

The Missing Debate



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The response of any administration to the devastating attacks that took place on September 11, 2001, would have been swift and sweeping—and unconditionally supported by virtually every citizen. The attacks also could have served as a trigger for the creation of an unprecedented international response, a grand global coalition encompassing most of the civilized world in a battle against terrorism.

Yet looking back, we can see that the federal government has squandered much of this potential for broad international support and for domestic bipartisanship. Instead, there is ample evidence that September 11 became a springboard for an ideologically driven unilateralism in global affairs and for an aggressive radical domestic agenda. This policy revolution occurred despite the fact that Americans strongly prefer a less divisive approach to international affairs and national security, as embodied in the familiar phrase “politics stops at the water’s edge.”

Despite the significance of recent policies, debate about the nation’s course has been slow to develop. While the quantity of discussion has increased sharply, it continues to fall far short of what would be expected and justified by the scope of recent foreign policy.

THE PATRIOTISM OF QUESTIONING THE GOVERNMENT’S ACTIONS

The problem is evident if we consider just one category of recent policies, those that could have significant and lasting impacts on the civil liberties of American citizens. Perhaps this issue has remained below the media’s radar screen because so much attention has been centered upon the continuing consequences and costs of the war and post-war in Iraq. Perhaps another factor is the federal government’s overt efforts to discourage and even intimidate those who wish to debate its policies.

There is nothing unpatriotic or even counterproductive about questioning a government's actions. History teaches us that bypassing public deliberation almost inevitably leads to outcomes that the nation ends up regretting. Looking back, there is long list of reactions to other threats in which the absence of open debate coincided with many of the nation's low points. During the twentieth century, the Palmer raids after World War I, the internment of Japanese Americans during World War II, the Bay of Pigs fiasco, Iran-Contra, the secret war in Honduras, and any number of other ventures went badly astray. Public deliberation entails controversy that can be painful and time consuming, but it often prevents bad ideas from taking hold while broadening support for policies that are implemented.

For months following the September 11 attacks, however, politicians, the press, and citizens remained off balance, unable to resume the normal rough and tumble of democracy. Still today, we as a nation continue to digest the dramatic alteration of the world. We were sure before September 11 that the United States was the unchallenged global economic leader—the preeminent nation, without conventional military rivals, that was culturally and politically admired and imitated.

Perhaps the specific actions taken by the federal government should have come as no surprise. Key officials were quick to put forward their own longstanding beliefs about greater government secrecy, less fettered law enforcement, military activism, and unilateral aggressiveness in international affairs as exactly the right remedies for the new threat. Indeed, the Patriot Act that the executive branch authored, and that Congress passed almost entirely intact, was among the most far-reaching and invasive legislation since the Espionage Act of 1917 and the Sedition Act of 1918. Other measures that the federal government put forward—sometimes only as trial balloons—went even farther.

The Patriot Act permits federal investigators to look at individuals' retail purchases, Internet searches, e-mail, and library usage, all without notification. It allows the U.S. attorney general to detain immigrants based on "suspicion," requires businesses to report "suspicious transactions," allows the government to conduct secret searches without notification, grants the Federal Bureau of Investigation and other agencies greatly expanded access to all sorts of personal and business data with little judicial oversight, and allows for surveillance of any number of domestic organizations and advocacy groups.

Despite the many new powers the Patriot Act grants, many experts doubt whether it will actually succeed in reducing terrorist activity. While the act permits the government to collect vast amounts of information, it does not provide the agencies involved the resources required to analyze it. As New York University law professor Stephen Schulhofer has observed, "a large part of what we lack [already] is not raw data but the ability to separate significant intelligence from 'noise'."

While the American Civil Liberties Union, the American Library Association, the Electronic Privacy Information Center, and other privacy and civil liberties

groups tried to prevent the historic changes in civil liberties embodied in the Patriot Act from becoming law in the heat of the moment, their efforts went virtually unnoticed. Even those members of Congress traditionally known as strong voices in favor of civil liberties said little about the legislation. The executive branch launched an aggressive campaign on behalf of enactment, implying that anyone opposing the Patriot Act could be considered soft on terrorists, the message of which echoed President Bush's comment after September 11: "You are either with us or with the terrorists."

Substantial debate of federal government policies did not take place for nearly two years following the terrorist attacks. Perhaps the simple passage of time since the attacks greatly contributed to the opposition's newly found voice. However, the effect of an increasing number of reports about the adverse impacts of recent policies combined with the determination of the executive branch to pass additional legislation that would infringe on Americans' civil liberties should not be overlooked.

The Department of Justice, for example, has announced that it might monitor conversations between attorneys and detainees. The attorney general rewrote FBI guidelines to allow agents to monitor all political, religious, and advocacy groups without any evidence of wrongdoing and to make it easier to monitor Internet activity. He reversed the policy underlying the Freedom of Information Act that required agencies to begin with the presumption that information should be publicly available. In addition, male immigrants already legally in the United States from twenty different countries, mostly Arab and Southeast Asian, now are required to register with the INS, regardless of their status. Those who fail to register are subject to fines, entry in the National Crime Information Center database, and possible deportation. In the process, the federal government detained almost 1,200 men, the vast majority for immigration violations, and refused to release their names or any other information about them. Some have been deported, others have been released, but several are still incarcerated.

In June 2003, the Justice Department Office of the Inspector General released a comprehensive 198-page report detailing the treatment of hundreds of additional Muslim men who were detained in the days immediately following September 11, and exposing a number of abuses committed by the department and the FBI in the wake of the terrorist attacks. The report's findings raised concern not only among immigrants' rights activists and civil libertarians but also among members of Congress and the media, something not even the passage of the Patriot Act was able to accomplish.

Of the 762 detainees, only Zacarias Moussaoui (who was already in custody before September 11) ultimately was charged with terrorism. The detainees were held in prison for long periods without being charged. Many were held secretly, unable to contact family members or seek counsel. There was evidence of mistreatment and, in Brooklyn, cases of physical abuse. Even upon release, it took the FBI on average

eighty days to clear the names of the detainees, making it virtually impossible for the men to live in their communities without suspicion. Yet the federal government has maintained it had done nothing wrong. The Justice Department argued that its actions were necessary in the war against terrorism and announced that the Justice Department “makes no apologies” for the treatment of the detainees.

A similar pattern of detention without prosecution has emerged regarding the detainees in Guantanamo Bay, Cuba. While the U.S. government has said that the detainees have connections to terrorist organizations, none of them has been charged with terrorism. In fact, the only people at the camps who have been charged are an American government translator and a chaplain.

THE THREAT OF A SECOND PATRIOT ACT

The growing doubt surrounding federal antiterrorism policies has not slowed a push for increased power to pursue terrorism suspects. There is support in many circles for an expansion of the Patriot Act, an endorsement for a Patriot Act II. Patriot Act II would grant the Department of Justice and law enforcement officials even greater powers of search and surveillance than those offered by the original Patriot Act. If passed, this legislation would:

- Severely restrict public access to information about those who have been detained, making it prohibitively difficult, if not impossible, for family members, the media, and even attorneys to determine detainees’ status or location.
- Increase the FBI’s ability to obtain a search warrant as well as expand its wire-tapping privileges, both with little court supervision. In many cases, an FBI agent would be able to obtain a search warrant by simply telling a secret court that he suspects an individual of planning terrorism. The agent would not have to provide any supporting evidence of this claim, and the individual likely would never know that a search warrant had been filed against him, that his phones had been tapped, his e-mail read, or his house and belongings searched.
- Amend the Freedom of Information Act to prevent any information about aliens who are being investigated for terrorism from being released. Such measures would cripple further immigrants’ rights in the United States and threaten journalists’ ability to provide detailed and accurate reporting.

While conservatives claim that such efforts are necessary to prevent future terrorist attacks, scholars such as Schulhofer question whether this level of secrecy actually would improve national security.

These actions have caused a stir among members of Congress. In contrast to their prior silence, members of both parties have reacted vocally and negatively to news of a possible second, even more far-reaching piece of legislation. Ironically, it was the discovery of the secretly drafted Patriot Act II, in large part, that facilitated the only serious, sustained debates in Congress about provisions in the *original* Patriot Act.

The number of members of Congress questioning the recent antiterrorism policies has grown. Some have introduced legislation that would limit executive branch authority. Among the issues debated is the longevity of the Patriot Act itself. As established in the original act, approximately half of the provisions will expire in December 2005 if Congress does not renew them. Among the laws scheduled to sunset are the FBI's expanded wiretapping authority and an increased ability to acquire business records in intelligence investigations.

Perhaps more important than the individual provisions, the sunset clause represents a limit on government's power. By requiring that these measures be reenacted after a defined period, Americans are offered some form of assurance that key provisions will last only as long as the emergency—or at least be automatically reconsidered after enough time elapsed to review their costs and benefits.

Yet even this effort to ensure basic checks and balances has not taken place without a battle. Some conservatives do not see the Patriot Act as a wartime provision and have proposed making permanent all laws included under the Patriot Act. Unlike the first time around, bipartisan opposition by key members of Congress to such a measure has ensured that, at least for now, the existing sunset provisions will stand.

OUTRAGE OVER THE POINDEXTER TERRORISM FUTURES MARKET

In 2003, a new debate arose, this time a result of the discovery of Admiral John Poindexter's plans for a terrorism futures market. Poindexter, then director of the Pentagon's Defense Advanced Research Projects Agency, had begun developing a system that would enable anonymous investors to place bets on when and where future acts of terrorism would take place. Not only was the executive branch aware of the project, but it even had requested \$8 million toward its development. In addition to a poorly thought-out idea that was doomed to fail, the concept was unethical at best and considered morbid and deeply disturbing by many. While some government officials, including Admiral Poindexter, defended the idea as an innovative use of futures markets and market forces, the majority of Congress and the American public were outraged and disgusted. Within days of the news leak about the program, the White House officially put an end to further work in the area and Poindexter resigned.

THE WISDOM OF “MR. REPUBLICAN”

These events have somewhat strengthened the position of civil liberties advocates. Unfortunately, the American public remains remarkably quiet. While 62 percent of Americans feel that the FBI's policies may be intrusive, an overwhelming majority (79 percent) think that investigating threats, even if it results in a loss of privacy, is more important right now than respect for privacy (18 percent). Americans also trust government more today than just a few months before the September 11 attacks. According to a Gallup poll, in May 2001 52 percent of Americans thought that the U.S. government had so much power as to pose an immediate threat to Americans' rights and freedoms. Yet on the two-year anniversary of the September 11 attacks, only 39 percent thought government had become too large and powerful.

The American public, in large part, is still unsettled. The avalanche of events dominating the media and private conversation—the anthrax attacks, Afghanistan, the “shoe bomber,” the Washington area sniper attacks, North Korea, frequent color-coded changes in the nation's security level, the war and post-war in Iraq, and suicidal terrorist attacks in many nations—have caused fear and confusion to linger. The nature and complexity of current threats, both real and imagined, inevitably strengthen the argument for continuation of the policies of recent years.

In the current circumstances, however, we might all learn something from the man who was known as “Mr. Republican.” Speaking less than two weeks after Pearl Harbor, Ohio Senator Robert A. Taft said, “As a matter of general principle, I believe there can be no doubt that criticism in time of war is essential to the maintenance of any kind of democratic government. Too many people desire to suppress criticism simply because they think it will give some comfort to the enemy. If that comfort makes the enemy feel better for a few moments, they are welcome to it as far as I am concerned, because the maintenance of the right of criticism in the long run will do the country maintaining it a great deal more good than it will do the enemy, and it will prevent mistakes which might otherwise occur.”

Those words ring true today. Clearly, we have much to talk about: a difficult conflict in Iraq, ongoing instability in Afghanistan, continued failure to locate our most dangerous foes, constraints on liberty and legal due process at home, and even a new readiness to condemn as disloyal those who raise questions. Americans often seek entertainment as much as enlightenment in their consumption of political information, but that appetite can be hazardous to the national health. We need to know more; we need to subject our policies to the most rigorous tests of debate and investigation; and we need to seek to reconstitute the all-too-fleeting unity of purpose at home and abroad that existed in the immediate aftermath of September 11. It will be an enormous undertaking—and it is one that depends upon the engagement of all of us if it is to succeed.

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