

## **English 1101**

**Student: Ashley Louise Smith**

**Teacher: Dr. June Griffin**

### **“The Unpatriotic USA PATRIOT Act: Roving Wiretap Provision is Both Unconstitutional and Invasive”**

On September 11, 2001, smoke arose from the cinders of the demolished twin towers, awakening the “sleeping giant” to weakness and tragedy. The nation’s instability baffled legislators, influencing them to pass legislation that does not honor the privacy of the people. Do desperate times call for disproportionate measures? Supreme Court Justice Thurgood Marshall wisely said, “Grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure” (quoted in Maclin). Although the power of the people detract from government control, Marshall insists that leaders should not manipulate the Constitution for the sake of convenience.

The global war on terror continues to intensify; meanwhile, radical legislation such as the Roving Wiretap Provision included in the PATRIOT Act is executed by the government with honorable intentions of better security. Under this provision, investigative agencies can secretly monitor communication without probable cause (“Roving Surveillance”). This new leniency allows authorities to suspect people based on assumptions, endangering the privacy of all citizens. Section 206 of the PATRIOT Act not only permits authorities to track suspected terrorists; it allows all phone lines linked to the suspect to be tapped as well (Maclin). From the view of the uninformed citizen, the government’s improvement and increased use of roving wiretaps appears to be beneficial to the security of the nation. However, people are oblivious to the privacy they forfeit to the government because of this law. If America does not reclaim the power of the people given by the Constitution, the government will continue to violate the privacy of innocent third parties. The Roving Wiretap Provision in the PATRIOT Act infringes upon rights rooted in the Fourth Amendment and grants unnecessary power to law enforcement by permitting investigators to act upon their own discretion.

#### **General Searches**

“General Searches” are allowed to take place through the Roving Wiretap Provision that lack specificity, which was essential according to the Framers’ reasoning for the Fourth Amendment (Maclin). The Framers of the Constitution recognized the potential risks of “multi-specific” search warrants and viewed them as harmful resources if exercised without restrictions (Maclin). Technology in the 1700’s is not comparable to current innovations because the government not only lacked the tools to monitor the public, the communication only existed by pen and ink. Therefore, tracking communication was not a factor contemplated by the Framers. Even so, in 1706, law enforcement applied a warrant to search all homes in the New Hampshire area, including the residences of innocent citizens (Maclin). Due to instances such as the case in New Hampshire, Congress first acknowledged the need for particular stipulations regarding search warrants to protect the innocent (Maclin).

Especially in modern times, there is still a necessity for the law to mandate detailed requirements. Opponents to roving wiretaps recognize that the PATRIOT Act only demands that the subject have a similar appearance to the individual described in the surveillance order (Barr). Without any firm restrictions, the courts “allow F.B.I. agents to engage in investigative fishing

expeditions” (Barr). For instance, the 1998 amendment to wiretaps allows law enforcement to continue tapping the line for “as long as it is reasonable to presume the target is or was reasonably proximate to the tapped telephone” (Banks and Bowman). Basically, law enforcement has the power to determine how long they extend wiretaps. Elasticity within the government’s interpretation of legislation undermines America’s foundation of guaranteed liberty. How can the PATRIOT Act advocate patriotism when invasions of the legislation challenge founding principles?

### **Specificity Requirement**

Legislators have expanded injustice by minimizing the constitutional requirement for specificity of location and extending the constitutional interpretation to allow law enforcement to track individuals. Attorney General John Ashcroft justifies changes that have occurred with new legislation, claiming, “roving wiretaps do not eliminate the particularity requirement for search warrants; roving wiretaps merely substitute particularity of person for particularity of place” (quoted in Maclin). In this statement, he casually refers to the Constitution as an editing experiment, open to frequent additions and deletions when legislators deem it necessary. Yet, the second clause of the Fourth Amendment explains the particularity requirement, stating, “No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (quoted in Maclin). Furthermore, “John Doe” wiretaps, which were enacted by Section 206 of the PATRIOT Act, do not call for authorities to even reveal the suspect’s name to obtain surveillance rights (“Roving Surveillance”). Vague qualifications within “John Doe” wiretaps not only violate the demand for particularity of place; they also proceed to blur the lines of particularity of the suspect. This extension launches legislation into a new realm of controversy: the neglect of third party privacy.

### **Supreme Court Ruling**

Courts have previously supported the Constitution by ruling that searching third parties is unjust (Maclin). For instance the Supreme Court established a precedent through the case *Steagald v. U.S.*, which states that “an arrest warrant for a particular individual could not be used as lawful authority to search the home of a third party not named in the warrant” (Maclin). The Court’s conclusions suggest that the warrant “specified only the target of the search and left police with the discretion as to which particular homes to search” (Maclin). Although this specific instance relates to searching a residence, roving wiretaps have a similar effect because they interfere with third party privacy by tapping multiple lines that connect to the suspect (Maclin). Therefore, as the ruling confirmed, reviewing conversations of the third party is unlawful since the warrant does not identify the individual (Maclin). However, the government justifies the overturn of this interpretation by the need to broaden the access to information for law enforcement (“Defending American”). President George W. Bush claims that the updated roving wiretaps simply allow law enforcement to investigate terrorists to the same degree that they were previously monitoring drug dealers or the mafia (“Deception is Patriotic?”). Yet, this statement carries no weight in the opposing argument because authorities previously had the power to track terrorists to the same degree that they could follow other criminals (“Deception is Patriotic?”). Ultimately, the most significant factor is that the government denies protection to vulnerable third parties.

### **Inadequate Protection Against Government Abuse**

Regrettably, new legislation on roving wiretaps lacks requirements that previous legislation included to protect privacy and guarantee that the government does not abuse its power (“Roving Surveillance”). Legislation has diminished legal requirements below the “probable cause” limit contained in criminal cases (“Roving Surveillance”). New legislation does not even undergo the same measure of judicial oversight as used in criminal cases (“Roving Surveillance”). Roving wiretaps are also active for more than three times longer than criminal wiretaps, and victims are not informed about the investigation even after false accusations are resolved (“Roving Surveillance”). Without definitive boundaries around the amount of discretion exercised by law enforcement, the provision will discriminate against individuals because judgments will vary on a case-to-case basis.

### **State Wiretap Laws**

The infringement of citizens’ privacy for use of roving wiretaps in a national scope is already a burden that Americans carry under the PATRIOT Act. Yet, now states have enacted their own roving wiretap legislation (Kennedy and Swire). In the future, state legislators intend to “liberalize” legislation beyond the bounds of national roving wiretap provisions (Kennedy and Swire). For example, they plan to increase the types of offenses that qualify suspicious people for “interception orders,” enlarge the number of government employees who are able to “execute wiretaps,” allow roving wiretaps to span across larger areas, and develop a system that can intercept a variety of communication devices other than telephones (Kennedy and Swire). While legislators have not yet approved the new provisions, the advanced plans of the states prove that roving wiretaps present much potential for even greater abuse of personal privacy.

### **Insufficient Execution of the Law**

Even with the enormous amount of power given to authorities, they do not reach aspirations for national security because authorities do not monitor investigations sufficiently. Devices that enable complex voice encryption are ineffective in intercepting terrorist communication due to the inadequate decoding abilities of United States authorities (Garfinkel). Oddly enough, the United States used a similar tactic to disguise communication in World War II with “Navajo code talkers,” (Garfinkel). If the method was effective for the United States, the enemy could easily defeat America with a similar plan. Furthermore, innovations have fostered software during the past ten years, which is even more valuable to the enemy (Garfinkel). These programs make it more difficult for law enforcement to decipher encoded messages (Garfinkel). Additionally, since there is a large quantity of communication sources, the probability of intercepting one crucial phone call is highly unlikely (Garfinkel). Therefore, prevention of devastating events such as the terrorist attacks on September 11 is not a guaranteed result through this legislation. As President George W. Bush stated in his speech to promote the benefits of the PATRIOT Act, terrorist cells were found in six cities; however, while three hundred people were charged, only half either admitted to their guilt or were convicted (“Benefits of the Patriot Act”). The standing of the other half whom law enforcement accused is unknown to the public (“Benefits of the Patriot Act”). Ironically, Bush assured the public on September 12, 2002, “We will not allow this enemy to win the war by changing our way of life or restricting our freedoms” (Whitehead and Aden). Yet, now he supports legislation that allows law enforcement to indict those they suspect are involved in terrorist activities in “military tribunals” (Whitehead and Aden). On the other hand, John Kerry, the recent Democratic Presidential candidate, desires to revise portions of the PATRIOT Act due to current statistics of

inadequate performance by intelligence agencies (Lichtblau). For example, investigators have not evaluated over 120,000 hours of taped conversations, which could possibly be significant evidence (Lichtblau). The F.B.I. policy states that government investigators must evaluate taped conversations, which are associated with Al Qaeda sources, no later than twelve hours after the office receives the evidence (Lichtblau). However, studies conducted by the Inspector General prove that authorities have failed to review recordings by the twelve-hour mark in thirty-six percent of approximately 900 tapes (Lichtblau). Accuracy is essential for improvement in safeguards against future attacks. Authorities have made minor accomplishments in capturing terrorists, but flaws in the system benefit terrorists by shielding them from law enforcement. If the task of analyzing crucial information is too great for investigation agencies to tackle, provisions are worthless, especially when compared with the underlying sacrifices the PATRIOT Act forces Americans to make.

### **Unnecessary Infringements**

According to supporters of the Roving Wiretap Provision, infringements upon privacy are necessary in order to make progress in national security. However, this ideology exploits the principle of “innocent until proven guilty,” assuming that the accused are “guilty until proven” otherwise (“Guilty until proven”). Since the government first established legislation to allow wiretaps in 1968, many have perceived that “communication is seriously jeopardized by techniques of surveillance” (“Groups”). Thus, the risk of the government taking advantage of citizens’ privacy is even greater today due to modern technology (“Groups”). Considering how much effort authorities have put forth to develop wiretaps over time, it is highly unlikely that they would forfeit the opportunity to intercept a suspicious individual’s phone line regardless of whether they have adequate evidence to judge whether the suspect seems guilty. In a congressional committee meeting, they discussed the possibility that the government could tap an entire apartment complex for the purpose of monitoring one suspect. Responding to the hypothetical situation, former United States representative Bob Barr argued, “I do believe [. . .] under the present situation regarding use of the PATRIOT Act for roving wiretaps that it does sweep broadly” (United States). While the provision’s purpose was not to make illegitimate cases, its excessive power inevitably tempts authorities to use sources to their advantage.

### **Frequent Errors in Communication Surveillance**

Errors in communication surveillance occur frequently. Even more frightening, victims will never know what led police to suspect them or even if they were suspected. A “security mistake” falsely identified Jason Halperin, submitting him to public humiliation as he ate “dinner at gunpoint” (Halperin). Law enforcement, garbed in bulletproof jackets, burst into the restaurant, knocking down the doors and holding guns with their hands placed firmly on the triggers (Halperin). Police authorities shouted, “You are being held under the PATRIOT Act following suspicion under an internal Homeland Security investigation” (Halperin). The only questions posed by police were about his license because it was from another state, and their only evidence was that he seemed suspicious (Halperin). As the police proceeded out of the restaurant, customers were outraged as they heard law enforcement repeating, “We are at war, we are at war. How can they not understand this?” (Halperin). The government excuses illegitimate attacks such as Halperin’s experience as mere mistakes (Halperin). Yet, how many violations of privacy does it take to illuminate the substantial flaws within this policy? The PATRIOT Act not only alters constitutional rights, but it also condones an irrational justice

system in which law enforcement's duty is superior to civilian interests. Americans regard digital communication as convenient and essential, but the government's access to information is not specified clearly enough to protect citizens' confidentiality. Law enforcement might have suspected Halperin due to his Middle-Eastern ethnicity. Or, he could be a victim of the government's random interception of third-party conversations. As long as the Roving Wiretap Provision remains in place, investigative agencies will screen the calls of third parties, making it possible for unrelated evidence to serve as the basis for frivolous accusations and undeserved criminal sentences ("Roving Surveillance").

Supreme Court Justice Thurgood Marshall declared, "This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise values that lie at the roots of our democratic system" (quoted in Ahmuty). Although said in 1972, this courageous statement still motivates Americans to stand by fundamental principles. The PATRIOT Act, specifically section 206 concerning roving wiretaps, is a "simple solution." It is evident that Americans are surrendering the key principles of liberty for a cause that is doomed to failure. Framers of the Constitution foresaw the consequences of vague legislation and attempted to prevent injustice for future generations. Now, since legislators have chosen to ignore fundamental principles, the nation is battling not only the danger of terrorist enemies, but also the invasion of privacy by the United States Government. Basic rights to privacy are diminishing, and citizens must fight to preserve the liberty that distinguishes America as the "land of the free."

#### Works Cited

- Ahmuty, Chris. "Preserving liberties is hard, but necessary, work." *Journal Sentinel Online*. 22 Sept. 2001. <<http://www.jsonline.com/news/editorials/sep01/ahmuty23092101.asp>>. Accessed on 21 Nov. 2004.
- Banks, William C., and Bowman, M.E. "Executive Authority for National Security Surveillance." *50 Am. U. L. Rev.* 1 (2001-2002): 111.
- Barr, Bob. "Testimony of Former Congressman Bob Barr Submitted to the Senate Judiciary Committee Concerning the USA Patriot Act, the Safe Act, and Related Matters." ACLU. 22 Sept. 2004. *American Civil Liberties Union*. Available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16516&c=262>>. Accessed on 3 Oct. 2004.
- "Benefits of the Patriot Act." *NPR*. 17 Apr. 2004. *National Public Radio*. Available at <http://npr.org/politics/issues2004/>>. Accessed on 23 Sept. 2004.
- "Deception is Patriotic?" *Constitutional Liberties*. 2004. *People For the American Way*. Available at <<http://www.pfaw.org/pfaw/general/default.aspx?oid=15212>>. Accessed on 30 Sept. 2004.
- "Defending American Lives & Liberty." *GeorgeBush.com* 2004. *Bush-Cheney '04*. Available at <<http://www.georgebush.com/agenda/Chapter.aspx?ID=4>>. Accessed on 26 Sept. 2004.

Garfinkel, Simson. "How Not to Fight Terror." *The Experiment*. 15 Dec. 2004. *The Experiment Network*. Available at <[http://www.theexperiment.org/artcles.php?news\\_id=1558](http://www.theexperiment.org/artcles.php?news_id=1558)>. Assessed on 30 Sept. 2004.

"Groups Challenge FBI Wiretap Standards: Say FCC Decision Threatens Communications Privacy." Electronic Privacy Information Center. 20 Jan. 2000. Available at <[http://www.epic.org/privacy/wiretap/calea/brief\\_release\\_1\\_00.html](http://www.epic.org/privacy/wiretap/calea/brief_release_1_00.html)>. Accessed on 20 Nov. 2004.

"Guilty Until Proven." *CBSNews.com*. 21 Nov. 2004 *CBS Broadcasting*. Available at <<http://www.cbsnews.com/stories/2003/04/06/60minutes/main548023.shtml>>. Accessed on 20 Nov. 2003.

Halperin, Jason. "A Security 'Mistake' Has the Author Eating Dinner at Gunpoint." *Patriot Raid*. 19 Apr. 2003. *Alternet*. Available at <<http://www.alternet.org/story/15770>>. Accessed on 6 Oct. 2004.

Kennedy, Charles H., and Swire, Peter P. "State Wiretaps and Electronic Surveillance after September 11." *Hastings L .J.* 54 (2002-2003): 977.

Lichtblau, Eric. "F.B.I. Said to Lag On Translating Terror Tapes." *NYTimes.com*. 28 Sept. 2004. *New York Times*. Available at <<http://www.nytimes.com/2004/09/28/politics/28fbi.html?ex=109750851&ei=3feb38003ea79a8f>>. Accessed on 29 Sept. 2004.

Maclin, Tracey. "On Amending the Fourth: Another Grave Threat to Liberty." *Law.com*. 2001. *The National Law Journal*. Available at <<http://www.law.com/cgi-bin/nwlink.cgi?ACG=ZZZPP4XEUTC>>. Accessed on 30 Sept. 2004.

"Roving Surveillance Authority Under the Foreign Intelligence Surveillance Act of 1978." *EEF*. 30 Sept. 2004. *Electronic Frontier Foundation*. Available at <<http://www.eff.org/Privacy/Surveillance/Terrorism/PATRIOT/sunset/206.php>>. Accessed on 30 Sept. 2004.

United States. Senate Judiciary Committee Hearing. 22 Sept. 2004. U. of Georgia Lib. *LexisNexis*. Available at <<http://web.lexis-nexis.com/universe>>. Accessed on 2 Nov. 2004.

Whitehead, John W., and Aden, Steven H. "Forfeiting Enduring Freedom for Homeland Security: A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives." 51 *Am. U. L. Rev.* 1081 (2001-2002): 1083.