

Spring 5-1-2005

# The USA PATRIOT Act and the Alien and Sedition Acts A Comparative Analysis

David Wicclair

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## Recommended Citation

Wicclair, David, "The USA PATRIOT Act and the Alien and Sedition Acts A Comparative Analysis" (2005). *Syracuse University Honors Program Capstone Projects*. 696.

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## Chapter 1

### The USA Patriot Act

Only forty-eight days removed from the horrific events that transpired in New York City, Washington D.C., and Pennsylvania on September 11, 2001, the United States Congress quickly responded and passed an act known as the USA PATRIOT Act (an acronym that stands for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”).<sup>1</sup> The Act, which I shall refer to as the “Patriot Act,” sought to tighten security measures in the United States by giving the executive branch new power that would serve to prevent future terrorist attacks on American soil. It was passed with little debate by a margin of 98-1 in the Senate and 357-66 in the House of Representatives.<sup>2</sup> Some of the more liberal Congressmen who were uneasy about the possible consequences that the Act would have on the civil liberties of Americans had to settle for the fact that more than a dozen of the more controversial sections of the 1, 016-section act would “sunset,” or expire at the end of 2005.<sup>3</sup> However, a large number of sections of the Patriot Act have been permanently written into law.

At the time of passage, just weeks after Sept. 11, a wave of patriotism swept the nation. Little emphasis was placed on discussing the possible drawbacks of the national security legislation. Indeed, with the anthrax

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<sup>1</sup> USA PATRIOT Act ([cited April 16 2005]); available from <http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.3162.ENR>. All references to the USA PATRIOT Act are to this Library of Congress Web site.

<sup>2</sup> Nancy Chang, *Silencing Political Dissent* (New York, 2002). 34.

<sup>3</sup> "Infringing on Civil Liberties," *St. Petersburg Times*, October 31 2001.

incidents that coincided almost precisely with the Patriot's Act passage, American citizens had more than enough to be concerned with already. As the President's high approval ratings following 9/11 show, the overwhelming majority of American people put their trust in President Bush's ability to protect them, no matter what the possible consequences to civil liberties. A December 2001 Boston Globe article reported that recent polls showed "support for the president, as well as for the use of military tribunals and a willingness to give up personal freedoms for the sake of national security."<sup>4</sup> Civil liberties groups such as the American Civil Liberties Union (ACLU) immediately following the terrorist attacks tried to warn both Congressmen and the American public of the dangers that could follow from national security legislation, but it was useless "trying to persuade Americans to hold fast to concerns about individual freedom and privacy, while the vast majority of people were terrified."<sup>5</sup>

However, as the months after September 11 began to pass with no additional terrorist attacks, Congressmen and the American people alike began to wonder just what the Patriot Act was and how it was being used. As stated in a February 25, 2004 *USA Today* article, "nearly 2 ½ years after Congress passed the Patriot Act, Americans are confused and troubled by the law."<sup>6</sup>

While most Americans support the Patriot Act according to a *USA*

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<sup>4</sup> Susan Milligan, "Fighting Terror/National Concerns Keeping Quiet; So Far Politicians' Dissent Left out of the War," *The Boston Globe* 2001.

<sup>5</sup> Robert O'Harrow, Jr., "Six Years in Autumn; A Year Ago as a Nation Reeled from Attack, a Battle was Joined for America's Future. Not in Afghanistan. In Washington," *The Washington Post*, October 27 2002.

<sup>6</sup> Toni Locy, "Special Report: Patriot Act Blurred in the Public Mind," *USA Today*, February 26 2004.

*TODAY/CNN* Gallup Poll conducted in February 2004, many Americans are unclear just what the Act does.<sup>7</sup> Further evidence of this frightening ignorance was provided by a *USA Today* survey of 501 adults that found that when the sections of the Act were explained to survey subjects, “71% disapproved of a section that allows agents to delay telling people that their homes have been secretly searched.”<sup>8</sup>

The Patriot Act is indeed an extremely complex document filled with pages upon pages of legalese and difficult to comprehend material. As Jeffrey Rosen correctly asserted in an *Atlantic Monthly* article, “The act is so technical and legally complicated that only policy junkies and law professors have the time to master it.”<sup>9</sup> Nonetheless, the American public’s failure to understand this significant piece of American legislation is disheartening – though not completely inexcusable. In fact, the secrecy surrounding the Patriot Act’s use over the past three and a half years has even left many high ranking Congressmen wondering how the Act has been enforced, despite frequent claims made by the Justice Department that there have been no abuses of it.<sup>10</sup> The mystery behind the Patriot Act’s usage and effect on the American public has fuelled a growing debate about the constitutionality of specific sections of the Act. Despite some misconceptions, most of the sections of the Act are quite uncontroversial. Civil libertarians and public interest organizations alike have tended to focus their concern on the implications of its most

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Jeffrey Rosen, "John Ashcroft's Permanent Campaign," *The Atlantic Monthly*, April 2004.

<sup>10</sup> Eric Lichtblau, "Senator Faults Briefing on Antiterrorism Law," *The New York Times*, April 13 2005.

controversial sections. Their efforts have spurred national interest in the Act at both the state and local level. Indeed, over the past two years, a growing number of states, towns, and cities have passed resolutions against the Act.<sup>11</sup> However, conservative organizations such as the Heritage Foundation have been leading the charge against the Patriot Act's opponents by arguing that the fears about the Act are overblown and that the Act is necessary for fighting the war on terrorism. Many advocates of the Patriot Act wish to even see it further strengthened.<sup>12</sup>

Although much of the information about the Patriot Act remains behind closed doors, by studying its sections, it is possible to analyze how the Act *has* or *may* be used. Moreover, it is crucial to pinpoint how specifically the Patriot Act has amended prior national security legislation. These steps are necessary to facilitate an adequate understanding and assessment of the debate about the Patriot Act. In this chapter, I will explain the most controversial sections of the Patriot Act and discuss both the arguments for and against these provisions. At the end of the chapter, I will argue that past instances of wartime national security legislation – such as the Alien and Sedition Acts – may be used to help further our understanding of the current debate about the Patriot Act and to speculate about the likely direction of that debate in years to come. Chapter 2 will provide a comparative analysis of these earlier acts and

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<sup>11</sup> Nat Hentoff, *The War on the Bill of Rights and the Gathering Resistance* (New York, 2003).

<sup>12</sup> The Patriot Act: Not the Threat Many Think (The Heritage Foundation, April 7 2005 [cited April 16 2005]); available from <http://www.heritage.org/press/dailybriefing/policyweblog.cfm?blogid=1E7B1AFB-0E7E-2186-FFE15A96CF5A97D2>.

the Patriot Act, and Chapter 3 will consider the future of the Patriot Act in light of the history of the earlier acts.

### **Description of Controversial Sections of the Act**

Before discussing some of the controversial sections of the Patriot Act, it is important to realize that much of it comes from national security legislation that was already in place long before September 11, 2001. Indeed, the foundation for the Patriot Act has been in place since the Foreign Intelligence Surveillance Act (FISA) was passed in 1978. Many of the same surveillance procedures that are dealt with in the Patriot Act were first addressed with FISA.<sup>13</sup> The similarities between the two acts are undeniable. However, this is not to say that there aren't also important differences. In fact, in most of the controversial sections of the Patriot Act, surveillance powers given to law enforcement agencies and the executive branch under FISA were broadened.<sup>14</sup>

In dealing with the controversial sections of the Patriot Act that have significantly altered preexisting national security legislation, civil libertarians have essentially divided the sections into three categories: sections that pertain to privacy issues; sections that blur the line between beliefs and terrorism and infringe upon First Amendment rights; and sections that deal with the rights of

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<sup>13</sup> Robert P. Abele, *A User's Guide to the USA Patriot Act and Beyond* (Lanham, Maryland, 2005). 19.

<sup>14</sup> Dahlia Lithwick and Julia Turner, *A Guide to the Patriot Act, Part 2* (Slate, September 9 2003 [cited December 20 2004]); available from <http://slate.msn.com/id/2088106/>.

non-citizens.<sup>15</sup> Whether or not one agrees with civil libertarian critics of the Act, these are useful categories, and I shall use them to identify and describe the Act's most controversial provisions.

Section 213 is an example of a controversial section of the Patriot Act that involves privacy issues. It amends a part of title 18 of the United States Code dealing with the right of a suspect to know that his or her house will be searched before the actual search takes place. Section 213 eliminates this need for prior notice and allows for "delay" in notification. The section specifically says that notice may be delayed if the court that approves the search warrant finds reason to "believe that providing immediate notification of the execution of the warrant may have an adverse result." The section leaves ambiguous the timeframe in which people must be notified of the search, allowing for the notice within a "reasonable period" of the warrant's execution. Moreover, although the warrant generally doesn't allow for seizure of property, an exception is provided to allow for this when the "court finds reasonable necessity for seizure."

An important provision of this section of the Patriot Act is its amending FISA to allow for these so-called "sneak and peak" searches to be used to gain information for criminal investigations. Although FISA introduced the use of "sneak and peak" searches, the act only allowed their

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<sup>15</sup> Chang, *Silencing Political Dissent*. 43-62.

use for terrorism investigations involving “foreign powers or their agents.”<sup>16</sup>  
This section is permanent and will not sunset in 2005.<sup>17</sup>

Section 215 – generally thought of as the most controversial of the Patriot Act sections – is another section that pertains to privacy rights of suspects. The section amends Title V of FISA by allowing high-ranking FBI officials to “make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities.” The section also requires that a judge grant permission to gain this information, and that a “semi-annual” report be given to Congress concerning how many applications were approved and denied.

As it stood under FISA, a court order could be given for FBI access to “business records of hotels, motels, car and truck rental agencies, and storage rental facilities” if it was shown that “the person to whom the records pertain [was] a foreign [sic] or an agent of a foreign power.”<sup>18</sup> However, section 215 of the Patriot Act allows for broader surveillance, and makes it clear that a “United States person” could be investigated under this section so long as the investigation “is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.” Section 215 is set to sunset in October 2005.

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<sup>16</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 26.

<sup>17</sup> Charles Doyle, USA PATRIOT ACT Sunset: Provisions that Expire on December 31, 2005 (Congressional Research Service of the Library of Congress, June 10 2004 [cited April 16 2005]); available from <http://www.fas.org/irp/crs/RL32186.pdf>.

<sup>18</sup> *Ibid.* ([cited]).



In addition to section 215, section 216 of the Patriot Act has attracted privacy concerns. The section amends, in numerous places, prior United States Code to allow for the government to monitor a suspect's Internet usage if "the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation. Like sections 213 and 215, section 216 broadens the scope of surveillance techniques "to include use of such tools to investigate crimes of all stripes, not just those related to terrorism."<sup>19</sup> Moreover, the section alters the definitions of pen registers and trap and trace devices—two devices used to monitor the source of incoming and outgoing phone calls—to allow them to apply to Internet material. An important subsection to note is that the information gained from these devices "shall not include the contents of any communication." Section 216 will not sunset in 2005.<sup>20</sup>

Section 218 of the Act has been regarded by civil liberties activists such as Nancy Chang as one of the most controversial and "far-reaching" sections of the Patriot Act in relation to privacy.<sup>21</sup> The section amends FISA's wiretap and physical search provisions by lowering the standard needed to carry out these surveillance techniques. Whereas under FISA, orders could be given to use wiretaps if foreign intelligence gathering was "the purpose" of the investigation, Section 218 of the Patriot Act amended this standard by striking the phrase "the purpose" and inserting "a significant purpose."

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<sup>19</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 27.

<sup>20</sup> Doyle, USA PATRIOT ACT Sunset: Provisions that Expire on December 31, 2005 ([cited]).

<sup>21</sup> Chang, *Silencing Political Dissent*. 56.

Furthermore, section 206 of the Patriot Act amends the standards laid out in FISA for using wiretaps by allowing roving wiretap surveillance. What this means is that communications made to or by intelligence targets can be monitored “without specifying the particular phone line or computer to be monitored.”<sup>22</sup> This replaces the standard that was in place under FISA, in which a FISA court could only give an order to monitor specific phones or computers.

The last controversial, privacy-related section of the Patriot Act that I shall discuss is Section 203, which concerns the authority to share criminal investigative information. The section is broken down into four subsections (a-d) – each of which lays out how information may be shared among government agencies. Before the Patriot Act was passed, domestic law enforcement and foreign intelligence surveillance “operated on separate tracks.”<sup>23</sup>

Subsection (a) allows intelligence sharing to occur with grand jury information. It amends the Federal Rules of Criminal Procedure and allows for disclosure of information obtained before a grand jury to be provided to “any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duty” when “the matters involve foreign intelligence or counterintelligence, or foreign intelligence

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<sup>22</sup> Dahlia Lithwick and Julia Turner, A Guide to the Patriot Act, Part 3 (Slate, September 10 2003 [cited December 20 2004]); available from <http://slate.msn.com/id/2088161/>.

<sup>23</sup> John Podesta, USA Patriot Act: the Good, the Bad, and the Sunset (American Bar Association Human Rights Magazine, [cited April 16 2005]); available from <http://www.abanet.org/irr/hr/winter02/podesta.html>.

information.” The other three subsections of Section 203 also deal with the sharing of foreign intelligence information. Subsection (b) allows an investigative or law enforcement officer to share any information that he or she attained from “any wire, oral, or electronic communication” pertaining to foreign intelligence with other such officers. Subsection (d) gives intelligence officials the ability to use “foreign intelligence information obtained as part of a criminal investigation.” In order to share this information, no Court orders are required.<sup>24</sup> There is no sunset clause for this section.

Privacy-related sections of the Patriot Act are not the only parts of the Act that have gained national attention. Indeed, section 802, which defines the federal crime of terrorism, has become one of the more controversial provisions of the Patriot Act because of a fear that it blurs the line between personal beliefs and terrorism and jeopardizes First Amendment rights.<sup>25</sup> This is the second of the three categories of controversial provisions of the Act identified above. In addition to listing a series of crimes which are obvious examples of terrorism, such as destruction of aircraft or assassinating a public official, the section provides a general definition of the new phrase “domestic terrorism,” saying that the term refers to activities that “involve acts dangerous to human life that are a violation of criminal laws of the United States or any state” and “appear to be intended to intimidate or coerce a civilian population” or “influence the policy of the government by intimidation or coercion.” The major effect of this section is the expansion of

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<sup>24</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 25.

<sup>25</sup> Chang, *Silencing Political Dissent*. 39-40.

the definition of terrorism to cover domestic as well as international terrorism.<sup>26</sup>

Moreover, section 411, which again deals with the issue of defining terrorism, has become controversial in that it sets up a “guilt by association” standard for aliens wishing to enter or stay within the United States<sup>27</sup> Section 411 of the Patriot Act amends the Immigration and Nationality Act to enhance the government’s ability to use immigration provisions dealing with terrorism to determine who is and isn’t allowed into the country. A clause within the section says that any alien who has been determined to be “associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible” to the United States. The section provides a broad range of actions that fall under the definition of “engaging in terrorist activity,” including being a member of a social or political group that publicly endorses terrorism, or simply the act of giving donations to an organization deemed by the United States government to be a terrorist organization.

Intertwined with section 411, a third and final category of controversial sections of the Patriot Act involves restrictions on aliens. One of these sections – Section 412 – allows for persons suspected of being “terrorist aliens” to be detained by the Attorney General for a period up to seven days.

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<sup>26</sup> How the USA PATRIOT Act Redefines 'Domestic Terrorism' (ACLU, December 6 2002 [cited March 15 2005]); available from <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=11437&c=111>.

<sup>27</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 51.

If the alien is not charged with a crime or if removal procedures are not completed in that set amount of time, “the Attorney General shall release the alien.” However, there is also a clause within the section, providing that those aliens whose “removal is unlikely in the foreseeable future, may be detained for additional periods of up to six months” if the release of the alien will threaten the national security of America. An alien who does not have a country willing to accept him or her can be detained indefinitely without a trial.<sup>28</sup> The section does not allow for any judicial oversight, save a successful petition for *habeas corpus* by the detained alien.

### **Criticisms of the Controversial Sections of the Act**

Many of the criticisms of the controversial privacy-related sections focus on a perceived blurring of the line between foreign intelligence investigations and domestic and criminal investigations. Civil liberties activists such as Nancy Chang argue that by allowing “sneak and peak” regulations to pertain to both terrorism investigations and criminal investigations, section 213 is one such example of this phenomenon. According to Chang, section 213 “contravenes the common law principle that law enforcement agents must ‘knock and announce’ their arrival before they conduct a search—a requirement that forms an essential part of the Fourth Amendment’s reasonableness requirement.”<sup>29</sup> Moreover, civil liberties activists have questioned the broad wording of section 213. Although the

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<sup>28</sup> Dahlia Lithwick and Julia Turner, A Guide to the Patriot Act, Part 4 (Slate, September 11 2003 [cited April 16 2005]); available from <http://slate.msn.com/id/2088239/>.

<sup>29</sup> Chang, *Silencing Political Dissent*. 45.

section notes that the suspect must be informed of the search within a reasonable amount of time after the search was conducted, it does not specify what is meant by a “reasonable period.” Moreover, the section has a clause that says that the “reasonable period” standard may be extended by the court in circumstances of “good cause.”<sup>30</sup> This lack of a clear-cut time-period, along with the blurring of the distinction between foreign and criminal surveillance investigations, has prompted much criticism.

Criticisms of section 215 of the Patriot Act again focus on the ability of law enforcement officials to implement the provision against American citizens. As indicated above, section 215 has significantly amended FISA, permitting records of those who are not the targets of an investigation or an agent of foreign power to be seized.<sup>31</sup> Former FISA regulations, however, required evidence that the suspect in question was a foreign power, or agent of a foreign power, in order to search his or her records.<sup>32</sup> With such broad categories as “international terrorism” and “clandestine intelligence activities” civil libertarians worry that everyday American citizens will be subjected to this section. Moreover, many critics have argued that the section violates the First Amendment rights of Americans by forbidding anybody who is approached by federal enforcement officials from speaking about the fact that information and records were taken for an investigation.

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<sup>30</sup> John W. Whitehead, "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-terrorism Initiatives," *American University Law Review* 51 (August, 2002).

<sup>31</sup> Peter B. Swire, "The Future of Internet Surveillance Law: A Symposium to Discuss Internet Privacy, Surveillance, and the USA Patriot Act: Surveillance Law: Reshaping the Framework: The System of Foreign Intelligence Law," *George Washington Law Review* 72 (August, 2004).

<sup>32</sup> Chang, *Silencing Political Dissent*. 53.

The major criticisms of section 216 of the Patriot Act revolve around the lowering of the standard needed to perform pen registers and traps on computers to anything “relevant” to a criminal investigation. This provision, civil libertarians contend, may lead to such tools being used on people who not only aren’t foreign terrorist suspects, but are also not directly connected to a criminal investigation.<sup>33</sup> Moreover, opponents of the section point out that section 216 fails to distinguish between “dialing, routing, addressing, and signaling information” and “content” when it comes to the Internet. Whereas telephone dialing information is separate from the content of phone conversations, e-mail messages include both the senders and recipients addresses and content<sup>34</sup> This ambiguity gives the government a wide scope of power in deciding what constitutes “Internet content.”

Again with section 218, opponents claim that the section has lowered another FISA standard. As the wording of the section indicates, FISA’s requirement that foreign intelligence information be the sole purpose for foreign intelligence investigations has been amended in favor of a broader ‘significant purpose’ standard.<sup>35</sup> In essence, this means that a greater proportion of those who would not have been subject to surveillance under FISA will now fall under its reach. According to Lithwick and Turner, under

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<sup>33</sup> Lori Ayotte, Kerry Criticizes Republican Leaders for Stifling Dissent (Associated Press, March 2 2002 [cited April 9 2005]); available from <http://www.ap.org/>.

<sup>34</sup> Chang, *Silencing Political Dissent*. 54.

<sup>35</sup> Cynthia Brown, ed., *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (New York, 2003). 43.

Section 218, one is subject to a police search simply if it can be shown that there is any foreign intelligence component involved.<sup>36</sup>

The last two controversial privacy-related sections that I will discuss – Section 206 and 203 – have also drawn criticisms for relaxing the standards established with FISA. Civil libertarians fear that the system of roving wiretaps established in section 206 may lead to the surveillance of unintended persons who have nothing to do with an ongoing investigation. Section 203, which allows for the sharing of criminal investigation information among different government agencies, has opponents concerned that the distinction between criminal and foreign intelligence investigations may be erased.<sup>37</sup>

Returning to First Amendment rights, section 802's broad definition of domestic terrorism has led many civil libertarians to fear that this section may be used to restrict the activity or even arrest the members of domestic organizations that actively voice criticism against the U. S. government. Under the the section's unspecific definition, the Secretary of State can designate any group that has ever engaged in violent activity a "terrorist organization."<sup>38</sup>

The controversy over section 411, which deals with immigration procedures and the deportation of suspected alien terrorists, arises from the expansion of the definition of what constitutes a terrorist activity and terrorist

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<sup>36</sup> Lithwick and Turner, *A Guide to the Patriot Act*, Part 2 ([cited]).

<sup>37</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 25.

<sup>38</sup> John Lichtenthal, "The Patriot Act and Bush's Military Tribunals: Effective Enforcement or Attacks on Civil Liberties?," *Buffalo Human Rights Law Review* 10 (2004).



organization.<sup>39</sup> The section defines “two or more individuals organized or which engage in terrorist acts” as a terrorist organization and “would allow the removal of any alien who collected funds or assisted an undesignated terrorist organization.” However, as many opponents of this section have pointed out, even many officially designated terrorist organizations perform useful duties within their society and accept donated money from Muslim charity organizations.<sup>40</sup> Critics of section 411 contend that it does not distinguish between the many different reasons that people provide money to terrorist organizations. They argue that it does not provide an exception for people who intended to support the philanthropic work of the terrorist organization and not the terrorist acts themselves. Moreover, civil libertarians have expressed concern about the retroactive clause of the section. The provision allows for aliens who gave donations to organizations which at the time were not deemed to be terroristic, to be deported under section 411 if the organization is later found to be terroristic.

Section 411 does include a subsection that grants an exception to those “who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section.” However, it is extremely difficult to determine whether an alien indeed did not know of a terrorist group’s actions or intentions. It is a reasonably safe assumption to conclude that, when in doubt, the government will play it safe and either

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<sup>39</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 30.

<sup>40</sup> Charles A. Flint, "Challenging the Legality of Section 106 of the USA Patriot Act," *Albany Law Review* 67 (2004).

deport or not allow an alien admission into the country if ever they have to determine the extent of the alien's knowledge.

Lastly, civil libertarians have expressed dissatisfaction over section 412 of the Patriot Act due to the section's allowance for detained aliens that have not been claimed by another country to be held indefinitely without judicial oversight, save a review of the detainment by the Attorney General every six months.<sup>41</sup>

### **Arguments in Support of the Patriot Act**

Despite a growing amount of opposition to certain sections of the Patriot Act, there remains a large contingent of individuals who believe that the entire Act is necessary to combat the imminent possibility of another terrorist attack and that it strikes an appropriate balance between civil liberties and national security. Moreover, many of the politicians who are the Act's most avid defenders argue that the civil liberties concerns that have been voiced against the Act have been blown entirely out of proportion and that the Act poses no real danger. Indeed, over the past four years, former Attorney General John Ashcroft and the Bush administration have not only been calling for the expiring Patriot Act sections to be renewed, but have also been pushing to strengthen national security legislation further by introducing a second Patriot Act of sorts (Abele, 69).

Advocates of the Patriot Act primarily point to the inability of the United States intelligence community to predict and prevent the tragic events

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<sup>41</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 31.

that transpired on September 11 as a reason why an overhaul of national security legislation was needed.<sup>42</sup> Thousands of Americans tragically lost their lives on the morning of September 11, 2001, in part because the government was unprepared for a terrorist attack on American soil. With the recent 9/11 commissions, more and more attention has been paid to the apparent lack of cohesion between the CIA and FBI in sharing vital information. Indeed, in response to arguments against the controversial privacy-related sections of the Patriot Act, supporters of the Act generally contend that the more lax surveillance and investigation standards are necessary in order to break down the wall that existed between law enforcement and intelligence agencies. Patriot Act supporters contend that controversial clauses such as section 218 go a long way in eliminating this divide.<sup>43</sup>

Andrew McCarthy describes the history of the relations between the CIA and FBI and discusses how the strict restrictions that were placed on each entity fueled a long-standing rivalry between them that jeopardized U.S. national security.<sup>44</sup> According to McCarthy, instead of sharing similar intelligence duties, the CIA and FBI were required to have two distinct tasks. The FBI was to operate dealing solely with domestic issues of security while

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<sup>42</sup> James Jay Carafano and Paul Rosenzweig, *A Patriotic Day: 9/11 Commission Recognizes Importance of the Patriot Act* (Heritage Foundation, April 15 2004 [cited March 15 2005]); available from <http://www.heritage.org/Research/HomelandDefense/wm480.cfm>.

<sup>43</sup> Paul Rosenzweig, Alane Kochems, and James Jay Carafano, *The Patriot Act Reader* (The Heritage Foundation, 2004 [cited March 15 2005]); available from <http://www.heritage.org/Research/HomelandDefense/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=69895>.

<sup>44</sup> Andrew C. McCarthy, "The Intelligence Mess: How it Happened, What to do About it," *Commentary* (2004).

the CIA was to deal with international security issues. He claims that this rigid divide between intelligence agencies promoted the confusion that made the al Qaeda terrorist attacks possible.

McCarthy and other supporters of the Patriot Act believe that it will serve to eliminate the gap that existed between the FBI and CIA and allow these two agencies to more easily and efficiently perform their security functions. By improving the means of intelligence gathering, Patriot Act supporters argue that the Act will ensure that an intelligence failure on the scale of the September 11 attacks will never occur again. They argue that the Act will, and probably already has, saved the lives of countless innocent Americans that would have met a similar fate to those thousands who perished on September 11, 2001. According to Jeffrey G. Collins, U.S. Attorney to the Eastern District of Michigan, “(t)he government’s success in preventing another catastrophic attack on the American homeland since September 11, 2001, would have been much more difficult, if not impossible, without the USA PATRIOT Act. The Authorities Congress provided has substantially enhanced our ability to prevent, investigate, and prosecute acts of terror.”<sup>45</sup> The Act may in fact allow the intelligence community to perform their duties more efficiently by escaping the restrictions that hampered the speed and effectiveness of investigations. However, its opponents worry about the cost to American civil liberties that these broader intelligence powers will have.

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<sup>45</sup> Jeffrey G. Collins, FAQ's and USA Patriot Act (United States Department of Justice, 2005 [cited March 15 2005]); available from <http://search.usdoj.gov/compass?scope=Jeffrey+G.+Collins+Patriot+Act&ui=sr&view-template=dojsimple&page=1>.

In response to opponents' arguments that the Patriot Act infringes on civil liberties, some of its supporters have indeed conceded this point. However, they argue that the end of protecting national security justifies these limitations. Eric Powner and John Yoo argue that the reduction in peacetime liberties caused by the Act was a reasonable price to pay for "a valuable weapon against Al-Qaida."<sup>46</sup> They claim that there are two ways to look at the proper role of the Constitution during times of national emergency. One, the "accommodation view," would allow for a relaxed reading of the Constitution in order to accommodate for times of national emergency. The second, a "strict reading," would not allow for the Constitution to be interpreted differently, no matter the circumstances. Both Powner and Yoo argued that the "accommodation view" is the more effective way to look at the role of the Constitution in response to September 11. In defense of the Patriot Act, they claim "civil liberties throughout history have always expanded in peacetime and contracted during emergencies."

Although some of the Patriot Act's advocates, such as Powner and Yoo, don't dispute the argument that certain of its sections infringe upon American's civil liberties, other advocates stress that the Act will not affect the liberties of American citizens. In a question and answer page about the Patriot Act on the Department of Justice website, Collins defends many of the Act's most controversial sections and discusses how many of the Act's critics falsely link issues dealing with enemy combatants, military tribunals and

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<sup>46</sup> Jerry Crimmins, Professors Defend the Patriot Act (Chicago Daily Law Bulletin, December 12 2003 [cited March 15 2005]); available from [http://www.law.uchicago.edu/news/posner\\_bulletin.html](http://www.law.uchicago.edu/news/posner_bulletin.html).

attorney-client privilege – to name only a few – to the Patriot Act.<sup>47</sup> As a Heritage Foundation article notes, “it [the Patriot Act] has become a convenient shorthand formulation for all questions that have arisen since September 11 about the alleged conflict between civil liberty and national security.”<sup>48</sup> Moreover, when asked about how the Patriot Act would affect civil liberties, Viet Dinh, the former top assistant to Attorney General Ashcroft, and primary author of the Act, rejected the claim that enhanced security would mean diminished freedoms.<sup>49</sup> As Dinh said, “It is a mistake to think of the Patriot Act as overwhelming or Orwellian in government authority.”

### **The Continuing Controversy and Historical Precedents**

Unlike the weeks directly following the terrorist attacks of September 11, in which the Patriot Act was enacted with little debate, the Act is now the focus of considerable controversy in the U.S. From receiving attention on television dramas such as *The Practice* and *Law and Order*, to being the topic of contention on news/interview programs such as *Hardball* and *The O’Reilly Factor*, the debate over the Patriot Act has become a hot topic for politicians, the media, and the general public. Just this month (April 2005), the Patriot Act

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<sup>47</sup> Collins, FAQ's and USA Patriot Act ([cited]).

<sup>48</sup> The Patriot Act: Not the Threat Many Think ([cited]).

<sup>49</sup> John Caher, "A Summit on the Patriot Act Asks: Has it Gone too Far?," *The Recorder* 128 (January 30, 2004).

has been continuously in the news due to the Congressional hearings in Washington concerning the expiration of some of the Act's sections.<sup>50</sup>

Unfortunately, despite the increased national attention to the Act, much secrecy still surrounds how it has been used.<sup>51</sup> Many of the statistics that would help answer questions about how it has been used have been declared unsuitable for the public. Only after an all-out assault by civil liberties advocates such as the ACLU and EPIC has the Justice Department released any information pertaining to the number of times the most controversial sections of the Act has been used<sup>52</sup> As Chuck Lewis, the executive director of the nonpartisan Center for Public Integrity, said in an interview with Bill Moyers on the PBS talk show "Now," "there have been 300 roll-backs of the Freedom of Information Act since September 11<sup>th</sup>...all over America, at the state and local level, as well as the federal government. The Attorney General sent a message to every federal employee, when in doubt, deny any Freedom of Information request."<sup>53</sup>

The veil of secrecy that surrounds the Act makes it extremely difficult, if not impossible, to evaluate its impact on our country and predict its future course. We seem to be left with several important but unanswered questions. Are the civil liberties concerns that have been raised by opponents of the Act justified, or have they indeed been exaggerated? How will the Act be viewed

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<sup>50</sup> Lichtblau, "Senator Faults Briefing on Antiterrorism Law."

<sup>51</sup> Ibid.

<sup>52</sup> Freedom of Information Documents on the USA PATRIOT Act, (Electronic Privacy Information Center, [cited April 16 2005]).

<sup>53</sup> Transcript available at [http://www.pbs.org/now/transcript/transcript206\\_full.html](http://www.pbs.org/now/transcript/transcript206_full.html). Accessed March 15, 2005.

in 10, 20, or even 100 years? Will it be viewed as a success or another stain in American history? With the uncertainty that surrounds the Patriot Act today, it becomes extremely important to gain a historical perspective.

Indeed, the study of history is a powerful tool. As David Boaz puts it, “the study of history is our best guide to the present and the future.”<sup>54</sup> The study of history has often been called upon to ensure that times of turmoil and strife are not repeated—that the same mistakes are not made twice. Indeed, after the horrors of the Holocaust during World War II, history has become one of the most important tools in combating similar evils. School children in Germany and the United States alike learn about the economic strife in Germany that led to the rise of Hitler and the public’s complacency with the man who would claim the lives of millions.

The Patriot Act is not the first instance of national security legislation being crafted during times of emergency. As Thurgood Marshall said in his dissenting opinion in *Skinner v. Railway Labor Executives’ Association* (1989) “history teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.”<sup>55</sup> There have indeed been other points in American history when the issues that are at the forefront of the debate concerning the Patriot Act—civil liberties versus national security interests—have dominated policy debates. As Alan Brinkley boldly states, “every major crisis in our history has led to abridgements of

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<sup>54</sup> David Boaz, "The Importance of History," *Cato Policy Report* (July/August, 2003).

<sup>55</sup> , "Skinner v. Railway Labor Executives' Association," in *489 u.s. 602* (1989).



personal liberty, some of them inevitable and justified.”<sup>56</sup> The Alien and Sedition Act of 1798, which like the Patriot Act, was prompted by an incident that led to a heightened concern about national security, provides an example of past legislation that can help to shed light on the Patriot Act. I will examine the Alien and Sedition Acts and the Patriot Act and their relationships in Chapter 2.

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<sup>56</sup> Alan Brinkley, "A Familiar Story: Lessons from Past Assaults on Freedoms," in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, ed. Richard C. Leone and Greg Anrig, Jr. (New York, 2003), 23.

## **Chapter 2**

### **The Alien and Sedition Acts and the Patriot Act**

#### **A Comparative Analysis**

More than two centuries before the terrorist attacks on 9/11 and the subsequent enactment of the Patriot Act, America experienced its first lesson in national security law. The enemy – unlike today – was not the terrorist, but instead the country of France. A pseudo-war – much like the current war on terrorism – had been waged against France by President John Adams and his Federalist party. Patriotism surged through the nation and the Adams administration realized that they had been afforded the opportunity to pass legislation that had been deemed unacceptable in prior years. The Federalist controlled Congress passed four significant national security laws in 1798 – The Naturalization Act, The Alien Friends Act, The Alien Enemies Act, and the Sedition Act.

Chapter 1 included a description of the major provisions of the Patriot Act. I will begin this chapter with a brief summary of the main features of the Alien and Sedition Acts. It is beyond the scope of this paper to provide a detailed comparison of the provisions of the Patriot Act and the Alien and Sedition Acts. Rather, the focus will be on the historical events that led to their enactment, the debate preceding their enactment, and the application and enforcement of both sets of acts. In the third and final chapter, I will discuss the fate of the Alien and Sedition Acts and consider whether a similar fate can be expected in relation to the Patriot Act.

## **The Naturalization Act**

On June 18, 1798, President Adams signed into law the first of a series of legislative acts that are now commonly referred to as “the Alien and Sedition Acts.” The Naturalization Act – as it was labeled – was created in order to make it tougher for aliens to become residents of the United States. The Act’s effect would be to nearly triple the time it took for immigrants to become citizens from five to fourteen years.<sup>1</sup> Moreover, as written in the first section of the Act, the alien requesting citizenship would have to “have declared his intention to become a citizen of the United States, five years, at least, before his admission.”<sup>2</sup> The Act also set up a system in which aliens would be required to report to government officials periodically in order to be documented.

## **The Alien Friends Act**

The Naturalization Act paved the way for the next bill concerning aliens in the United States. On June 25, 1798, President Adams signed into law the Alien Friends Act, which was created as a tool to be used by the president during both wartime and periods of peace to protect the security of

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<sup>1</sup> James Morton Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties* (Ithaca, New York, 1966). 23.

<sup>2</sup> Alien and Sedition Acts ([cited April 16 2005]); available from <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html>. All references to the Alien and Sedition Acts are to this Library of Congress Web site.

the country from dangerous aliens. It was determined that the act was to be in effect for two years before expiring, or being phased out.

The first section of the act granted the President broad powers in dealing with aliens and made it “lawful for the President of the United States at any time during continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States ... to depart out of the territory of the United States.” The second section of the Alien Friends Act further defined the role of the President in deporting aliens and made it abundantly clear that the President may also imprison aliens for an unspecified amount of time if an alien did not comply with the President’s demand of removal.

The remaining four sections of the Alien Friends Act laid out some of the more minor specifications of the act. For instance, one such section made it a requirement that masters and commanders of ships arriving at a United States port provide a written report to a customs officer documenting specific information about any aliens onboard. Moreover, the other sections specified that the Court should be afforded knowledge of all crimes under the act and that all officers of the United States “are required to execute all precepts and orders of the President of the United States issued in pursuance or by virtue of this act.”

### **The Alien Enemies Act**

A mere two weeks after the signing of the Alien Friends Act, President Adams signed the next section of the Alien and Sedition Acts – The Alien Enemies Act – into law on July 6, 1798. Much like the Alien Friends Act before it, the later Act awarded the President new broad powers in dealing with aliens during national security crises. However, unlike the Alien Friends Act, which was applicable during both periods of war and peace, the Alien Enemies Act could only be used as a wartime measure. Moreover, the Alien Enemies Act would be a permanent measure, which would only affect aliens from a country with which the United States was at war. This aspect made the Alien Enemies Act much less controversial than the Alien Friends Act, which allowed the President powers in deporting aliens regardless of their home country.

The first section of the Act defined the President’s powers to have “all natives, citizens, denizens, or subjects of the hostile nation or government ... apprehended, restrained, secured, and removed as alien enemies” upon a declaration of war. The section also provided a clause that allowed for alien enemies “who shall not be chargeable with actual hostility” to have sufficient time to gather their goods and belongings for their departure. The amount of time that would be granted to these aliens would be based on any treaties that the United States had with the hostile nation. If none existed, it was deemed the responsibility of the President to declare a “reasonable time” for their departure.

The second section of the Alien Enemies Act defined the duties of enforcement officers and the Courts in response to the President's proclamation of war to decide how to handle alien enemies on a case-by-case basis. Lastly, section III set up the responsibilities of local marshals and deputies to carry out the President's and Court's orders in removing an alien enemy from the United States.

### **The Sedition Act**

President Adams signed the last act comprising the Alien and Sedition Acts – The Sedition Act – into law on July 14, 1798. Unlike the three acts before it that dealt with aliens, the Sedition Act sought to enforce national security measures upon citizens of the United States. The purpose of the act, which was to expire on March 3, 1801, the last day of Adams' term of office, would be to punish those in the United States who conspired against the government or spoke and wrote ill of the government. Although Federalists explained the rationale for the Act's expiration date by saying that it was just meant to be a temporary measure, scholars have conjectured that the date was set to ensure that the Republicans would not use the act against Federalists if Adams were defeated in 1800.<sup>3</sup>

The first section of The Sedition Act dealt specifically with punishing those people who “shall unlawfully combine or conspire together, with intent to oppose any measure of government of the United States” or intimidate any member of the government. This section deemed such an offense a high

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<sup>3</sup> Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* (New York, 2004). 67.

misdemeanor and authorized that the guilty subject be punished by a fine “not exceeding five thousand dollars, and by imprisonment during a term not less than six month nor exceeding five years.”

The second section of The Sedition Act – the Act’s most controversial part – deemed “any false, scandalous and malicious writing or writings against the government of the United States” a punishable offense, subject to fines and imprisonment. The third section of the Act dictated how suspected offenders would be prosecuted. The section made allowances for defendants to have a trial by jury and “give evidence in [their] defense, the truth of the matter contained in the publication charged as a libel.”

### **The Sociopolitical and Historical Context of the Alien and Sedition Acts**

A mere decade removed from the ratification of the United States Constitution, the United States government was still going through the rudimentary stages of developing domestic and foreign policy in the 1790s. That was a period of international problems for the United States government. Much of the initial tension was caused by events not in the United States, but in Europe. Following the French Revolution of 1789, pro-monarchist governments in Europe, such as England, Spain, Austria, the Netherlands, and Prussia, declared war on France, fearing that the revolution would spread to their countries. However, much to the displeasure of both the French and British, the United States government vowed to stay neutral and continue to trade with both nations. The British navy began to seize American ships at sea

and force American sailors to join their forces.<sup>4</sup> Just when war between the two nations appeared imminent, the United States government narrowly averted it by sending John Jay to London to bargain for peace and sign a peace treaty that would become known as Jay's Treaty.<sup>5</sup> Although Jay's Treaty effectively dissipated the British threat, the American government inadvertently made itself a new enemy – France. With Britain still engaged in a war with France, the treaty made the French suspicious that the Americans had abandoned their neutrality in support of the British.

By 1795, the French government had responded to the perceived threat by withdrawing ministers from Philadelphia, not allowing United States ministers into France, and seizing United States ships at sea.<sup>6</sup> Between June 1796 and June 1797, 316 ships were seized by the French.<sup>7</sup> In the years following Jay's Treaty, war between the United States and France seemed imminent. Warfare between the two nations became so threatening that the newly elected U.S. president, John Adams, sent a group of negotiators to Paris in 1797 to try to settle the dispute with French agents and French foreign minister, Charles Maurice de Talleyrand. However, in what has since come to be known as the "XYZ Affair," month-long negotiations between the United States came to a stand still when three unofficial agents – who were later dubbed X, Y, and Z – told the American diplomats that all talks would end unless the American government loaned France money for their war against

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<sup>4</sup> Ibid. 21.

<sup>5</sup> <http://www.state.gov/r/pa/ho/time/nr/14318.htm>. Accessed April 16, 2005.

<sup>6</sup> John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston, 1951). 4.

<sup>7</sup> Stone, *Perilous Times: Free Speech in Wartime*. 21.



Britain and gave the Executive Directory \$250,000. This demand for a bribe enraged the American diplomats who famously responded, “No, no; not a sixpence.”<sup>8</sup>

As negotiations ended in France, word was spread in the United States about the French diplomats’ insulting actions. President Adams prepared his nation for war as anti-French sentiment began to sweep across the nation. According to John Miller, “the country began to get under arms and the spirit and unity of the people had never been higher.”<sup>9</sup> Congress voted on several war preparations, among them orders to build frigates, expand harbor defenses, and renounce all treaties with France. Indeed, the United States was thrown into a virtual state of war with France in 1797.<sup>10</sup>

In addition to foreign policy concerns, the crisis also began to create ripples domestically in the political domain. This is not to say that America was not politically divided before the crisis with France. After all, in the election of 1796 John Adams, the leader of the Federalist Party, won by only three electoral votes over Thomas Jefferson, the leader of the Republican Party.<sup>11</sup> Moreover, Republicans and Federalists had long been at odds over their views on the French Revolution. According to Gragg, “Republicans applauded the revolutionaries’ destruction of aristocratic privileges, the overthrow of monarchy, and the implementation of a constitutional government,” while Federalists saw the same process as the “degeneration of

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<sup>8</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 6.

<sup>9</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 7.

<sup>10</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 7-9.

<sup>11</sup> *Ibid.* 21.

legitimate government into mob rule.”<sup>12</sup> However, the situation with France simply furthered this divide as an impenetrable chasm began to form between the two major political parties in America. The Republican Party, trying to quell the public patriotism hysteria, stressed that a war with France was undesirable and called for a diplomatic settlement. Indeed, in 1798 the Republicans opposed every major defense measure proposed by the Federalists during congressional debates.<sup>13</sup> The Federalists, however, spurred on by their sudden popularity, were not opposed to the use of a military solution against France, and they began to forge a new battle against the Republicans, who they deemed a dangerous “faction.”<sup>14</sup> Indeed, the Federalists launched a flak campaign against the Republicans, claiming that they were sympathizers with France, or Jacobins. According to scholars such as James Smith, the Federalists had long been concerned with usurping power from the Republicans. As he puts it, “the XYZ affair was not so much the cause, as the occasion, for striking at political opposition.”<sup>15</sup>

After the XYZ incident, the Federalists worked feverishly to instill into the minds of the public that Republicans were unpatriotic. According to Miller, “the purpose of the opposition party was made to appear to be the advancement not of American interests but of those of France; it became axiomatic that no Republican could be a true American.”<sup>16</sup> Once the framework had been set, and the popularity of the Republicans had been

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<sup>12</sup> Larry Gragg, "Order vs. Liberty," *American History* 33 (October 1998, 1998).

<sup>13</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 26.

<sup>14</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 11.

<sup>15</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 21.

<sup>16</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 13.

drastically curtailed, the Federalists moved into legislative action. The Alien and Sedition Acts – which were thought to have been in the works even before the dire situation with France – would provide the Federalists an opportunity to further undermine the Republican Party. Within a year of the XYZ Affair, the Federalist Party would push all four measures through Congress and into law.

### **Comparisons to the Sociopolitical and Historical Context of the Patriot Act**

Much like the months leading up to the signing of the Alien and Sedition Acts, in which the XYZ Affair dominated the national scene, the period preceding the signing of the Patriot Act could be defined by one major event – the terrorist attacks of 9/11. Just as the XYZ affair had brought together a new nation in the 1790s, the strikes on the World Trade Center and Pentagon created an uncanny wave of patriotism in America. President Bush's approval ratings shot up an unheard of 35 points – from 55 to 90 percent – in the days following the event.<sup>17</sup> Within weeks of the attack, President Bush – in much the same manner as President Adams with France – was making plans for a war with Afghanistan and calling for heightened security measures.

Moreover, as had been the case in the 1790s with the Federalists and Republicans, following the 2000 election, the country was bitterly divided between two major parties – the Republican and Democrat Party. Indeed, the

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<sup>17</sup> USA Today/Gallup Poll: <http://www.usatoday.com/news/polls/tables/live/01132003.htm>. Accessed April 13, 2005.

House and Senate, although controlled by the Republicans, were almost evenly divided between Democrats and Republicans. Moreover, the election of 2000, which saw George W. Bush claim a victory over Al Gore despite receiving less of the popular vote, can be seen as mirroring the close election of 1796, in which Adams won by a mere three electoral votes. Although the claim has seldom been made that the Patriot Act was a political tool to be used by the Republican Party against the Democrats, there is evidence that Republicans were planning to implement measures similar to those in the Act even before the events of 9/11. As David Staudt states:

“We know in hindsight that the PATRIOT Act was a Department of Justice compiled ‘wish list’ amending over thirty federal statutes to give law enforcement either greater powers; to remove limitations from existing authorities; or to codify or overrule specific judicial rulings.”<sup>18</sup>

In a move that resembles the efforts of the Federalists to pass their coveted Alien and Sedition Acts in the weeks following the XYZ incident, the Republicans capitalized on the events of 9/11 in order to pass their favored legislation. However, unlike the fiery debate between Federalists and Republicans concerning national security in the weeks leading up to the signing of the Alien and Sedition Acts, the Democrats were largely maneuvered into a state of silence by the Republicans. Democrats did not want to be pilloried for being soft on terrorism.<sup>19</sup> Indeed, in the Senate, only one Democrat, Russ Feingold, voted against the Patriot Act, whereas other

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<sup>18</sup> David J. Staudt, "How the Terror Laws Make Terrorists: Pre-emptive Prosecution," *Philosophy & Public Policy Quarterly* 24 (Fall, 2004): 5.

<sup>19</sup> Judy Mann, "Speeches and Symbolism Do Little to Solve Our Problems," *The Washington Post*, October 31 2001.

Senators who were usually concerned with protecting civil liberties – such as Senator Leahy – put up little resistance to the act.<sup>20</sup> Nearly five months after Sept. 11, then-Senator Tom Daschle was accused by Republicans of trying to divide the nation after simply questioning the success of the war on terror.<sup>21</sup> For months following September 11, any form of dissent was silenced by the wave of patriotism. Comedians, whose jobs had revolved around poking fun at the Bush administration, softened their routine so as not to be deemed unpatriotic. As a local Boston comedian said in December 2001, “I had all this great Bush material, and then came Sept. 11, and what used to be an entertaining Bush joke, now could be treason.”<sup>22</sup>

Moreover, much as the Federalists made the Republicans out to be traitors and French sympathizers after the XYZ Affair, modern-day Republicans have attacked the Democratic Party, particularly after the war in Iraq, by questioning their patriotism and pointing to their close affiliations with the United Nations and the European Union as evidence of catering to the views of foreign countries. Indeed, in the campaign for the 2004 presidential election, one of President Bush’s major criticisms of John Kerry was that, as President, he would cater to the views of the United Nations and not look out for the best interest of Americans. During the campaign, Vice President Cheney mocked Kerry’s internationalism, claiming that, “Senator Kerry began his political career by saying he would like to see our troops

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<sup>20</sup> "Infringing on Civil Liberties."

<sup>21</sup> Ayotte, Kerry Criticizes Republican Leaders for Stifling Dissent ([cited]).

<sup>22</sup> Nick A. Zaino, III, "For Tingle, Finding Laughs in Time of War is a Calling," *The Boston Globe*, December 21 2001.

deployed only at the directive of the United Nations. ...George W. Bush will never seek a permission slip to defend the American people.”<sup>23</sup>

Furthermore, similar to the anti-French and anti-international climate of the late 1790s, since France’s and the United Nation’s denouncement of the U.S. war in Iraq, a new culture of nativism and contempt specifically concerning the French has swept through America. Indeed, disdain for the French has risen to such high levels that U.S Congressmen have voted to have the word “French” removed from fries and toast on their cafeteria menus.<sup>24</sup> Much as the Federalists of the late 1790s, the Republican Party has been taking full advantage of this phenomenon to strike at the minority party, the Democrats. Indeed, even in the 2004 presidential campaign, “French” became a dirty word. Republicans sought to capitalize on anti-French sentiment among Americans by repeatedly accusing Democrat nominee John Kerry of appearing “French.”<sup>25</sup> In a statement that makes current Republicans’ actions seem eerily similar to the techniques used by the Federalists centuries ago, Senator Joe Biden said that Republicans were trying to associate Kerry with the French in order to make him look unpatriotic.<sup>26</sup>

Additionally, more than three years after the horrific terrorist strike, there is evidence to suggest that the Republican Party’s political strategy still hinges on the idea of rekindling the patriotic fervor that followed the attacks

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<sup>23</sup> John Nichols, "GOP Pulls out the Stops in U.N. Attack," *Capital Times*, September 7 2004.

<sup>24</sup> Libby Quaid, "Freedom Fries' Follow Long Tradition of Patriotic Bashing [LexisNexis] (Associated Press, April 12 2003 [cited April 10 2005]); available from <http://www.lexisnexus.com/>.

<sup>25</sup> Sandra Maler, ""French" Becomes Campaign Slur," *The Seattle Times*, October 27 2004.

<sup>26</sup> GOP Seeking Subtle Political Gain by Painting Kerry as a Farcophile [LexisNexis] (Bulletin News Network, April 12 2004 [cited April 10 2005]); available from <http://www.lexisnexus.com/>.

of September 11. During the 2004 election campaign, this strategy appeared particularly dominant. In March 2004, President Bush was criticized by firefighters and the families of the victims killed on September 11, for running television campaign advertisements that featured images of the destroyed World Trade Center and firefighters carrying a flag-draped coffin.<sup>27</sup> Moreover, approximately three years to the date after September 11, 2001, the Republicans held their national convention in New York City – a move that angered many, including half of the families of the victims who felt that the Republicans were simply trying to capitalize from the event.<sup>28</sup>

### **The Alien and Sedition Acts Debate**

As Geoffrey Stone states, “a theme that recurs throughout the history of war in the United States is the status of aliens.”<sup>29</sup> Although the United States was never officially at war with France, the Alien and Sedition Acts drastically reshaped legislation concerning aliens. This process began with the Naturalization Act. From the initial introduction of the Naturalization Act, the Republicans sensed that the Federalists were seeking to weaken their political party. Between 1790 and 1798, thousands of foreigners entered the United

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<sup>27</sup> Wayne Washington and Anne E. Kornblut, "9/11 Images in Bush Ads Hit Firefighters, Kin of Victims Complain," *Boston Globe*, March 5 2004.

<sup>28</sup> Half in 9/11 Kin Survey Oppose RNC in NYC (Associated Press Online, August 29 2004 [cited April 9 2005]); available from <http://www.ap.org/>.

<sup>29</sup> Stone, *Perilous Times: Free Speech in Wartime*. 29.

States from countries such as France, Ireland, and Germany.<sup>30</sup> The Federalists, realizing that the Republicans relied on the vote of immigrants, feared that the influx of foreigners would breed potential disloyalty and promote the rise of the Republican Party.<sup>31</sup> Empowered by the threat of war, the Federalists sought to reduce the political influence that foreigners could achieve in the United States by passing the Naturalization Act, which would make aliens have to wait an extra nine years before becoming a citizen and voting in elections. As John Miller writes, “the purpose of this law was to make the Republican party wither on the vine by cutting off its supply of foreign-born voters.”<sup>32</sup> Although this political move could not easily be disguised as national security legislation, the Federalists used incidents such as the XYZ affair to bolster their argument that immigrants were not to be trusted, especially not with the rights of American citizens.

While the Naturalization Act was being debated in Congress, Republicans were able to strike down an amendment that would have barred naturalized citizens from gaining all the rights of native citizens. The Federalist Congressman Harrison Gray’s motion was defeated in the House of Representatives by a margin of fifty-five to twenty-seven.<sup>33</sup> However, if the Federalists’ first proposed measure had passed, naturalized citizens would have been unable to ever hold office in the United States. In a forceful attack, “the Republicans contended that second-class American citizenship is not

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<sup>30</sup> Ibid. 30.

<sup>31</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 23.

<sup>32</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 47.

<sup>33</sup> Ibid. 48.



possible under the Constitution.”<sup>34</sup> The Republicans would not, however, succeed in striking down all of the Federalists’ naturalization proposals. Despite efforts by Republican Congressmen such as Albert Gallatin and Joseph McDowell to argue the unfairness of raising the residency requirement to fourteen years, the terms remained unchanged.

The Republicans saw the introduction of the Alien Friends Act into the Senate as another strike at their political base by the Federalists. Accordingly, the Senate appointed an all-Federalist committee to draft the bill.<sup>35</sup> The Federalists once again sought to justify the legislation by pointing to the impending crisis with France and claiming that the Alien Friends Act was necessary for national security. A pillar of the Republican opposition to the Act was their constitutional theory that the states had jurisdiction over resident aliens.<sup>36</sup> In addition to arguing that the federal government was not empowered to control aliens, the Republicans questioned the necessity of the legislation and challenged Federalists to give evidence of alien insurrection. Moreover, the Republicans maligned the President’s newfound powers as a breach of the separation of powers and argued that the Act was in direct violation of the due process rights laid out in the Constitution. Indeed, the Republicans feared having American immigration powers placed in one man’s hands without the use of the judiciary.<sup>37</sup> Republicans such as Albert Gallatin stressed that aliens were also to be awarded a trial by jury and due process of

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<sup>34</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 29.

<sup>35</sup> *Ibid.* 51.

<sup>36</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 162.

<sup>37</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 84-86.

law and began to voice concern that similar legislation would be used to target United States citizens.<sup>38</sup> According to Gallatin, “the laws of the United States will reach alien friends if guilty of seditious or treasonable practices, as well as citizens.”<sup>39</sup> If the Alien Friends Act was defended on the basis of its being necessary to national security, the Republicans felt it was not unreasonable to suspect that a similar bill would be proposed to deal with American citizens. Despite heavy Republican protest, the Federalists pushed the legislation through Congress and President Adams signed the act into law.

Only weeks after the signing of the Alien Friends Act, the debate over the Alien Enemies Act began. Although there was indeed some bipartisan support for the measure, Republicans continued to fear that similar laws would be enacted to affect not only aliens, but also United States citizens.<sup>40</sup> Moreover, the Republicans also feared giving the president and the executive branch excessive authority over the country.<sup>41</sup>

Just as Republican Congressmen had suspected, legislation addressing American citizens was indeed planned by the Federalist Party. Within weeks of enacting the Alien Friends Act and Alien Enemies Act, Federalist Senator James Lloyd introduced the Sedition Act in Congress. What followed was the most heated debate between Republicans and Federalists of all the security measures passed in 1798.<sup>42</sup> When Lloyd’s bill was introduced in the House,

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<sup>38</sup> Stone, *Perilous Times: Free Speech in Wartime*. 31.

<sup>39</sup> The Library of Congress Web site: <http://memory.loc.gov/ammem/amlaw/lwaclink.html>. Accessed April 16, 2005.

<sup>40</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 35.

<sup>41</sup> *Ibid.* 39.

<sup>42</sup> *Ibid.* @113

Republican representatives sought to reject the measure outright, saying that it was both unnecessary and unconstitutional. Indeed, the entire Republican Party united under the goal of overcoming passage of the Sedition Act. Although past national security bills had sometimes violated the spirit of the Constitution, the Republicans argued that the Sedition law would turn the Constitution into “little more than a scrap of paper.”<sup>43</sup> Their main constitutional argument hinged on the idea that the Sedition Act was in direct opposition to the First Amendment’s provision that, “Congress shall make no law... abridging the freedom of speech, or of the press.”<sup>44</sup> The Republicans feared that sedition laws would strike at the core of the coveted fourth estate, a primary purpose of which is to provide checks on the government. However, as Miller discusses, the Republicans were not fundamentally opposed to the idea of allowing the states to punish seditious material. In response to the claim that the federal government’s enforcement of libel was unconstitutional, the Federalists adopted their usual defense that in times of national emergency, Congress has the power to ensure that the safety and welfare of the American public is preserved from dangerous sedition.<sup>45</sup>

The Republicans, doubting this assessment, once again asked Federalists to prove that there was in fact seditious material endangering the wellbeing of the country. Instead of subscribing to the Federalists’ claim that the Sedition Act was introduced to eliminate dangerous sedition, the

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<sup>43</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 166.

<sup>44</sup> Bill of Rights ([cited April 16 2005]); available from [http://www.archives.gov/national\\_archives\\_experience/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html)

<sup>45</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 167-8.

Republicans viewed the Act as yet another power move by the Federalists to silence the Republican minority and “perpetuate their authority.”<sup>46</sup> According to Congressman Gallatin:

No reason could be adduced why this bill should pass, except that a party in the United States, feeling that they had more power, were not afraid of passing such a law, and would pass it, because they felt themselves so strong – so little in need of the assistance of that measure – that they expected to be supported by the people, even in that flagrant attack upon the Constitution.<sup>47</sup>

Indeed, many Republicans feared that the Sedition Act would serve to chill public opposition of the Federalists. Given the words of Federalist representatives during the Congressional debates over the Sedition Act, the Republicans’ claim that the Sedition Act was largely politically motivated seems well-justified. For example, Federalist Representative John Allen not only told members of the House that Republican newspapers were threatening the security of America by convincing people “to raise an insurrection against the government,” but also argued that Federalist Congressmen were guilty of seditious comments. Allen even accused Republican Senator Livingston of sedition because he spoke before the House in favor of rejecting the alien bill.<sup>48</sup> As Smith states, “at one point Allen came close to contending that criticism of the proposed sedition bill was itself seditious.”<sup>49</sup> The outspoken Allen was not the only Federalist to put forth this radical view. Representative Robert Harper shared Allen’s views on the danger of Republican

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<sup>46</sup> Stone, *Perilous Times: Free Speech in Wartime*. 37.

<sup>47</sup> 8 Annals of Congress 2161 at The Library of Congress Web site: <http://memory.loc.gov/ammem/amlaw/lwaclink.html>. Accessed April 16, 2005.

<sup>48</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 114.

<sup>49</sup> *Ibid.* 117.

Congressmen and even proposed a way to work around their Congressional immunity in order to be able to enforce the Sedition Act on them too. He suggested that private letters written by Republican Congressmen be subject to review under the Sedition Act.

In the end, Republican efforts to squelch the passage of the Sedition Act failed and the measure passed with a straight party vote in both the House of Representatives and the Senate. On July 14, 1798 the Sedition Act was signed into law by President Adams.

Although the Republicans were dealt a crushing blow when the Sedition Act was passed, the struggle against the bill did not end with its passage in Congress. Instead, the struggle to strike down the act only grew with each application of the measure. In the months following the passage of the Act, American citizens took a stand and signed petitions citing its unconstitutionality. In Northampton County, Pennsylvania, twelve hundred citizens signed a petition that said that the Sedition Act contradicted America's system of a republican government.<sup>50</sup> However, according to John Miller, the "most forceful statement of the constitutional objections to the Alien and Sedition Acts was made in the Virginia and Kentucky Resolves."<sup>51</sup> The Virginia Resolution and Kentucky Resolutions, which were secretly drafted by Republicans James Madison and Thomas Jefferson, respectively, were adopted by each state's legislature in the fall of 1798. Within the documents, Jefferson and Madison borrowed from the federalism argument

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<sup>50</sup> Stone, *Perilous Times: Free Speech in Wartime*. 44.

<sup>51</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 169.

used by fellow Republican Congressmen during the Sedition Act's debate and argued that the punishment of seditious speech and writing fell under the jurisdiction of the states rather than the Federal government. As Geoffrey Stone observes, the resolutions argued, "that the Constitution was a compact between the states that limited the federal government to certain enumerated powers, and that the federal government could not be the final arbiter of the scope of the powers delegated to it by the states."<sup>52</sup> As Stone suggests, the first and most crucial section of the Kentucky Resolution laid out the Republican states' rights philosophy, a viewpoint that had seldom been used prior to the resolutions.<sup>53</sup> The first section of the Kentucky Resolution included the following resolution:

That the several States composing the United States of America, are not united on the principle of unlimited submission to their general government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes,-- delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force.<sup>54</sup>

This statement coupled with the Virginia Resolution's direct invitation for other states to join the fight and "watch over and oppose every infraction" of the Constitution by the Federal government had Federalists up in arms.<sup>55</sup>

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<sup>52</sup> Stone, *Perilous Times: Free Speech in Wartime*. 45.

<sup>53</sup> Ishmael Reed, "The Patriot Act of the 18th Century," *Time*, July 5 2004.

<sup>54</sup> The Kentucky Resolutions of 1798 ([cited April 16 2005]); available from <http://www.constitution.org/cons/kent1798.htm>.

<sup>55</sup> Elliot's Debates, Volume 4, 528: <http://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=004/lled004.db&recNum=539>. Accessed March 15, 2005.

Some felt that the state's actions were nothing short of a declaration of war and that violence was on the horizon.<sup>56</sup>

Although there was dissent in relation to the Sedition Act in other states, they all declined to join with Virginia and Kentucky. Moreover, despite the stir that the Kentucky and Virginia Resolutions caused in Philadelphia, they did little to deter the Federalists. Indeed, as Miller suggests, they even may have given the Federalists more of a justification for using the acts to squelch dissent. Indeed, in the 1799 elections the Federalists gained seats in Congress, suggesting that the Virginia and Kentucky resolutions may have hurt more than helped the Republican cause against the national security legislation.<sup>57</sup> However, Jefferson and Madison's move did encourage Republicans to make the Alien and Sedition Acts a major issue during the campaign of 1800.<sup>58</sup> Moreover, Thomas Jefferson and his Republican compatriots now understood that they would have to rely on winning elections, as opposed to counting on the states to take action, in order to overcome the perils of the Sedition Act.<sup>59</sup>

### **Comparison to the Patriot Act Debate**

Just six weeks after the September 11 terrorist attacks, the Patriot Act passed both houses of Congress with a large degree of bipartisan support. Indeed, Capital Hill was so intent on quickly complying with the "wartime"

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<sup>56</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 171.

<sup>57</sup> *Ibid.* 179.

<sup>58</sup> Gragg, "Order vs. Liberty."

<sup>59</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 179.

Bush administration that no Congressman actually took the time to read the important document.<sup>60</sup> Consequently, unlike the heated debate in Congress over the Alien and Sedition Acts, there was very little discussion or debate prior to passing the Patriot Act. As indicated earlier, even Senators like Patrick Leahy, who were generally concerned with protecting civil liberties, put up little protest to the Act. According to a Washington Post article commemorating the one year anniversary of the Act, public interest lobbyists found that “normally privacy-minded lawmakers, including Sens. Dianne Feinstein (D-Calif.) and Charles Schumer (D-N.Y.) had no intention of questioning efforts to push a bill through quickly.”<sup>61</sup> Many of those troubled by provisions of the act were sufficiently reassured by the sunset provisions in some sections of the Act to support it.<sup>62</sup> Moreover, Congressmen who were especially troubled by the Act, such as Leahy, realized that it would be political suicide to vote against the Act, and they would be labeled “soft on terrorism.”<sup>63</sup>

This lack of dissent from the Democrats over the Patriot Act in comparison to the heated debates that took place during the passing of the Alien and Sedition Acts could also be explained by the fact that, unlike the Alien and Sedition Acts, the Patriot act didn't try to destroy the Democratic Party by attacking its constituency and politicians.

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<sup>60</sup> Staudt, "How the Terror Laws Make Terrorists: Pre-emptive Prosecution," 8.

<sup>61</sup> O'Harrow, "Six Years in Autumn; A Year Ago as a Nation Reeled from Attack, a Battle was Joined for America's Future. Not in Afghanistan. In Washington."

<sup>62</sup> "Infringing on Civil Liberties."

<sup>63</sup> O'Harrow, "Six Years in Autumn; A Year Ago as a Nation Reeled from Attack, a Battle was Joined for America's Future. Not in Afghanistan. In Washington."



Although there was little dissent offered by either politicians or the American public in the months directly after the attacks of September 11, a movement not unlike that experienced in the late 1790s was forming. Just as Sedition Act dissent only intensified after the passage of the measures, civil libertarians began to capture both Congress's and the public's attention about the possible dangers of the Patriot Act as the ardent patriotism surrounding 9/11 and the anthrax attacks began to subside. Indeed, some of the same members of Congress who voted for the Patriot Act a mere three years ago, are now calling to narrow its scope. For instance, John Kerry, the Democratic Senator from Massachusetts, made the modification of some of the more controversial sections of the Patriot Act an issue during his campaign for President in 2004.<sup>64</sup> A robust debate such as that preceding passage of the Alien and Sedition Acts, which did not take place in Congress when the Patriot Act was first passed, is now increasingly occurring on Capitol Hill. Just this month (April 2005), hearings have begun over the possible renewal of sixteen sections of the act that are set to expire at the end of the year. Unlike the process of modifying and passing the Act that took mere days in 2001, its provisions are likely to be rigorously scrutinized this time around. Senator Patrick Leahy, who has been criticized for voting for the Patriot Act originally, vowed that before making a decision this time around, he would need to have a deep understanding of "how these powers have been used and

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<sup>64</sup> Bob Egelko, "Bush, Kerry Divided on Scope of Patriot Act," *The San Francisco Chronicle*, September 20 2004.

whether they've been effective.”<sup>65</sup> As an article on the hearings suggests, the Congressional proceedings over the Patriot Act are controversial enough to be “shaping up as one of the biggest legislative battles in the current Congress.”<sup>66</sup>

Of the sixteen “sunsetting” sections of the Patriot Act being discussed in the hearing, Section 215 is the by far the most controversial. As discussed in Chapter 1, Section 215 of the Act, which grants the executive branch authority to access private records such as library information, has caused a large uproar from civil libertarians who fear that the government can now look into what ordinary American citizens are reading. In fact, according to a *Los Angeles Times* article, librarians have expressed concern that the provision was already being used to probe the reading habits of ordinary citizens.<sup>67</sup> Although it remains unclear precisely how the section is being used, there is the fear that it will be used as a Sedition Act of sorts and allow the government to keep tabs on, and possibly later arrest, American citizens who are reading allegedly “un-American” material. In the months leading up to the Congressional hearings, this section has become extremely politicized. In the first round of Senate hearings, Attorney General Alberto Gonzales immediately began discussing the section and even went so far as to endorse certain changes to the section that would allow individuals who possess records that are desired for an investigation the chance to consult with a lawyer. Moreover, it is thought that Gonzales will seek to tighten the legal

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<sup>65</sup> Eric Lichtblau, Antiterrorism Law Defended as Hearings Start (New York Times on the Web, April 6 2005 [cited April 10 2005]); available from <http://www.nytimes.com/>.

<sup>66</sup> Ibid.([cited]).

<sup>67</sup> Richard B. Schmitt, "Gonzales to Endorse Patriot Act 'Modifications'," *The Los Angeles Times*, April 5 2005.

standard in the section to make it clear that prosecutors must prove to a judge that desired documents are "relevant" to a terror investigation before making the request.<sup>68</sup>

Another controversial part of the Patriot Act that is set to expire at the end of 2005 is Section 802. Many of the Act's staunchest critics have also compared section 802 of the Act, which concerns the issue of "domestic terrorism," to a sedition law of sorts. It is argued that the government could one day use this section to prosecute protestors and activists under the label of "domestic terrorists." As the ACLU has suggested, "the definition of domestic terrorism is broad enough to encompass activities of several prominent activist campaigns and organizations" such as Greenpeace, Operation Rescue, Vieques Island, WTO protestors, and the Environmental Liberation Front.<sup>69</sup> In the weeks leading up to the Congressional hearing, a political lobbying group consisting of both conservative and liberal organizations and headed by a former Republican Congressman, has formed to ensure that controversial sections of the act, including 802, are not reauthorized by Congress.<sup>70</sup>

Moreover, the same separation of powers concerns that arose during the debate of the Alien and Sedition Acts – in particular the Alien Acts – have come to the forefront of today's arguments against the Patriot Act. As I have already discussed above, with the Alien Friends Act, the President was given broad powers to control immigration and deport and detain aliens with little judicial oversight. The Patriot Act, similarly, has given the executive

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<sup>68</sup> Ibid.

<sup>69</sup> How the USA PATRIOT Act Redefines 'Domestic Terrorism' ([cited].

<sup>70</sup> Audrey Hudson, "Alliance to fight Patriot Act," *The Washington Times*, March 23 2005.

sweeping powers in performing wiretaps, searches and seizures, and detainments without a large degree of judicial interference. This abuse of executive powers during the current administration was a topic of contention for Senator Patrick Leahy during the Congressional hearings over the Patriot Act. As he said during the hearing, “Now, whether or not there have been abuses under the Patriot Act, the unchecked growth of secret surveillance powers and technologies, with no real oversight by the Congress or the courts, has resulted in clear abuses by the executive branch.”<sup>71</sup>

Furthermore, just as some of the staunchest criticisms of the Alien and Sedition Acts came from outside of the Capitol, local communities and states have become involved in the process of repealing the Patriot Act. Much as the efforts of small communities such as Northampton, Pennsylvania to pass resolutions against the Alien and Sedition Acts, many battles against the Patriot Act have now arisen at the local level as well. Numerous communities have spoken out against the Patriot Act since its passage. According to Nat Hentoff, in February 2002 the community of Northampton, Massachusetts “began a new American Revolution” by meeting to discuss ways to protect their town from the Patriot Act.<sup>72</sup> Resolutions against the Act have been signed in 369 communities in 43 states.<sup>73</sup> Five states – Montana, Maine,

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<sup>71</sup> A transcript of the hearings is available at the Washington Post Web site: <http://www.washingtonpost.com/wp-dyn/articles/A28081-2005Apr5.html>. Accessed March 20, 2005.

<sup>72</sup> Hentoff, *The War on the Bill of Rights and the Gathering Resistance*. 87.

<sup>73</sup> ACLU Web site: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207>. Accessed March 12, 2005.

Alaska, Vermont, and Hawaii – have passed statewide resolutions against the Patriot Act.

During both the initial passage of the Alien Acts and the passage of the Patriot Act, there were fears from politicians and civil libertarians that more encompassing legislation was yet on the way. As it turns out, it appears that in both cases, these concerns were well justified. Indeed, as Republicans predicted, the Sedition Act soon followed the Alien Acts and turned government's watchful eye onto American citizens. Similarly, following the signing of the Patriot Act, there was talk of further sweeping intelligence legislation on the way in the form of Attorney General John Ashcroft's proposed "Domestic Security Enhancement Act of 2003," nicknamed "Patriot II."<sup>74</sup> Patriot II would further promote the process of handing over power to the federal government and expanding the Executive branch's powers of gaining information on aliens and American citizens.<sup>75</sup>

### **Application of the Alien and Sedition Acts**

The Naturalization Act was passed by the Federalist Party in part as an attempt to strike at the heart of the foreign-born Republican constituency and make it more difficult for aliens to become citizens of the United States. However, the Naturalization Act failed to achieve this objective because the states retained power over naturalization. For instance, although the Naturalization Act required that aliens live in the United States for fourteen

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<sup>74</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. vii.

<sup>75</sup> *Ibid.* 69.

years before becoming citizens, the state of Pennsylvania allowed naturalization after just two years' residence. Yet another demonstration of the emerging power of the states during the 1790s, this allowed newly naturalized Pennsylvania residents to vote in both state and federal elections.<sup>76</sup>

The Federalists and the Adams administration did not use the Alien Friends Act. However, on numerous occasions they contemplated its use. Moreover, Adams signed a blank arrest warrant for Dupont de Nemours, a French philosopher, if he was to be found within the United States.<sup>77</sup> Although the act was never actually utilized by the Federalists, it had a kind of “chilling” effect on foreigners, striking fear into the aliens living within the United States. Indeed, many Frenchmen began leaving the country in fear that the act would be used against them. According to Stone, not only was it the case that “apprehensive French immigrants fled the country,” but also the “flow of immigrants into the United States trickled to a halt.”<sup>78</sup> As was the case with the Alien Friends Act, the Alien Enemies Act was not used by the Adams administration. The Act, which was to be used only during times of official warfare, had no bearing on the time period due to the fact that the Adams administration never formally declared war against France.

Although the Naturalization Act, Alien Friends Act, and Alien Enemies Act were used sparingly, if at all, the Federalists prized and most notorious Sedition Act was used against American dissenters on numerous

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<sup>76</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 48.

<sup>77</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 171.

<sup>78</sup> Stone, *Perilous Times: Free Speech in Wartime*. 33.

occasions.<sup>79</sup> Although it is difficult to determine the precise number of times that the measure was utilized, it is thought by scholars such as Larry Gragg that the Sedition Act itself was used to indict seventeen people – 10 of whom were actually convicted.<sup>80</sup> However, numerous others were arrested for sedition, but were never indicted. Moreover, several newspaper editors were indicted in the weeks leading up to the Act's passage under common law. Although the Sedition Act was targeted mostly at Republican newspapers, the Republican Party itself was to fall victim to the act shortly after its passage. Indeed, the enforcement of the Sedition Act by Federalists was directly related to efforts to ensure success in the elections of 1800.<sup>81</sup>

The Federalists wasted no time using the Sedition Act to strike at their political foes, the Republicans. One of the first targets of the Act was a Federalist representative from Vermont, Matthew Lyon. Lyon, "one of the most despised Republicans in the nation," was a vocal opponent of conflict against France, favoring diplomatic solutions instead.<sup>82</sup> Moreover, he established his own magazine, *The Scourge of Aristocracy and Repository of Important Political Truths*, to strike at the Sedition Act and other Federalist legislation he deemed unconstitutional. For these reasons, the Federalists branded him a domestic enemy and he was indicted on Oct. 5, 1798, on charges of maliciously violating the Sedition Act by verbally attacking

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<sup>79</sup> Samuel Dash, *The Intruders: Unreasonable Searches and Seizures from King John to John Ashcroft* (New Brunswick, New Jersey, 2004). 47.

<sup>80</sup> Gragg, "Order vs. Liberty."

<sup>81</sup> Stone, *Perilous Times: Free Speech in Wartime*. 48.

<sup>82</sup> *Ibid.*

President Adams.<sup>83</sup> During the trial, Lyon, acting as his own attorney, based his defense on the notion that the Sedition Act was unconstitutional.<sup>84</sup> However, the jury returned a verdict of guilty, and Lyon was sentenced by a federal judge to four months in jail and a \$1,000. What is most remarkable about the Lyon case, however, is that even from his jail cell, he launched a successful campaign for reelection to the House and won by a large majority.<sup>85</sup> Indeed, the people of Vermont had sent a clear signal to the Federalists that many questioned the validity of the Sedition Act. Lyon's punishment under the Sedition Act simply had made him a martyr for the cause of overturning the Act that had landed him in jail.

Although Lyon was one of the first targets of the Sedition Act, the majority were editors of Republican newspapers. Thomas Cooper, the editor of the Sunbury and Northumberland *Gazette*, was one such Republican editor punished by the Sedition Act. Cooper, while at the *Gazette*, wrote an essay that hammered the Adams administration. Shortly thereafter, an anonymous article thought to be written by the Adams administration appeared in a newspaper proclaiming to the public that Cooper had applied for a government post with President Adams two years earlier, claiming to have political views similar to the President. In response to this article, which Cooper took as a great insult, he wrote a second article explaining that he did not know how poor a leader Adams would turn out to be when he applied for

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<sup>83</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 228-29.

<sup>84</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 108.

<sup>85</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 241.



the post. In response to this statement, Cooper was indicted under the Sedition Act.<sup>86</sup> Before the start of the trial, Cooper became concerned about his ability to receive a fair trial before the judge, United States Supreme Court Justice Samuel Chase. As it turns out, these fears were warranted. During the trial, which began in April 1800, it became clear that the burden of proof had become reversed and that Cooper was “guilty until proved innocent, rather than innocent until proved guilty.”<sup>87</sup> The jury was packed with Federalists and Justice Chase’s words to the jury often “sounded more like the address of a public prosecutor than a calm and judicious summing-up of the evidence and exposition of the law.”<sup>88</sup> Moreover, while defending his actions with the argument that he had not made a private attack on the President’s character, Cooper found himself continually thwarted by Judge Chase. Indeed, the Court refused to allow passages speaking favorably of the President to be read and also would not permit character witnesses to speak in Cooper’s defense. In the end, Cooper was sentenced to four months in federal prison and fined \$400.<sup>89</sup>

After presiding over the Cooper trial, Justice Chase made his way to Virginia for the trial of yet another Republican journalist, James Callender. Indeed, Chase looked forward to enforcing the Sedition Act in a state that had years earlier passed legislation declaring the Act void.<sup>90</sup> Callender, a Scotsman who had come to America after being expelled from Britain, was a staunch critic of the Federalists and took delight in berating the Adams

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<sup>86</sup> Stone, *Perilous Times: Free Speech in Wartime*. 54-55.

<sup>87</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 325.

<sup>88</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 208.

<sup>89</sup> *Ibid.* 207-209.

<sup>90</sup> Stone, *Perilous Times: Free Speech in Wartime*. 61.

administration from within Virginia—a state that he thought was a safe haven from the Sedition Act. However, as the story goes, after Justice Chase was shown a copy of Callender’s pamphlet *The Prospect Before Us*, which contained scathing remarks about Adams and George Washington, Callender was indicted under the Sedition Act. The trial, which drew national attention, proceeded much like the earlier Cooper trial. Judge Chase, who was described as being “rude, partial, and contemptuous” to Callender’s attorney, rejected all of his claims. The jury quickly brought back a verdict of guilty and Chase sentenced Callender to nine months in jail and a \$200 fine.<sup>91</sup>

The trials and prosecutions of Lyon, Cooper, and Callender are just three of the more famous examples of how the Sedition Act was used against politicians and journalists alike. By the time the Sedition Act expired in 1801, it is estimated that twenty-five well-known Republicans were arrested under the act.<sup>92</sup>

### **Comparisons to Application of the Patriot Act**

Unlike the case with the Alien and Sedition Acts, we do not have the power of hindsight to help us determine the exact uses of the Patriot Act. It was only after thirteen years had passed since the expiration of the Alien Friends Act that President Adams publicly announced that the measure had never been used. Unfortunately, because the Patriot Act is still being applied today, much secrecy surrounds its usage. During recent Congressional

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<sup>91</sup> Ibid. 62.

<sup>92</sup> Ibid. 63.

hearings, Senator Leahy expressed his frustration with the inability to understand how the Patriot Act is being used, stating, “We have heard over and over again, there have been no abuses as the result of the Patriot Act. But it's been difficult, if not impossible, to verify that claim when some of the most controversial surveillance powers in the act operate under a cloak of secrecy.”<sup>93</sup>

Civil liberties groups such as the ACLU have made some progress in the pursuit for information by filing Freedom of Information Act (FOIA) requests with the Justice Department. As a result, much of the information that we obtain from the government comes in bits and pieces. As Senator Leahy said during the hearings concerning the Act’s secrecy, “information about these disgraceful acts continues to trickle out in large part only because of a persistent press and the use of FOIA.”<sup>94</sup> During the Congressional hearings in Washington, Congressmen have been able to pry out of the Justice Department information about some of the sections’ enforcement. In early April, Attorney General Alberto Gonzales admitted at the hearing that a section of the Patriot Act was used to secretly search the home of a Madrid bomb suspect.<sup>95</sup> However, much of the government’s usage of the act still remains hidden from public knowledge. Nonetheless, what we do know about the enforcement of the Patriot Act may help us make some reasonable

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<sup>93</sup> A transcript of the hearings is available at the Washington Post Web site: <http://www.washingtonpost.com/wp-dyn/articles/A28081-2005Apr5.html>. Accessed March 20, 2005.

<sup>94</sup> Washington Post Web site transcript.

<sup>95</sup> Rukmini Callimachi, Attorney General Admits use of Patriot Act in Mayfield Case [LexisNexis] (Associated Press, April 5 2005 [cited April 11 2005]); available from <http://www.lexisnexis.com/>.

comparisons to the Alien and Sedition Acts and shed some light on the question of whether the Patriot Act is as dangerous as civil libertarians suggest.

Although the Justice Department assured the American public that Section 215 of the Patriot Act – a section allowing government agents to receive warrants in order to gain “tangible” information pertaining to a terrorist investigation – had not been used in the years following 9/11, the ACLU filed a Freedom of Information request and learned that the power had indeed been invoked. However, the extent to which it has been used is still pure speculation. As General Counsel for the Electronic Privacy Information Center David Sobel said upon receiving the government files, “A veil of secrecy has shrouded the Patriot Act for two and a half years. The fragments of information that we have managed to pry out of the Justice Department raise serious questions and provide few answers.”<sup>96</sup> Again, during the Congressional hearings in April, Attorney General Gonzales claimed that the Justice Department had not sought a section 215 order “to obtain library or bookstore records, medical records, or gun sale records.”<sup>97</sup> Despite the inability to determine precisely how many times the section has been invoked, a study by the University of Illinois found that 85 of the 1,020 libraries that they surveyed had been contacted by law enforcement officials about patrons of the library.<sup>98</sup>

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<sup>96</sup> Cited by ACLU: <http://www.aclu.org/news/NewsPrint.cfm?ID=15959&c=262>. Accessed April 16, 2005.

<sup>97</sup> Washington Post Web site transcript.

<sup>98</sup> Staudt, "How the Terror Laws Make Terrorists: Pre-emptive Prosecution," 8.

It is unclear who exactly has had their records searched under this section of the Patriot Act and whether anyone has been prosecuted or detained due to the findings. However, without much difficulty one can see comparisons between the likely enforcement of Section 215 of the Patriot Act and the use of the Sedition Act in relation to their possible infringements on the First Amendment. Indeed, both sought to target non-citizens and citizens that wrote or read material that were contrary to the mainstream political views in this country. Just as a Republican journalist writing an article ridiculing the Adams administration in 1798 would have reason to fear arrest under the Sedition Act, a leftist American citizen in 2005 might fear checking a book on Islam out of his local library, thinking that it may lead to a government investigation. Much as the Sedition Act, Section 215 may serve to create a chilling effect that would persuade non-citizens and citizens to refrain from reading material that would be deemed anti-American. Moreover, civil libertarians have claimed that Section 215 infringes upon librarians' First Amendment rights by not allowing them to disclose to others whether the government has gained information from their library.

Civil Liberties organizations such as the ACLU and EPIC have also been able to determine that Section 505 of the Patriot Act, which allows the attorney general to write letters requesting the use of citizens' personal records, has been used. After a Freedom of Information request was filed by the ACLU, the government released a quite extensive blacked out list of the applications of Section 505. Moreover, according to the *Las Vegas Review-*

*Journal*, the executive branch has used this section to gain travel and hotel records for 350,000 visitors to Las Vegas.<sup>99</sup> What is most worrisome to civil libertarians about the section is that there is no judicial oversight of the process. The attorney general can send national security letters without a system of checks and balances in place to ensure that he is not abusing his powers.<sup>100</sup> Indeed, this section of the Patriot Act very much resembles the Alien Enemies Act, which gave the executive branch broad powers to deal with issues of immigration, detainment, and deportation with little or no judicial interference.

The section of the Patriot Act that most closely resembles the Sedition Act – Section 802 – has received particular attention from civil liberties advocates, fueled by the secrecy surrounding its application. Conclusions about the section's enforcement seem to require large amounts of speculation. However, given the tales of its usage, and the lessons of the Alien and Sedition Acts, it is not unreasonable to believe that Section 802, which deals with the issue of domestic terrorism, has been used at some point in its three-year existence. It is feared that this Act can and has been used to silence public dissenters and protestors in this country. David Staudt presents evidence that points to the section's usage.<sup>101</sup> In addition to a memo sent to the FBI by former Attorney General John Ashcroft saying that political action,

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<sup>99</sup> Rod Smith, "Anti-terrorist Law: Parts of Patriot Act Rejected," *Las Vegas Review-Journal*, September 30 2004.

<sup>100</sup> Information at ACLU Web site: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12166&c=206>. Accessed April 16, 2005.

<sup>101</sup> Staudt, "How the Terror Laws Make Terrorists: Pre-emptive Prosecution."

“when disguised propaganda and harassment,” could be targeted under the section, Staudt writes that days before anti-Iraq occupation protests in Washington and San Francisco, the FBI notified local law enforcement that they should “report possible indicators of protest activity and other potentially illegal acts to the nearest FBI Joint Terrorism Task Force.”<sup>102</sup> Moreover, Staudt presents evidence that the FBI has had local law enforcement officers infiltrate protests across the country. In one of the more recent instances, the FBI admitted to infiltrating and monitoring the Internet sites of groups planning to protest at the Republican national convention, despite having “no evidence to move against any member.”<sup>103</sup>

If Staudt’s claims are true and dissenters are indeed being targeted by the government without sufficient reason, comparisons between the Sedition Act and Section 802 of the Patriot Act may be stronger than we may like. It may be far-fetched to believe that the Patriot Act will be used to imprison dissenting Congressmen and journalists, but some civil libertarians believe that the situation will rise to a level where dissent is viewed as lawless. Indeed, as Staudt states, “dissent is already, in too many people’s minds, ‘unpatriotic.’”<sup>104</sup> This, as was seen during the last years of the Adams administration, is a frightening and dangerous phenomenon.

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<sup>102</sup> Ibid.: 5-6.

<sup>103</sup> Ibid.: 7.

<sup>104</sup> Ibid.

## Chapter 3

### Looking From the Past to the Future

Having analyzed and compared several aspects of the Patriot Act and the Alien and Sedition Acts in the first two chapters, it is now possible to draw some conclusions and, in the process, address the important question of where the Patriot Act is headed.

In order to attempt to accomplish these goals, it is first necessary to understand the fate of the Alien and Sedition Acts. As it turns out, the presidential election of 1800 served as the deciding factor for the Alien and Sedition Acts' lifespan. What is ironic is that the Alien and Sedition Acts, which were mainly put in place to consolidate Federalist power for the election of 1800, were undone by the election. As Smith states, "the law [Sedition Act] furnished a ready text which the Democratic-Republicans used to incite the American people to legal 'insurgency' at the polls."<sup>1</sup> Indeed, in part due to making the Alien and Sedition Acts a major issue in the campaign, the Republicans gained the majority in the House of Representative and had one of their own, Thomas Jefferson, elected President.<sup>2</sup> The election results ensured that the Alien and Sedition Acts would be repealed or allowed to expire. In his inaugural address, Jefferson began his presidency by speaking out against the Sedition Act, saying: "if there be any among us who would wish to dissolve this Union or to change its republican form, let them stand

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<sup>1</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 431.

<sup>2</sup> Gragg, "Order vs. Liberty."



undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.”<sup>3</sup>

After taking office, Jefferson effectively disregarded the Sedition Act and pardoned all of the bill’s offenders who were still in prison.<sup>4</sup> Moreover, he allowed for the Sedition Act and Alien Acts to expire, as was prescribed by the acts themselves. Furthermore, Jefferson led efforts to repeal the Naturalization Act in 1802.<sup>5</sup> The only part of the Alien and Sedition Acts that remained untouched was the Alien Enemies Act, a measure that had never been used during the Adams administration.<sup>6</sup> In 1840, Congress repaid all the fines collected under the Sedition Act and officially declared the Act a “mistaken exercise.”<sup>7</sup>

Much as the Alien and Sedition Acts during the election of 1800, the Patriot Act is at a crossroads of sorts. In fact, the progression of the Patriot Act and national security legislation in the last several decades is quite similar to the evolution of the Alien and Sedition Acts that occurred over two-hundred years ago. Just as national security legislation in the 1790s began with the introduction of legislation such as the Naturalization Act and Alien Acts, which dealt primarily with foreign subjects, the United States government in the modern era introduced the Foreign Intelligence Surveillance Act (FISA) primarily to set procedures for investigating foreign

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<sup>3</sup> James Morton Smith, "The Sedition Law, Free Speech, and the American Political Process," *The William and Mary Quarterly* 9 (October 1952, 1952): 511.

<sup>4</sup> Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties*. 268.

<sup>5</sup> U.S. Citizenship & Immigration Web site:

<http://uscis.gov/graphics/aboutus/history/mar1790.htm>. Accessed April 12, 2005.

<sup>6</sup> Gragg, "Order vs. Liberty."

<sup>7</sup> Abele, *A User's Guide to the USA Patriot Act and Beyond*. 73.

subjects. However, with the passage of both the Sedition Act and the Patriot Act, the American government began to broaden the scope of national security legislation, allowing for its use on American citizens and, in the case of the Patriot Act, also blurring the line between regular criminal investigations and international surveillance investigations.<sup>8</sup>

Although the Patriot Act – unlike the Sedition Act in 1800– was not the subject of intense debate during the 2004 Presidential and Congressional elections and the President who pushed the legislation through Congress in 2001 was reelected, the recent Congressional hearings concerning the Act will undoubtedly have major implications on its future. Indeed, sixteen provisions of the Patriot Act are set to expire by the end of the year unless Congress votes to renew them.<sup>9</sup>

As discussed in the previous chapter, the similarities between the Alien and Sedition Acts and the Patriot Act are numerous. However, at this crossroad in history, will the fate of the Patriot Act also mirror that of the Sedition Act? The sheer degree of secrecy behind the Patriot Act may make the task of answering this question a difficult one. Despite the fact that there was an element of secrecy behind the use of the Alien and Sedition Acts, the application of the Patriot Act remains all but a complete mystery to Americans despite the Freedom of Information Acts that are meant to counter this confidentiality. However, although it is impossible to tell for sure whether the Patriot Act will suffer the same ill fortune as the Alien and Sedition Acts,

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<sup>8</sup> Ibid. 23.

<sup>9</sup> Eric Lichtblau, "Justice Dept. Defends Patriot Act Before Senate Hearing," *The New York Times*, April 5 2005.

there are signs that point us in both directions. The fact that both the Alien and Sedition Acts and the Patriot Act were crafted in response to a sudden national security emergency would suggest that many sections of the Patriot Act – like the Alien and Sedition Acts – may be phased out of existence as the threat of terrorism subsides. Throughout American history, the United States government has had a tendency to drastically curtail the civil liberties of Americans during crises, only to revert back to normal procedures after the threat has subsided.<sup>10</sup>

Indeed, not long after the Alien and Sedition Acts were enacted, a United States peace mission to Paris in 1799 ended much of the tension between France and the U.S. and took much of the wind out of the sails for justifying those acts.<sup>11</sup> With respect to the Patriot Act, Congress's inclusion of expiration dates for a number of the more controversial sections seems to suggest that members of Congress themselves were well aware that parts of the Act might no longer be needed as the national crisis following September 11, 2001 subsided.

However, it is important to note when gauging the possibility of sections of the Patriot Act being repealed or allowed to expire that there is no end in sight to the war on terrorism. When President Bush declared a state of national emergency on September 24, 2001 in response to the terrorist attacks that occurred just days before, he was acknowledging the beginning of a new

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<sup>10</sup> Chang, *Silencing Political Dissent*. 19.

<sup>11</sup> Stone, *Perilous Times: Free Speech in Wartime*. 67.

war – a war on terrorism.<sup>12</sup> Unfortunately, unlike the crisis with France, or even WWI or WWII, which all had definite beginnings and conclusions, “the war against terrorism will be a struggle of uncertain length” and may lead to a more “open-ended commitment” to emergency measures such as the Patriot Act.<sup>13</sup> Therefore, unlike the circumstances surrounding the Alien and Sedition Acts, it may very well be naive to believe that the threat of terrorism will ever be eliminated or lowered to a point where the Patriot Act would be deemed unnecessary.

In addition to the parallels that exist between the initial national security crises that prompted the passage of the Alien and Sedition Acts and the Patriot Act, the national and local movements against the Acts seem to be similar. Indeed, just as towns and villages passed ordinances against the Sedition Act in the years following its passage, 377 communities have passed resolutions denouncing the Patriot Act.<sup>14</sup> Moreover, following the lead of Kentucky and Virginia during the 1790’s, five states have passed resolutions against the Patriot Act. This growing trend of concern and dissent in relation to the Patriot Act may indeed influence politicians to run for office on an anti-Patriot Act platform in years to come. However, it may yet be too soon to predict that a movement of this sort will lead to the repeal or expiration of sections of the Patriot Act.

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<sup>12</sup> <http://www.whitehouse.gov/news/releases/2001/09/20010924.html>. Accessed April 16, 2005.

<sup>13</sup> Michael Barkun, "Defending Against the Apocalypse: the Limits of Homeland Security," *Policy Options* (September, 2002): 31.

<sup>14</sup> Information at the ACLU Web site: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207>. Accessed April 16, 2005.

As we saw during the campaign for the 2004 Presidential and Congressional elections, despite the fact that many of the controversial sections are up for renewal in 2005, minimal attention was given to the Patriot Act. Other issues such as the war in Iraq and the United States economy seemed to have drowned out the debate over the Act. It seems that politicians such as John Kerry did not raise the Patriot Act as a major campaign theme.<sup>15</sup> By contrast, Republicans such as Thomas Jefferson and James Madison sought to bring the Alien and Sedition Acts to the forefront of national attention before the elections of 1800.

Moreover, although there have been states passing resolutions against the Patriot Act, unlike the Kentucky and Virginia Resolutions of 1798, these measures seem to be simply symbolic in nature. By using the phrase symbolic, I am not suggesting that the five states that have passed these resolutions haven't indeed taken an impressive stand against the Patriot Act. However, the Kentucky Resolutions and Virginia Resolutions resonated throughout the capital and the nation in ways that have not been seen with the Patriot Act resolutions. Indeed, with the introduction of the Kentucky and Virginia Resolutions, civil war was thought to be an all too real possibility as rumors of succession spread to the capital.<sup>16</sup>

In order to account for this difference, it is important to note that the Virginia and Kentucky Resolutions were scripted by Madison and Jefferson largely based on states' rights concerns as opposed to civil liberties

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<sup>15</sup> Charlie Savage, "Civil-Liberties Issue in the Background," *The Boston Globe*, October 4 2004.

<sup>16</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 169-173.

complaints.<sup>17</sup> Using powerful language, the resolutions argued that the Constitution was a compact between states that prohibited the federal government from being the “final arbiter of the scope of the powers delegated to it by the states.”<sup>18</sup> Indeed, this states’ rights issue was central to the failure of the Naturalization Act. Although that act significantly raised the level of requirements needed for becoming a citizen of the United States, states maintained power of naturalization and were able to craft their own standards. For example, despite the passage of the Naturalization Act, Pennsylvania permitted naturalization after two years, which included the right to vote in both state and federal elections.<sup>19</sup>

Moreover, the states’ rights language that was used by Jefferson and Madison had the advantage of resonating with people who were concerned with issues other than civil liberties concerns such as the subject of slavery. Indeed, much the same states’ rights issues that were being used by Jefferson and Madison to rally states against the Alien and Sedition Acts were used a half-century later during the Civil War era to lead the southern states in a fight to preserve slavery.

This states’ rights issue is not apparent in the resolutions that are being passed by state governments in response to the Patriot Act. Instead, state governments are primarily using civil liberties arguments designed to show that the Act is unconstitutional. Montana, the most recent state to have passed a state-wide resolution, is a perfect example of this focus on civil liberties

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<sup>17</sup> Ibid. 169.

<sup>18</sup> Stone, *Perilous Times: Free Speech in Wartime*. 45.

<sup>19</sup> Miller, *Crisis in Freedom: The Alien and Sedition Acts*. 48.

concerns instead of the states' rights. As opposed to the Kentucky resolutions' words maintaining "that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force,"<sup>20</sup> the Montana resolution legislation states "it is the policy of the citizens of Montana to oppose any portion of the USA PATRIOT Act that violates the rights and liberties guaranteed under the Montana Constitution or the United States Constitution, including the Bill of Rights."<sup>21</sup>

Stemming from this discussion of states' rights, it is interesting to note that the Patriot Act was crafted in large part due to the efforts of President Bush and the Republican Party, a party that has long been associated with preserving the rights of the states.<sup>22</sup> However, the opposite was the case with the introduction of the Alien and Sedition Acts. It was the Federalist Party, which stressed a strong national government that pushed the series of bills through Congress. This in turn prompted the Republican Party, which was a firm supporter of the states' rights philosophy, to denounce the Alien and Sedition Acts based on states' rights concerns. This observation seems to suggest that we may never hear the states' rights philosophy being used as an argument against the Patriot Act.

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<sup>20</sup> The Kentucky Resolutions of 1798 ([cited]).

<sup>21</sup> <http://data.opi.state.mt.us/bills/2005/billhtml/SJ0019.htm>. Accessed April 16, 2005.

<sup>22</sup> GOP Agenda vs. States' Rights (CNN.Com, March 31 2005 [cited April 15 2005]); available from <http://www.cnn.com/2005/POLITICS/03/31/gop.states.ap/>.

Although the debate over the Patriot Act does not include states' rights concerns, it is apparent that a diverse group of people has indeed latched on to the issue of individual rights. Conservatives and democrats alike have climbed aboard the fight against the Patriot Act. Indeed, members of the conservative National Rifle Association and Gun Owners of America have joined the ACLU in protesting the Act. If the debate over individual liberties and the Patriot Act is framed in the right way to continue to draw support from a wide array of Americans, it is possible that the Patriot Act could be headed toward failure.

However, this point only further highlights the fact that, unlike the Alien and Sedition Acts, the Patriot Act is not being used as a political tool to attack the Democratic Party's base. As I have already discussed, the fact that the Alien and Sedition Acts directly targeted the Republican Party led to the debate falling right down party lines. However, the Patriot Act has both advocates and opponents from both sides of the political spectrum. The fact that the state of Montana – which decisively went to the Republicans in the 2004 presidential election – passed a statewide resolution against the Patriot Act further highlights this point.

Although it is impressive to see supporters of the two main political parties working together to oppose the Patriot Act, the fact that the debate over the Patriot Act does not fall right along party lines may inevitably lead to the Act's survival. During the 2004 presidential elections, neither party made the issue of the Patriot Act a major party platform. This outcome was



undoubtedly based on the fact that the debate over the Patriot Act crossed party lines. This result is indeed in direct contrast to the election of 1800, where the Republicans to a large degree campaigned against the Federalist Alien and Sedition Acts. It is quite ironic to think that that the fact that the Patriot Act has opponents and supporters on both sides of the political divide could very well be the main reason that the Patriot Act survives for some time to come.

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