

The War on Terror vs. The 4th Amendment

Young Patriots Essay Contest

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February 19, 2016

The war on terror has led to perhaps the greatest national security threats that the United States has ever faced. As a direct result of this conflict, the Patriot Act was passed in 2001, stepping up surveillance efforts and the abilities of the National Security Agency (NSA) and Federal Bureau of Investigation (FBI) to combat domestic terrorism.



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Provisions of the Patriot Act are still in effect today, demonstrating how global terrorism has had a marked effect on the surveillance abilities of the government. Since the terrorist attack of 9/11, the United States has been more prepared to prevent and counter terrorism than ever before. The FBI has not only collected, but has used, more intelligence in the years since 9/11 than in all years prior. (Mueller) The Patriot Act enabled the organization to remove obstacles to the collection and combination of intelligence that had been in place before 9/11. (FBI) After 9/11, the FBI established new procedures for intelligence collection, creating a broader data collection program and the Intelligence Basic Course to teach agents the new program. (FBI) This clearly demonstrates that the FBI, along with other intelligence-collecting agencies, is more vigilant than ever.

In addition to the efforts made in the United States as a reaction to increased global terrorism, the increased threat alone is justification that government surveillance should adapt to the changing world. Since 1997, almost 5 times as many Foreign Terrorist Organizations (FTO's) have been added to the State Department's Bureau of Counterterrorism's (CT) official list than have been removed. (CT) The CT definition for an FTO

is a foreign organization that engages in terrorist activity or terrorism or has the ability and intent to and that threatens the national security of the United States. (CT) The Global Terrorism Index for 2015 showed that the deaths from terrorism worldwide increased 80% from 2014, from 18,111 to 32,685 deaths. (IEP) Additionally, from 2013 to 2014, 5 more countries experienced a terrorist attack and there was a 120% increase in the countries that experienced more than 500 deaths, from 5 to 11. (IEP) These statistics show the alarming rise of global terrorism. It is therefore justifiable to say that global terrorism should have an impact on the way surveillance is conducted in the United States.

Global terrorism has caused a revolution in the way our government looks at surveillance, and this has everything to do with the 4th Amendment. While the threat of global terrorism should promote changes in the way our government conducts surveillance, it should in no way influence any changes to our interpretation of the privacy rights of American citizens guaranteed in the 4th Amendment. As Neil M. Richards asserted, a foundation of the American political system is the government "protecting individuals' rights to... private consultation with confidants." (Richards) In addition, our government should strive to establish a surveillance system that satisfies both the need for better surveillance brought on by global terrorism and the provisions of the 4th Amendment. Better surveillance and protection of privacy are not incompatible. Rather, a

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surveillance system that satisfies both these requirements is quite possible. With a system like this in place, for which the government has already taken steps to establish, it will be possible for government to fulfill its essential duty, “to protect our liberty, without unnecessarily violating that liberty in the process”, as defined by Roger Pilon and Richard A. Epstein. (Pilon and Epstein)

The 4th Amendment guarantees “the right of the people to be secure... against unreasonable searches”. (LII) According to the Legal Information Institute from Cornell Law School, electronic surveillance has been established as a type of search by judicial precedent. (LII) The courts decided what constitutes a search because it was left undefined by the 4th Amendment. Therefore, Americans are protected from electronic surveillance without “reasonable cause”, because electronic surveillance is a search. This inclusion of electronic surveillance as a search regulated by the 4th Amendment is becoming more important as electronic surveillance is increasingly the method of choice for government collecting surveillance. Electronic surveillance has become the most debated and controversial method since former NSA contractor Edward Snowden released classified documents regarding the NSA’s mass phone data collection program in 2013. The issue soon caused a lot of trouble for the NSA, which was castigated for conducting unwarranted surveillance, a violation of the 4th Amendment. This was the eventual catalyst for the renewed controversy over safety vs. privacy.

The current surveillance system relies on blanket collection of data that lacks focus and specifications. Before Congress passed the USA Freedom Act in June 2015, shutting down

the NSA’s bulk metadata collection program, the NSA tracked nearly every American cell phone by issuing orders to all the major cell phone providers, including Verizon, that forced them to release to the NSA all their metadata. (Mornin) The NSA also collected bulk phone records using indiscriminate methods like collecting all data from a zip code with no probable cause. (HJC) This in itself is a blatant violation of the 4th Amendment. This type of surveillance, in addition to being unconstitutional, is inefficient. As Colonel Allen B. West suggested, this policy is like “instead of focusing on a small stack of needles... we needed to dump a big pile of hay... on top”. (West) This type of data collection is inefficient because it provides a lot of unnecessary information that just takes up space. In fact, it is dangerous because it allows for more error in identifying threats. Daniel Byman and Jeremy Shapiro echoed the same sentiment, saying that “For intelligence services, often the problem is not in accessing or gathering the data, but in processing, analyzing, and following up on it”. (Byman and Shapiro) An official they quoted also said “The data are buried in a mountain of data,” (Byman and Shapiro) again reflecting the idea that this blanket surveillance is creating a “needle in the haystack” dilemma. This change in interpretation of the 4th Amendment is wrong because it violates essential principles of the Amendment and because it is inefficient as well.

The USA Freedom Act was finally a step in the right direction. It prohibited indiscriminate large scale data collection, (HJC) effectively requiring that any large scale data collection program would be required to conduct “trend analysis” (West) in order to identify patterns of risk and people who fit those patterns. This technique greatly reduces the number of possible

suspects and makes it easier for government to do its job ensuring our security from terrorism. In addition, it also upholds the freedoms of privacy guaranteed by the 4th Amendment. Trend analysis surveillance ensures that all surveillance is conducted with probable cause and not indiscriminately, which violates the 4th Amendment. After the USA Freedom Act was passed, the NSA replaced its mass metadata collection program with a “targeted, narrowly-tailored call detail records authority” that conducts surveillance with far more specifications (HJC), requiring suspects to fit into not only identity-based trends but also behavior-based trends. This type of trend analysis that includes actions as trends helps mitigate fears of racial, religious, or gender profiling. This type of development in surveillance is the one our government needs in order to keep Americans safe while upholding the 4th Amendment.

Evan Fitchett is the first place winner of the Young Patriots Essay Contest.

Citations are available upon request.