

"Why Should We Care? It's Only the Constitution"

By Nat Hentoff

"Precisely because the need for action against the scourge is manifest, the need for vigilance against excess is great. The first, and worst, casualty will be the precious liberties of our citizens."

—Justice Thurgood Marshall

Two nights after the September 11 attack, the Senate swiftly, by voice vote after thirty minutes of debate, attached to a previously written appropriations bill an amendment making it much easier for the government to wiretap computers of terrorism suspects without having to go to various courts to get multiple search warrants. The bipartisan bill was introduced by Senator Orrin Hatch, Republican of Utah, and Dianne Feinstein, Democrat of California. "Terrorism" was not defined.

That was the beginning of the steamroll. Now Attorney General John Ashcroft has gotten his way with his originally titled Anti-Terrorism Act of 2001, which coolly contradicted the earnest assertions of the President and the Secretary of Defense that necessary security measures would not violate our fundamental liberties because our freedom is what we are fighting for. The final legislation passed the Senate on October 25 by a vote of 98 to 1, with only Russ Feingold, Democrat of Wisconsin, dissenting. In the House, the bill passed 356 to 66.

The new law will permit government agents to search a suspect's home without immediately notifying the object of the search. In J. Edgar Hoover's day, this was known as a

"black bag job." The FBI then never bothered to get a search warrant for such operations. Now, a warrant would be required, but very few judges would turn a government investigator down in this time of fear. Ashcroft's "secret searches" provision can now extend to *all* criminal cases and can include taking photographs, the contents of your hard drive, and other property. This is now a permanent part of the law, not subject to any "sunset" review by Congress.

Ashcroft also asked for roving wiretaps—a single warrant for a suspect's telephone must include any and all types of phones he or she uses in any and all locations, including pay phones. If a suspect uses a relative's phone or your phone, that owner becomes part of the investigative database. So does anyone using the same pay phone or any pay phone in the area.

Ashcroft neglected to tell us, however, that roving wiretaps already became law under the Clinton Administration in 1998. At that time, only Congressman Bob Barr, Republican of Georgia, spoke against it in Congress, while the media paid little attention to this brazen attack on the Fourth Amendment.

But Ashcroft demanded and received a radical extension of these roving wiretaps: a one-stop *national*

warrant for wiretapping these peripatetic phones. Until now, a wiretap warrant was valid only in the jurisdiction in which it was issued. But now, the government won't have to waste time by having to keep going to court to provide a basis for each warrant in each locale.

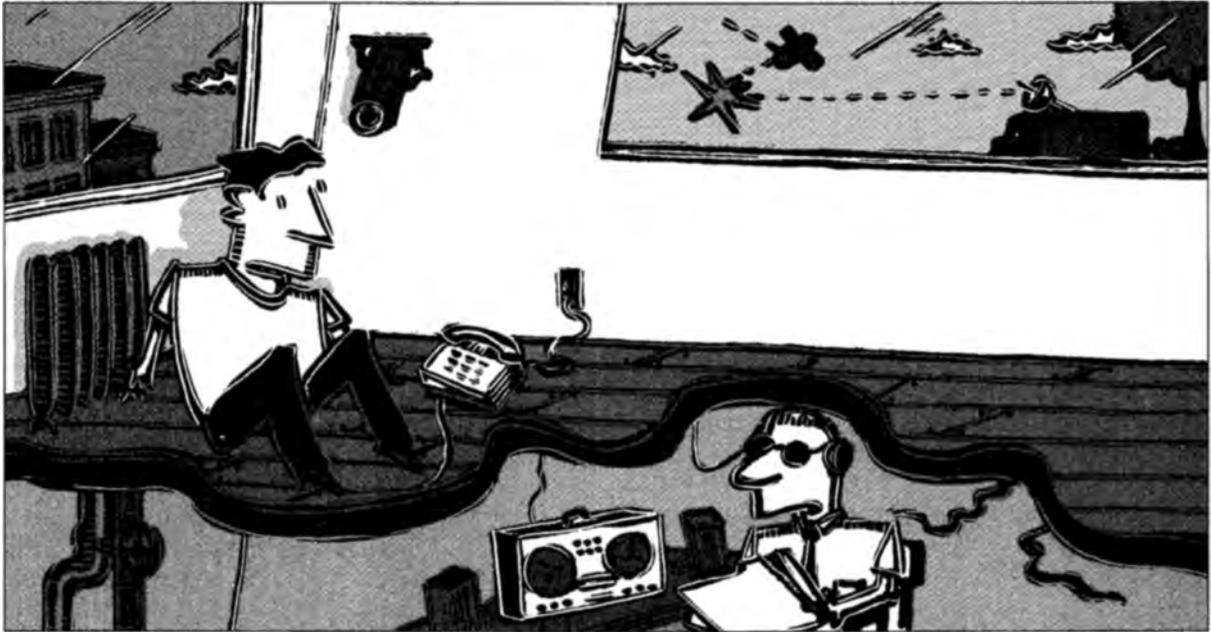
The expansion of wiretapping to computers, and thereby the Internet, makes a mockery of Internet champion John Perry Barlow's 1996 "Declaration of the Independence of Cyberspace":

"Governments of the industrial world, on behalf of the future, I ask you of the past to leave us alone. . . . You have no sovereignty where we gather . . . nor do you possess any methods of enforcement we have true reason to fear. Cyberspace does not lie within your borders."

This government invasion of cyberspace fulfills the prophecy of Justice Louis Brandeis, who warned, in his dissent in the first wiretapping case before the Supreme Court, *Olmstead v. United States* (1928), "Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."

This has come to pass. The government now has access to bank records, credit card purchases, what has been searched for on the Internet,

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and a great deal more for those who have “supported,” or are suspected of, terrorism.

Moreover, as Brandon Koerner, a fellow at the New America Foundation, has pointed out in the *Village Voice*, the bill that Congress passed so hastily on the night of September 13—and is now part of the law—“lowers the legal standards necessary for the FBI to deploy its infamous Carnivore surveillance system.” Without showing—as the Fourth Amendment requires—probable cause that a crime has been committed or is about to be committed, the government invades what’s left of your privacy.

The fearful name “Carnivore” disturbed some folks, and so it has been renamed DCS1000. Carnivore, Koerner notes, is “a computer that the Feds attach to an Internet service provider. Once in place, it scans e-mail traffic for ‘suspicious’ subjects which, in the current climate, could be something as innocent as a message with the word ‘Allah’ in the header.” Or maybe: “SAVE THE FOURTH AMENDMENT FROM TYRANTS!” Carnivore also records other electronic communications.

There was resistance to the assault

on the Bill of Rights. In Congress, such previously unlikely alliances between Maxine Waters and Bob Barr, Barney Frank and Dick Armey, helped hold back Ashcroft’s rush to enact his anti-terrorism weapons within a week, as he had demanded. In the Senate, Patrick Leahy, chairman of the Judiciary Committee, also tried to allow some deliberation, but Majority Leader Tom Daschle usurped and undermined Leahy’s authority. Leahy ultimately caved and declared the law signed by Bush on October 26 “a good bill that protects our liberties.”

The House Judiciary Committee did pass by a 36-to-0 vote a bipartisan bill that restored some mention of the Bill of Rights to Ashcroft’s proposals. But, late at night, that bill was scuttled behind closed doors by Speaker of the House Dennis Hastert and other Republican leaders, along with emissaries from the White House.

As a result, on October 12, the House, 337 to 39, approved a harsh 175-page bill that most of its members had not had time even to read. David Dreier, chairman of the Committee on Rules, often seen being smoothly disingenuous on television,

said casually that it was hardly the first time bills had been passed that House members had not read.

Democrat David Obey of Wisconsin accurately described the maneuver as “a back-room quick fix,” adding mordantly: “Why should we care? It’s only the Constitution.”

And Barney Frank made the grim point that this subversion of representative government was “the least democratic process for debating questions fundamental to democracy I have ever seen. A bill drafted by a handful of people in secret, subject to no committee process, comes before us immune from amendment.”

Among those voting against the final bill were: Barney Frank, John Conyers, David Bonior, Barbara Lee, Cynthia McKinney, John Dingell, Jesse Jackson Jr., Jerrold Nadler, Melvin Watt, and Maxine Waters. Unaccountably, Bob Barr voted for the bill.

But House Judiciary Committee Chairman James Sensenbrenner, as reported on National Public Radio, assured us all that this steamrollered bill did not diminish the freedom of “innocent citizens.”

Providing, of course, that the presumption of innocence holds.

Also late at night, on October 11, the Senate, in a closed-door session, attended only by Senate leaders and members of the Administration, crafted a similar, expansive anti-terrorism bill that the Senate went on to pass by a vote of 96 to 1. Only Russ Feingold, a Wisconsin Democrat, had the truly patriotic courage to vote against this attack on the Bill of Rights that the President and the Secretaries of State and defense have said we are fighting for.

As Feingold had said while the Senate was allegedly deliberating the bill, "It is crucial that civil liberties in this country be preserved. Otherwise I'm afraid terror will win this battle without firing a shot." (See sidebar.)

In essence, the new law will, as *The Wall Street Journal* noted, "make it easier for government agents to track e-mail sent and web sites visited by someone involved in an investigation; to collect call records for phones such a person might use; and to share information between the Federal Bureau of Investigation and the Central Intelligence Agency."

Until now, the CIA was not legally allowed to spy on Americans. Also, previously secret grand jury proceedings will now be shared among law enforcement and intelligence agencies.

In addition, the new law subverts the Fourth Amendment's standards of reasonable searches and seizures by allowing anti-terrorism investigations to obtain a warrant not on the basis of "probable cause," as has been required in domestic criminal probes, but on the much looser basis that the information is "relevant to an ongoing criminal investigation"—not just terrorism.

The new law has a "sunset clause," requiring it to be reviewed after four years to determine if these stringent measures are still needed. But before this collusion in reducing our liberties was effected, George W. Bush had assured us that the war on worldwide terrorism will be of indeterminate

length. A Congress that so overwhelmingly passed this anti-terrorism bill is hardly likely to expunge parts of it in four—or more—years. And even if it did, evidence gathered in the first four years could be used in prosecutions after that.

In self-defense, all of us should be interested in how terrorism is defined in this historic legislation. As summarized by the ACLU, the language in the final bill said: A person "commits the crime of domestic terrorism if within the U.S., activity is engaged in that involves acts dangerous to human life that violate the laws of the United States or any State, and appear to be intended to: 1) intimidate or coerce a civilian population; 2) influence the policy of a government by intimidation or coercion; or 3) affect the conduct of the government by mass destruction, assassination, or kidnapping." (Note the words: "appear to be intended to" and "intimidate.")

Considering the loose language of the first two provisions, the ACLU points out that "this over-broad terrorism definition would sweep in people who engage in acts of political protest if those acts were dangerous to human life. People associated with organizations such as Operation Rescue and the Environmental Liberation Front, and the World Trade Organization protesters have engaged in activities that should subject them to prosecution as terrorists."

Furthermore, "once the government decides that conduct is 'domestic terrorism,' law enforcement agents have the authority to charge anyone who provides assistance to that person, even if the assistance is an act as minor as providing lodging. They would have the authority to wiretap the home of anyone who is providing assistance."

"Assistance" includes "support." So, contributions to any group later charged with domestic terrorism—even if the donor was unaware of its range of activities—could lead to an investigation of those giving "support."

The Bush Administration and its allies in Congress are confident of continued public backing of these anti-terrorism measures, and other incursions into what is left of the Bill of Rights. As James Madison prophesied: "Wherever the real power in a Government lies, there is the danger of oppression. In our democracy, the real power lies in the majority of the Community."

After the terrorist attacks on September 11, poll after poll has shown that 70 or more percent of Americans are willing to give up some of their freedoms in order to stay free.

In all the news and commentary so far, little attention has been paid to the fact that before September 11, the majority of Americans had little knowledge of their own rights and liberties, to begin with. So what do they have to fear now, losing what is guaranteed to them under the Bill of Rights and the rest of the Constitution, let alone care about what happens to the rights of others?

In a survey conducted by the Freedom Forum's First Amendment Center, Americans were asked: "To the best of your recollection, have you ever taken classes in either school or college that dealt with the First Amendment?"

Forty-seven percent of the respondents answered "No." As I can attest from many years of visiting schools, including graduate schools, such classes, when they exist, are quick and superficial. As for the rest of the Bill of Rights, in classes at Columbia and NYU *graduate schools of journalism*, eyes have glazed when I ask what's in the Fourth Amendment or, for that matter, the Fifth, Sixth, and Eighth Amendments.

As for the First Amendment—and the right to criticize the government is never more fundamental than in a period of justified national fear of a nearly invisible enemy—consider these results of the First Amendment Center's "State of the First Amendment" 2001 survey released on July 4

of this year.

Seventy-one percent believe "it is important for the government to hold the media in check." Only 24 percent strongly agree that "people should be allowed to display in a public place art that has content that may be offensive to others."

How about art that severely condemns the President's war on terrorism?

There's more. Only 53 percent strongly agree that "newspapers should be allowed to publish freely without government approval of a story."

Again, this survey was taken months before the killings at the World Trade Center and the Pentagon.

And, only 57 percent agree strongly that "newspapers should be allowed to criticize public officials."

As Judge Learned Hand once said, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."

We and the Constitution have survived the contempt for the Bill of Rights in the Alien and Sedition Acts of 1798; Abraham Lincoln's suspension of habeas corpus, and the jailing of editors and other dissenters during the Civil War; Woodrow Wilson's near annihilation of the First Amendment in the First World War; and the "Red Scares" of 1919 and the early 1920s when Attorney General A. Mitchell Palmer and his enthusiastic aide, J. Edgar Hoover, rounded up hundreds of "radicals," "subversives," and "Bolsheviks" in thirty-three cities and summarily deported many of them. And we also survived Joe McCarthy.

This will be one of our severest tests yet to rescue the Constitution from our government. Benjamin Franklin has been quoted a lot lately: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

There are teach-ins taking place on whether reciprocal killing in this war

will make us secure. Teach-ins were a key factor in generating opposition to the Vietnam War. But an even more fundamental subject for teach-ins, on and off campuses, is essential now. And that subject, of course, is how all of us on all sides can remain free—now that we finally know how much John Ashcroft has won in his evisceration of the Bill of Rights.

Across the land, with flags flying, what George W. Bush has called

"Operation Enduring Freedom" is being trumpeted. But in a little noted publication of the Worcester County, Massachusetts, Bar Association, James Van Buren, president of the association, said, without flourish: "Preserving our freedoms is the only sure way to thwart the terrorists' goal."

He is among the minority that James Madison hoped would secure the Constitution in times of danger. Mr. Van Buren needs support. ♦

"That Country Wouldn't Be America"

(Editor's Note: On October 11, the Senate voted 96 to 1 in favor of an anti-terrorism bill that severely infringes on our civil liberties. The only Senator to vote against it was Russ Feingold, Democrat of Wisconsin. What follows is an excerpt from his floor statement that day. On October 25, the Senate voted on the final version of the bill. This time, it was 98 to 1, with Feingold again the odd man out.)

There is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country where the police were allowed to search your home at any time for any reason; if we lived in a country where the government is entitled to open your mail, eavesdrop on your phone conversations, or intercept your e-mail communications; if we lived in a country where people could be held in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, the government would probably discover and arrest more terrorists or would-be terrorists, just as it would find more lawbreakers generally.

But that wouldn't be a country in which we would want to live, and it wouldn't be a country for which we could, in good conscience, ask our young people to fight and die. In short, that country wouldn't be America.

I think it is important to remember that the Constitution was written in 1789 by men who had recently won the Revolutionary War. They did not live in comfortable and easy times of hypothetical enemies. They wrote the Constitution and the Bill of Rights to protect individual liberties in times of war as well as in times of peace.

There have been periods in our nation's history when civil liberties have taken a back seat to what appeared at the time to be legitimate exigencies of war. Our national consciousness still bears the stain and the scars of those events: The Alien and Sedition Acts, the suspension of habeas corpus during the Civil War, the internment of Japanese Americans during World War II and the injustices perpetrated against German Americans and Italian Americans, the blacklisting of supposed communist sympathizers during the McCarthy era, and the surveillance and harassment of anti-war protesters, including Dr. Martin Luther King Jr., during the Vietnam War. We must not allow this piece of our past to become prologue.

Preserving our freedom is the reason we are now engaged in this new war on terrorism. We will lose that war without a shot being fired if we sacrifice the liberties of the American people in the belief that by doing so we will stop the terrorists.