the TRAC and media studies (The Center on Law and Security 2007, 2008a, 2008b). Between September 11, 2001, and April 1, 2008, the center reports, slightly less than a third of suspected terrorist defendants were actually charged with terrorism crimes; conversely, almost three-fifths were charged with other crimes. Of completed terrorism trials, there was a relatively high rate of conviction; but an even higher rate for conviction exists for trials relating to other crimes (The Center on Law and Security 2008b).⁹ The center’s latest report card (2008a) suggests that the increasing trend of higher convictions for terrorism charges can be explained by the government’s strategy of using antiterrorist-funding laws more aggressively, and, significantly, taking advantage of nonterrorism statutes to prosecute suspected terrorists.

Multiple reasons explain the prosecution and conviction trends. The shift to a preemption law-enforcement rationale caused changes in the way Federal Bureau of Investigation field agents and prosecutors handled cases. In a manner similar to the PATRIOT Act, the Justice Department’s Ashcroft Guidelines strengthened the operative rules of law enforcement procedure.¹⁰ Under the guidelines, in a break with pre-9/11 protocols, field agents have the authority to use more invasive search techniques to stop terrorist suspects from committing illegal acts before they happen. Likewise, under the act and other antiterrorism laws, prosecutors are vested with enhanced legal powers that give them more discretion to bring more terrorism suspects into court through a “net widening” strategy under which they can be charged with an array of crimes (Shields, Damphousse, and Smith 2009, p. 136). This, in turn, gives prosecutors more opportunities to leverage plea bargains and obtain guilty pleas. The results are striking: In the new post-9/11 legal environment, the number of prosecutions and convictions has spiked, but nearly half the cases have no link to terrorist groups or ideologies (Shields, Damphousse, and Smith 2009, p. 134).¹¹ On the one hand, supporters of the preemption approach argue that

it adeptly prevents terrorist acts before they occur; on the other hand, detractors claim that more suspects are coerced into convictions on less serious charges that are unrelated to terrorism.

Justice Department Inspector General Oversight

This section summarizes the major conclusions from the Justice Department inspector general reports statutorily required by Congress in order to provide oversight and monitor PATRIOT Act civil rights and liberties compliance by executive agencies.

Executive agencies have inspector generals (IGs) charged with monitoring agency practices for abuse, waste, and fraud. As described by IG Glenn A. Fine, “the mission of [Office of Inspector General] is to prevent and detect fraud and abuse in government programs and operations, and to improve the economy, efficiency, and effectiveness of agency operations” (U.S.

Department of Justice, Office of Inspector General 2007e, p. 2). As independent bodies, they have “the right of access to all agency documents, the ability to subpoena documents outside the agency, the authority to conduct investigations and reviews that are in the judgment of the Inspector General neces-

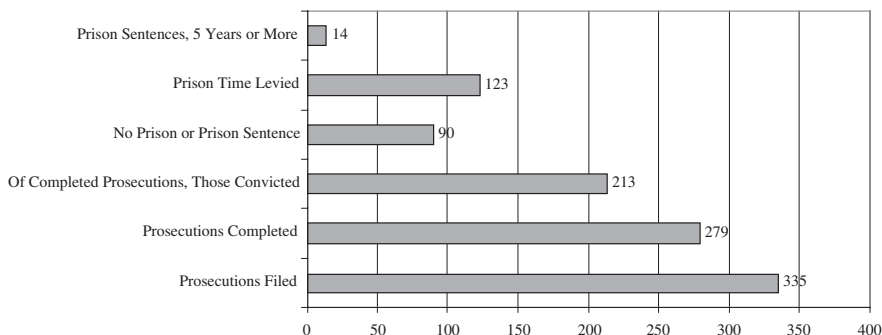
sary, and the right to have direct access to the agency head” (ibid.). The degree of oversight they exercise is significant in evaluating the effect of increasing executive power in fighting the War on Terror. Hence the Justice Department inspector general reports are analyzed to identify the nature and scope of PATRIOT Act enforcement actions, especially as to whether antiterror legal administration creates bureaucratic dysfunction or constricts the scope of citizen liberties (Donahue 2009, p. 359). Three matters of inquiry are explored: the management of terrorism statistics, the filing of civil rights and liberties complaints pertaining to enforcement of the PATRIOT Act, and the issuance of national security letters and business record orders under the act.

Executive management of terrorism statistics is an issue because of allegations that President Bush misled Congress and relied on inaccurate figures to inflate the government’s successes in fighting terrorism, sometimes for the purpose of justifying larger budget requests (Dalmer 2005; Eggen 2006; Eggen and Tate 2005; U.S. General Accounting Office 2003, p. 1). As a result, at least nine IG audits pertaining to terrorism reporting were performed between 2003 and 2005, and others were done independently by the Senate Judiciary Committee in the same time period (U.S. Department of Justice, Office of the Inspector General 2007c, p. 6 n. 17; 2007d, p. 8 n. 21). In its February 2007 audit, the IG found that the Justice Department’s collection and reporting of terrorism statistics was “decentralized and haphazard,” leading to the overstating, and understating, of prosecution-related data. Due to the lack of internal controls, the agency could not provide support for the numbers or identify the terrorism link used to categorize the reported statistics as terrorism-related (2007c, pp. 10–14).

The IG expressed concern about the Justice Department’s use of terrorism data for budget requests and to justify increased powers to prosecute terrorism cases. In FY 2006, it observed, the agency procured \$3.6 billion for counterterrorism activities, almost a 400 percent increase from its FY 2001 appropriations of \$737 million.

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Figure 3
Criminal Enforcement of Federal Terrorism
International Terrorism Program, 2001–2006



While the IG acknowledged the agency’s rationale of pursuing a “prevention through prosecution” law-enforcement policy (2007c, p. 19; Eggen 2006), it nonetheless supplied several illustrations underscoring the consequences of employing faulty and unreliable data. The propensity to misclassify cases meant, in practice, that the individuals counted as “terrorists” included, in actuality, (1) an Iranian national and pathological liar convicted of giving false statements; (2) a state worker convicted for conspiring to procure driver’s licenses for money; (3) a Bosnian national convicted for fraudulently obtaining a commercial driver’s license; (4) a person convicted for fraudulently arranging marriages between U.S. citizens and Tunisian nationals; and (5) a Mexican national convicted of falsely claiming he was a U.S. citizen in order to obtain employment (U.S. Department of Justice, Office of the Inspector General 2007c, pp. 18–19, 44, 48).

Additionally, the IG tested a sample of conviction statistics used by the FBI—only 39 percent of the cases had a proven link to terrorism, and only 9 percent of the convictions were under a terrorism law (U.S. Department of Justice, Office of the Inspector General 2007c, p. 18). In another instance, in a budget request to Congress the FBI’s Counterterrorism Division overstated the number of terrorist threats it tracked in FY 2004 (by 450 events, of a total of 4,490 reported threats), primarily because they were duplicated multiple times (*ibid.*, p. 27). Similarly, in budget requests for three fiscal years, the Executive Office of U.S. Attorneys inaccurately reported the number of terrorism cases filed and terminated, along with the frequency of allegedly terrorism-related defendants, defendants tried, prosecutions, convictions, and acquittals (*ibid.*, pp. 34–68). These examples and others corroborate the media and TRAC studies implying that the Bush administration manipulated faulty statistics to gain public support for antiterrorism initiatives.

Apart from analyzing terrorism statistics, after 9/11 the Office of Inspector General filed multiple biannual reports with Congress pursuant to its duty to investigate and report allegations of civil rights and liberties abuses by executive officials charged under Section 1001 with enforcing criminal law under the PATRIOT Act (U.S. Department of Justice, Office of Inspector General 2007e, p. 2). Likewise, the USA PATRIOT Improvement and Reauthorization Act of 2005 (Reauthorization Act) requires the IG to assess the FBI’s use of two other controversial PATRIOT Act provisions: the FBI’s power under Section 505 to issue national security letters without a court order, and the agency’s Section 215 authority to get *ex parte* business

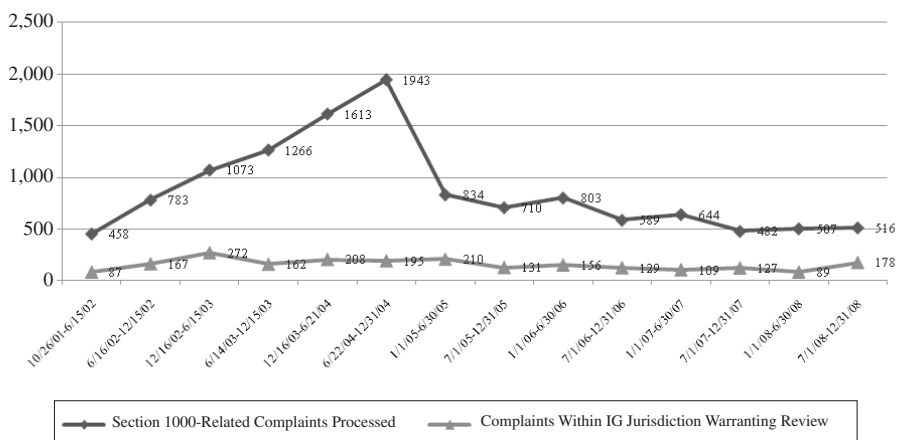
records from third parties, as issued by the Foreign Intelligence Surveillance Court. The official Section 1001 statements are best read in conjunction with four separate March 2007 and 2008 IG reports relating to national security letters and business records because they shed light on the dynamics between meaningful oversight and the USA PATRIOT Act's impact on freedom.

Figure 4 documents more than 12,000 Section 1001 complaints filed between September 11, 2001 and December 31, 2008. The total number of complaints rose sharply up to the end of 2004, but then (for reasons that are not apparent) the rate leveled off in the last three years. No more than 2,220 complaints, or 18 percent of the total, warranted further review. The balance (not shown in the table) were "unrelated" complaints, which include matters falling outside IG jurisdiction (and referred to another agency) or not meriting further action because they were deemed frivolous. Of the 18 percent requiring additional IG action, the majority were referred elsewhere because they involved "management" issues (e.g., complaints relating to prison conditions, allegations that the FBI did not investigate possible abuse). The agency often could not substantiate the complainant's allegations in management-type cases. The complainants tended to be Muslims who claimed religious discrimination by prison officials (e.g., not being allowed to pray in the prison library) and personal harassment (e.g., prison staff cursing at inmates or referring to select inmates as "Bin Laden," "towel-heads," or "terrorists") (U.S. Department of Justice, Office of the Inspector General 2005a). Only a small percentage of the total complaints filed, in the IG's estimation, justified extended administrative treatment.

While the overall percentage was small, the complaints inviting greater IG scrutiny illustrate how the act is applied; and they shed light on whether it causes abuse in specific high-profile cases. These cases raised such issues as whether the FBI was properly following FISA search protocols against domestic advocacy groups or political protesters; as, for instance, whether the FISA search of Brandon Mayfield, a U.S. lawyer, caused the FBI to conclude wrongfully that he was responsible for the March 2004 train bombings in Madrid (U.S. Department of Justice, Office of the Inspector General 2005a, 2006a). Other subject matter reviewed include whether the NSA terrorist surveillance program was administered properly, whether there was abuse of material witness warrants, and whether the FBI acted properly in regard to the abuse of military detainees held at Guantanamo Bay and in Iraq (U.S. Department of Justice, Office of the Inspector General, 2006a). While many discrete complaints went unsubstantiated, the IG occasionally found significantly substantive Section 1001 problems or violations, as in the Mayfield wrongful identification case, or, in another instance, involving the body cavity search of a wrongfully arrested male Egyptian national that was performed in the presence of a female member of the correctional staff (U.S. Department of Justice, Office of the Inspector General 2006a, p. 12; 2006b, p. 7).

The FBI's enhanced PATRIOT authority to employ national security letters (NSLs), either as "requests" or "exigent letters," has garnered special IG attention. Included in at least five laws over the past twenty years, NSLs are direct written requests, or administrative subpoenas, issued by the FBI in national security investigations to get customer records from third-party financial and communication providers without court order. Before 9/11, an NSL was legally valid if a senior FBI official certified that there were specific reasons to believe that the records being sought were from a foreign power or its agent. This standard, thought to be too

Figure 4
Section 1001 PATRIOT ACT Complaints Reviewed by Inspector General



unwieldy and slow in fighting terrorists after 9/11, was significantly altered by the original PATRIOT Act’s Section 505 (Banks 2009, pp. 94–95).

Conceived as a sunset provision to expire in 2005, but reauthorized thereafter, Section 505 eliminated the foreign power requirement and allowed NSLs to be issued by special agents in charge of FBI field offices if they could certify that the information sought was relevant to a foreign intelligence investigation. Once issued, post-PATRIOT Act NSLs, which often include multiple requests for information from different customers, could secure histories of telephone calls and e-mail records (calls made, billing records, e-mail addresses, screen names, subscriber and payment information), financial information (account, safe deposit, and transaction information), and consumer credit information (including full credit reports in international terrorism cases) from telephone companies, financial institutions, Internet providers, and consumer credit agencies, all without judicial oversight. The FBI took full advantage of its expanded authority. Whereas in 2000 the FBI issued only about 8,500 NSL requests, in 2003 it issued 39,346; in 2004, 56,507; in 2005, 47,221; and, in 2006, 49,425, for a total of 192,499 NSL requests in a four-year period (U.S. Department of Justice, Office of the Inspector General 2008a, p. 9).

In its March report (2008a, p. 107), the IG tracked NSL usage for 2006 and discovered that the “overwhelming majority” of requests were directed at gaining telephone toll billing information, subscriber information (telephone or e-mail), or e-transactional records under the Electronic Communications Privacy Act (ECPA) NSL statute. Banking information, derived from banks, credit card companies, and finance companies, including open and closed checking and savings accounts, along with consumer credit reports, was also frequently targeted for disclosure. Of these figures, the IG reported (2008a, pp. 111, 112) that nearly 60 percent of the 2006 NSL requests were related to investigations of U.S. persons, a sharp uptick, and nearly double the rate, from the number of NSLs issued in 2003. Over the same period, requests directed at non-U.S. persons declined from 2003 (10,232) to 2004 (8,494) and leveled off to about the same rate in 2005 (8,536) and 2006 (8,605).

Although it acknowledged that NSLs were an important law-enforcement tool to develop leads and evidence in foreign intelligence cases, the IG concluded that between 2003 and 2005 there were multiple intelligence violations regarding NSLs,

including (1) issuing them without proper authority, (2) applying for them under the wrong statutes, (3) collecting telephone and Internet records without authorization, (4) misuse, in nearly 700 instances, of “exigent letters,” which are expedited information requests issued before NSLs on an emergency basis, and (5) NSLs issued in violation of internal protocols and rules, including the revised Attorney General Guidelines (U.S. Department of Justice, Office of the Inspector General 2007a). In its follow-up report (2008a, p. 11), the IG found that the FBI made good-faith efforts to correct these deficiencies, but nonetheless discovered at least eighty-four possible intelligence violations involving NSLs in 2006, thirty-four of which required disclosure to the president’s Intelligence Oversight Board.

In contrast, in two separate March 2008 and 2007 analyses the IG inspected how the FBI implemented Section 215 business-record orders (U.S. Department of Justice, Office of the Inspector General 2008b, 2007b). Under this section, the FBI was given increased powers to seek a FISA order to get access to virtually any record, document, or book from any type of business, even if not connected to a foreign power, so long as there is FBI certification that the information is linked to a foreign intelligence investigation. Despite its broad sweep, the IG found far less abuse (two instances, of a total of 163 business-records FISA requests) than with NSLs in investigations between 2002 and 2005, while in 2006 it found no illegal use of the forty-seven Section 215 applications and orders (U.S. Department of Justice, Office of the Inspector General, 2008b, p. 5). But, in both reports, the IG also determined that the use of Section 215 was hampered and made ineffectual by legal, bureaucratic, and procedural problems within the agency, such as not being able to process the requests on a timely basis, or FBI field offices failing to understand how Section 215 procedures could be utilized effectively (U.S. Department of Justice, Office of the Inspector General 2007b, 2008b). In conjunction with the NSL findings, the oversight business-records report illustrates that federal officials do not have adequate internal training or protocols in place to safeguard against agency abuse of civil rights and liberties in two different, highly controversial, areas of executive power under antiterrorism law.

The inspector general reports and the trends established in the prosecution and conviction data support the argument that national security agency officials have taken full advantage of the new powers given them under the PATRIOT Act. As Donahue (2008, p. 2) predicted, for example, the law is becoming part of the framework of ordinary criminal law prosecutions; but the increasing rates of arrests show that the law has mostly targeted nonterrorists. There is also evidence showing that the new law has caused internal disruption within law-enforcement agencies in their fervor to keep the nation safe after 9/11, and that zeal has exacerbated the tendency to abuse the rights of those brought under the scope and application of the act.

On balance, it is plausible that the haste with which Congress created the law, and extended the new powers to the executive branch (without additional measures of oversight built in to control agency behavior), contributed to what was probably an unintended consequence of the law’s application in the legal War on Terror. The oversight provided by Congress and studied here, namely the requirement to use inspector generals to report to the legislature about how the law is administered, is valuable insofar as it sheds light on the nature of the problem at hand—but it does little to fix the underlying difficulties associated with the initial legislative behavior of so hastily ceding expansive powers to the executive.

Conclusion

The USA PATRIOT Act and its preemption rationale bolstered agency and prosecutorial power to investigate, arrest, and prosecute suspected terrorists after September 11. The minimal oversight exercised by Congress and the executive branch underscores that the legal administration of antiterror laws has exacted the cost of organizational dysfunction in the management of terrorism statistics and applying agency discretion in the fight against terrorism (as illustrated by the aggressive use of national security letters and other invasive searches). Moreover, increasing prosecutorial discretion and widening the net of possible charges against defendants has allowed the special character of antiterrorism investigations to become an ordinary part of the criminal process, a trend that is potentially threatening to defendant rights and broader democratic values. Critics are likely to see these developments as having the effect of diminishing the freedom of ordinary citizens; but supporters probably will counter that they legitimately protect public security.

In light of these views, the administration of antiterror laws registers the inherently ethical dilemma of trying to strike an appropriate balance between security and freedom. Reconciling the interests of public safety and private liberty necessarily involves the ability to retain a meaningful commitment to preserving the integrity of criminal justice administration in the post-9/11 legal landscape. The shift in law-enforcement priorities compels agencies and prosecutors to make defensible moral judgments that weigh the competing harms of widening the preemptive net of law enforcement and taking the risk of not stopping acts of terrorism before they occur, if they opt for less aggressive antiterrorism tactics.

Such decisions ask for practical answers to moral questions like “Is it better to stop fifty potential terrorists who are bent on inflicting mass casualties rather than detaining only a few or one innocent suspects [*sic*] through aggressive and invasive use of antiterror laws?” (Dershowitz 2009, p. 23). The impracticality of knowing whether the right choice is made—and whether the prevention of harm in any given case is best achieved through preemptive law-enforcement strategies instead of deterrence—compounds the problem further. In this light, whatever balance or compromise is achieved among competing interests depends on whether the front-line decisions made by agencies and prosecutors best accord with democratic values, such as preserving the rule of law or ensuring full deliberation and accountability (Dershowitz 2009, p. 29). Adherence to these ideals probably is the best defense against making the wrong ethical choices in the fight against terrorism, further underscoring the ongoing need to achieve effective oversight of executive decisions.

NOTES

1. Congressional Information Service, “Legislative History of P.L. 109–177” (USA PATRIOT Improvement and Reauthorization Act of 2005, 6 CIS PL 109177),” (derived from Academic LexisNexis search performed on December 4, 2008; on file with author).

2. Congress voted on retaining the remaining sunset provisions in 2009. Those provisions are: the PATRIOT Act’s powers to grant roving wiretaps on unnamed suspects; to compel broad disclosure of documents relative to the library records power; and, as per the Intelligence Reform and Terrorist Prevention Act of 2004, to permit surveillance of lone-wolf terrorists unaffiliated with any group or foreign nation (Emery 2009).

3. While Congress appears to have received at least three reports from the board (two annual reports and one issue report on terrorism watch lists, see Relyea 2008, CRS-8), there is no evidence that Congress or the Obama administration has received any reports from the board (see, e.g., Privacy and Civil Liberties Oversight Board 2009).

4. Of 330 Department of Justice prosecutions over a three-year period, there was no “demonstrated connection” to terrorism or terrorist groups in 180 cases (55%); and 142 (43%) had a “demonstrated relationship” to a terrorist group. Of 305 total convictions, forty-six defendants (15%) were convicted of terrorism or national security crimes; but of ten different terrorist organizations, twenty-three (66%) of thirty-five persons from Al-Qaeda were charged and were convicted (“Case-by-Case” 2005; see also Eggen and Tate 2005).

5. The *Post* data and identical media studies (Dalmer 2004, 2005) are constrained by missing and ambiguous data that defies precise definition or classification. Case files, for example, were released to the media but redacted; or case files were reported and counted by the government as prosecution successes, but these data were not part of the base dataset originally released to the media, as in the 2005 *Post* study (Eggen and Tate 2005). Furthermore, compiling accurate statistics was complicated by political and logistical factors. For example, for two years after 9/11 the Justice Department intentionally relaxed its record-keeping practices while simultaneously broadening what counted as a terrorism-related investigation, prosecution, or crime in order to justify antiterrorism PATRIOT Act budget requests (Dalmer 2005).

6. TRAC is a research center affiliated with the communications and management schools at Syracuse University. It uses data released by federal agencies under the Freedom of Information Act. Much of the TRAC data reveals how the Executive Office of U.S. Attorneys administratively recorded the frequency of what the Justice Department classified as domestic and international terrorism events. For instance, “domestic terrorism” is composed of violent or otherwise dangerous acts, arising from intent to coerce, intimidate, or retaliate against a government or civilian population; occurring primarily within the United States, and not involving a foreign terrorist organization. “International terrorism” was similar, but those applied to non-U.S. events transcending national borders and involving a terrorist organization. After 9/11, the DOJ added a third classification, “terrorism financing,” classification consisting of acts directed at providing material support or resources to foreign terrorist organizations (Transactional Records Access Clearinghouse 2007, p. 3).

7. Of 82% of completed prosecutions, 62% were for terrorism convictions; about 52% of convictions from completed prosecutions yielded no prison time; and, only 5% were punished with longer sentences.

8. Of 83% of completed prosecutions, 76% resulted in convictions and only 42% received no prison time; 7% were punished with longer prison sentences. Also, a comparison of domestic and international cases shows that there were slightly higher rates of enforcement for international terrorism cases; however, it remains unclear whether those differences were due to more aggressive pursuit of those types of cases or because there were fewer cases in the sample. Furthermore, the September 4, 2006, TRAC report provides insight about a cohort of prosecution referrals involving international terrorism that began two years after 9/11 and continued to May 2006. For the cohort, among the total of 1,391 recommended international terrorist suspect prosecutions, only 335 (24%) were filed. Over a five-year period, prosecutors declined to file charges against 748 (54%); of those charged, 213 (64%) were convicted and 90 (43%) received no prison time. Of prison sentences levied, only 14 defendants (11%) were punished for five years or more. The median sentence for all 213 convictions was 28 days (Transactional Access Clearinghouse Center 2006, p. 5).

9. The Center on Law and Security is a New York University Law School research center. Using datasets organized from the Justice Department and other public sources, it analyzed 204 terrorist trials between September 11, 2001, and April 1, 2008. It found that 32% of terrorism suspects were charged under terrorism statutes; whereas 68% were charged with other crimes. Of 118 completed terrorism trials, 69% were convictions;

whereas 92% (328 trials) were obtained from trials relating to other crimes (The Center on Law and Security 2008b).

10. The Federal Bureau of Investigation uses two sets of attorney guidelines to investigate domestic and international acts of terrorism. The international set is classified; the domestic set, most recently called the Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations, are rules governing the initiation and scope of terrorism investigations. After 9/11 the Ashcroft Guidelines (named after then-attorney general John Ashcroft) changed prior rules and represented a more proactive approach to investigating, arresting, and prosecuting terror suspects before acts of terrorism occur (Shields, Damphousse, and Smith 2009, pp. 127, 130).

11. Shields, Damphousse, and Smith (2009, pp. 134–138) discussed terrorism prosecutions and convictions in a database categorizing the cases under the rubrics “event-linked” (i.e., defendant linked to terrorism group or ideology and indicted on charges relating to an act of terrorism), “pretextual” (i.e., defendant linked to terrorist group or ideology, but charged with crimes not directly related to an act of terrorism), and “diffusion” (i.e., defendant neither linked to a group or ideology; nor charged with a crime related to an act of terrorism) cases. As compared with zero indictees before 9/11, 79 of 167 defendants were indicted in diffusion cases post-9/11, with a 95% conviction rate. A majority of the charges filed pertained to immigration fraud and financial fraud crimes.

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